



Issue Date: 19 August 2016

OALJ Case No.: 2016-TLC-00064
ETA Case No.: H-300-16133-423623

In the Matter of:

MENDEZ FARMS, LLC,
Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Benito T. Mendez, *pro se*
Mendez Farms, LLC
Andersonville, Georgia
For the Employer

Vincent C. Costantino, Esq.
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Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Steven D. Bell
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor.¹ A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.²

¹ 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

² 20 C.F.R. § 655.171.

STATEMENT OF THE CASE

Mendez Farms, LLC (“Employer”) is contractor which agreed to supply seasonal workers for a farm located in Leslie, Georgia. AF 55.³ On May 12, 2016, the Employer filed with the CO the following documents: (1) Form ETA 9142, H-2A Application for Temporary Employment Certification (“Application”); (2) Appendix A.2 to Form ETA 9142; and (3) Form ETA 790, Agricultural and Food Processing Clearance Order. AF 123-143. The Employer requested certification for ten farmworkers⁴ to harvest squash, cucumbers, watermelons, and peanuts from June 27, 2016, to November 10, 2016, based on an alleged seasonal need during that period. AF 123. Thereafter, on May 19, 2016, the CO issued a Notice of Deficiency, requesting an original surety bond as required by 20 C.F.R. §655.132(b)(3). AF 94-104.

Following the Employer’s June 1, 2016, response to the Notice of Deficiency, the CO issued a Conditional Notice of Acceptance (“NOA”) on June 2, 2016, contingent on the Employer’s submission of an original surety bond. AF 85. On July 8, 2016, an email was sent to the Employer requesting the surety bond. On July 17, 2016, the Employer sent an email which outlined:

We have been trying to get proof of the surety bond and it is taking longer because the information given to us was not correct now finally we spoke to someone from the US Department of Labor Wage and Hour Division and we were told to submit the vehicle inspections as well as the housing certificate in which we are waiting for an amendment which is what was advised according to them. [E]nclosed are the documents that we send (sic) US Department of Labor to obtain our Housing/Transportation License, which will be used for the surety bond. We have being (sic) very irritated with the delayed (sic) of this document because we were mislead (sic) realizing the importance of the document. We hope to have an answer as soon as possible.

AF 27. However, because the Employer failed to provide an original surety bond, the application was denied on July 19, 2016. AF 20-25.⁵

On July 25, 2016, the Employer appealed the CO’s decision to deny its application. AF 1.⁶ On July 27, 2016, I issued a Notice of Docketing and Order Setting Briefing Schedule, acknowledging the Employer’s request for expedited administrative review and permitting the parties to file briefs within three business days after receipt of the Administrative File. On

³ In this Decision and Order, “AF” refers to the Administrative File.

⁴ SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” and occupation code 45-2092. AF 123.

⁵ The CO’s Brief clarified that although the NOD outlined other deficiencies, “The other issues raised in the NOD are no longer at issue in this matter.” (CO Brief at 3, n.3).

⁶ The Employer did not expressly request expedited administrative review, but instead requested “a little more time to supply with the Surety Bond.” AF 1.

August 16, 2016, counsel for the Certifying Officer (“Solicitor”) filed a brief, urging the Court to affirm the CO’s decision denying the Employer’s application. The Employer did not file a brief.

DISCUSSION AND APPLICABLE LAW

The Employer bears the burden to establish eligibility for temporary labor certification.⁷ Twenty C.F.R. §655.132(b)(3) requires that an H-2A employer must provide:

Proof of its ability to discharge financial obligations under the H-2a program by including with the Application for Temporary Employment Certification the original surety bond as required by 29 CFR 501.9. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond (as calculated pursuant to 29 CFR 501.9) and any identifying designation used by the surety for the bond.

Id. The preamble to the regulations specifically notes that this “requirement to provide the original bond is intended to ensure that the Department has legal recourse to make a claim to the surety against the bond following a final order finding violations.” 75 Fed. Reg. 6,884, 6,942. (Feb. 12, 2010).

Applying that standard, the regulations unambiguously require an employer to submit an original surety bond with an H-2A application. Further, it is uncontested that the Employer failed to submit an original surety bond with its Application. In fact, even the Employer’s appeal letter highlights that it still has not secured a surety bond and requests “a little more time” to work with its insurance company. AF 1. However, at this stage of review, the Employer’s informal request for “a little more time” neither establishes its entitlement to an extension nor excuses its clear failure to comply with the regulatory mandate. Moreover, as highlighted by the Certifying Officer’s Brief, even if the Employer would have submitted to me the original surety bond required by the regulations, I could not have considered it because it was not submitted to the certifying officer. (CO Brief at 5, n.5)⁸ In short, the Employer missed its opportunity to bring its application into compliance with the controlling regulations.

In light of the foregoing, I conclude that the Employer has failed to demonstrate that it submitted proof of its ability to discharge financial obligations under the H-2A program per the requirements at 20 C.F.R. §655.132(b)(3). Therefore, the CO properly denied the Employer’s request.

⁷ See e.g. *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); see also *Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015).

⁸ Pursuant to 20 C.F.R. §655.171(a), in cases on administrative review, “the ALJ will, 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 or amici curiae, either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” §655.171(a)(emphasis added).

ORDER

IT IS HEREBY ORDERED that the CO's decision denying the Employer's Application be, and hereby is, **AFFIRMED**.

Steven D. Bell
Administrative Law Judge