



Issue Date: 25 May 2016

CASE NO.: 2016-TLC-00048

ETA CASE NO.: H-300-16060-086410

In the Matter of:

LOHR'S ORCHARD,
Employer

Certifying Officer: Lynette Wills,
Chicago National Processing Center

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

**DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION**

This matter involves a request for certification of non-immigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended,¹ and the implementing regulations promulgated by the Department of Labor.² This Decision and Order is based on the written record, consisting of the Appeal File ("AF") forwarded by the Employment and Training Administration. Since Employer requested an expedited administrative review, I considered only the evidence that was before the Certifying Officer ("CO"), with no new evidence submitted on appeal.³ In expedited administrative review cases, the administrative law judge has five working days after receiving the AF to issue a decision on the basis of the written record.⁴ The AF for this case was received on 16 May 16.

¹ 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

² 20 C.F.R. Part 655, Subpart B.

³ The Solicitor offered the CO's position statement on 20 May 16.

⁴ 20 C.F.R. § 655.171(a).

BACKGROUND AND LAW

On 26 Feb 16, Employer filed ETA Form 790 and Form ETA 9142A requesting temporary labor certification for the position “Farmworkers and Laborers, Crop, Nursery, and Greenhouse.” The period of intended employment was to begin on 15 Apr 16.⁵

The CO issued a Notice of Deficiency on 7 Mar 16, notifying Employer of four deficiencies in its application: (1) it failed to demonstrate how the job opportunity is temporary or seasonal in nature (specifically why its dates of need changed from June through December to April through December); (2) it listed in Item 19 and 28 of the ETA Form 790 that it will reimburse the workers \$11.86 per day, while the regulations⁶ require disbursement of at least a minimum of \$12.09 per day; (3) it failed to indicate in the ETA Form 790 that it will agree to follow all of the obligations required by 20 C.F.R. 655.122(o); and (4) it failed to state its obligations set forth at 20 C.F.R. 655.122(i)(1) in its job order.⁷

On 20 Mar 16, Employer sent the CO an email with corrections and additions to its H-2A filing.⁸ On 30 Mar 16, the CO responded to Employer that its application had been reviewed and accepted for processing. The CO also instructed Employer to comply with the requirements to receive a final determination on its temporary labor certification application.⁹

On 14 Apr 16, the CO responded to Employer’s request for a status update explaining that Employer had not yet provided a recruitment report or a valid workers compensation certificate covering its dates of need.¹⁰ On 15 Apr 16, Employer responded to the CO in an email including a recruitment report and workers compensation certificate. On 18 Apr 16, the CO responded that it had received Employer’s email.¹¹ On 21 Apr 16, an account manager from Agri-Services Agency emailed the CO the Employer’s Certification of Liability Insurance.¹²

On 28 Apr 16, the CO emailed Employer about two deficiencies that Employer had not yet corrected and on 2 May 16, Employer responded that it sent all the required information on 22 Apr 16.¹³ On 5 May 16, Employer emailed the CO requesting a status update on her case, referencing 22 Apr 16, 28 Apr 16, and 2 May 16 emails it sent the CO.¹⁴

⁵ AF 82-103.

⁶ 20 C.F.R. 655.122(h).

⁷ AF 64-68.

⁸ AF 50-51.

⁹ AF 43-48.

¹⁰ AF 42.

¹¹ AF 39-41.

¹² AF 36-38.

¹³ AF 31-32.

¹⁴ AF 30.

The CO issued a Notice of Denial on 5 May 16 because Employer failed to provide a valid recruitment report and proof of workers' compensation insurance coverage.¹⁵

Throughout the labor certification process, the burden of proof in alien certification remains with Employer.¹⁶ When conducting an administrative review, the presiding Administrative Law Judge ("ALJ") is to render a decision "on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved..."¹⁷ Accordingly, an ALJ may not refer to any evidence that was not a part of the record as it appeared before the CO.

DISCUSSION

Employer's appeal of the CO's Notice of Denial is timely. Employer cured the four deficiencies the CO noted in its Notice of Deficiency on 7 Mar 16. However, in its Notice of Acceptance for processing, the CO explained to Employer that it was required, pursuant to the regulations, to submit a written recruitment report containing its signature by 6 Apr 16 and to submit actual proof of workers' compensation coverage for its employees prior to the issuance of temporary labor certification.¹⁸

Employer's appeal request explains that there was confusion over its correct email address and argues it did not receive all the emails the CO sent. However, the record shows Employer did receive a copy of the Notice of Acceptance from the CO on 30 Mar 16, which specifically addressed the requirements of a recruitment report and workers' compensation coverage. Moreover, Employer and the CO exchanged numerous emails discussing Employer's insurance coverage as well as a recruitment report. On 18 Apr 16, Employer emailed the CO their recruitment report and on 21 Apr 16, Employer emailed the CO their workers' compensation certificate. Thus, while there may have been confusion about Employer's email address, there was sufficient communication between the parties such that Employer more likely than not should have reasonably known of the requirements for acceptance.

While Employer did submit two separate recruitment reports, I find that neither complied with the regulations. Specifically, Employer did not identify the name of each recruitment source, provide the name and contact information of each U.S. worker who applied or was referred to the job opportunity, and confirm whether former U.S. workers applied but were not hired. Employer also failed to sign and date the initial recruitment report.¹⁹ Employer argued it cured the deficiencies with its 6 May 16 updated recruitment report, however, that report failed to specify the recruitment sources or confirm that U.S. employees were contacted.²⁰ Accordingly, I find the CO properly denied certification based upon a recruitment report that complied with 20 C.F.R. 655.156(a).

¹⁵ AF 25-29; 20 C.F.R. 655.156; 20 C.F.R. 655.122(e)(1)-(2).

¹⁶ *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011).

¹⁷ 20 C.F.R. §655.171(a).

¹⁸ 20 C.F.R. 655.156; 20 C.F.R. 655.122(e)(1)-(2).

¹⁹ 20 C.F.R. 655.156; AF 41 (the recruitment report does appear to be signed by Employer, but it is not dated).

²⁰ AF 22 (Employer attached an updated recruitment report to its request for appeal on 6 May 16. This copy was signed and dated, which cleared that deficiency, however, other remained).

Alternatively, the CO also denied certification based upon improper proof of workers' compensation coverage. Employer argues that it submitted the certificate and that since it stated it would renew the insurance *prior to* the job order ending date, it was not an issue. However, further review of the certificate shows the expiration date of the insurance coverage was 1 Apr 16, which is *before* the job order start date.²¹ Thus, the policy would not cover any period of work listed in the job order. Accordingly, pursuant to 20 C.F.R. 655.122(e), I find the CO properly denied certification based upon lack of workers' compensation coverage for the dates listed in the job order.

ORDER

Based on the foregoing, it is hereby ordered that the Certifying Officer's decision is **AFFIRMED**.

So ORDERED.

PATRICK M. ROSENOW
Administrative Law Judge

²¹ AF 35, 38.