



Issue Date: 13 June 2016

Case No.: 2016-TLC-00051
ETA Case No. H-300-16112-422164

In the Matter of

PALOMA HARVESTING INC.,
Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (the “DOL”) at 20 C.F.R. Part 655. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A). Paloma Harvesting Inc. (“Employer”) timely filed a request for expedited administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration (“ETA”), and the written submissions of the parties.

STATEMENT OF THE CASE

On April 22, 2016, ETA received an application from Employer for temporary labor certification of “Farmworkers and Laborers.” AF 54-64.¹ Employer stated that it had a seasonal temporary need for 50 farm workers from June 15, 2016 to July 15, 2016. AF 54. On April 29, 2016, the CO issued a Notice of Deficiency (“NOD”), citing seven deficiencies. AF 28-37. The deficiencies included failure to provide an original surety bond pursuant to 20 C.F.R. §655.132(b)(3), failure to submit a rental housing agreement pursuant to 20 C.F.R. §655.122(d)(1)(ii), and failure to submit Farm Labor Contractor (“FLC”) Certificates of Registration pursuant to 20 C.F.R. 655.132(b)(2). The CO stated that under 20 C.F.R. §655.142(a), Employer’s application “will be deemed abandoned if the employer does not submit a modified application within 12 calendar days after the Notice of Deficiency was issued.” AF 29.

¹ Citations to the 101-page Administrative File will be abbreviated “AF” followed by the page number.

On May 24, 2016, the CO issued a Final Determination denying the Employer's application (the "Denial Letter"). AF 23. The CO wrote that Employer neither submitted a modified application nor appealed the decision within 12 calendar days after the NOD. By letter dated May 27, 2016, Employer appealed the CO's denial. AF 3. In the letter, Employer explained that it is a Farm Labor Contractor and that

the Krystal Inn has been promising to deliver a business license for the past few weeks. The owner of the motel was accompanied by the FLC to city hall in Lyons to request a new copy. The FLC does not have any other options for housing that would be within the commuting distance nor available for his contractual dates.

The housing issue has kept the FLC from purchasing a bond until the license has been furnished by the motel owner. It only takes a couple days for the bond to be issued and that is the reasoning for the bond not being sent in yet. We ask that you remand the case for further processing and reverse the decision to deny.

AF 3. Along with its appeal letter, Employer submitted a letter dated May 5, 2016 listing amendments to its application. AF 5-6. Employer also attached copies of FLC certificates along with other driver documentation. AF 7-17.

On June 3, 2016, the Office of Administrative Law Judges ("OALJ") received the Administrative File from the CO. In administrative review cases, the Administrative Law Judge ("ALJ") has five working days after receiving the file to "review the record for legal sufficiency" and issue a decision. § 655.115(a). Pursuant to an Order dated June 3, 2016, the parties had three business days to file any briefs they wished to submit.

The Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief on June 8, 2016. The Solicitor explained that Employer's application should be denied because Employer failed to respond to the NOD within 12 calendar days. *See* CO's Brief at 1. The Solicitor noted that although Employer's modification letter is dated May 5, 2016, Employer submitted this letter for the first time with its appeal on May 27, 2016. *Id.* at 2.² The Solicitor explained that even if Employer timely submitted its modification letter, Employer failed to submit a surety bond and housing inspection documentation. *Id.* at 3.

ANALYSIS

Scope of Review

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding ALJ may only 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 or amici curiae." Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Here, the Employer's appeal letter, for the first time, included amendments to its H-2A application and copies of FLC certificates. As this new

² There is no evidence in the record that Employer in fact submitted its proposed amendments on May 5, 2016.

evidence was not a part of the record before the CO, it will not be considered on review, under § 655.171.

Failure to Respond to the NOD

Section 655.171 affords ALJs the ability to “affirm, reverse, or modify the CO's decision, or remand to the CO for further action.” An ALJ must affirm a CO’s denial of certification unless the employer demonstrates that the decision is arbitrary or capricious or otherwise not in accordance with the law. *J & V Farms, LLC*, 2015-TLC-00022, at *3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, at *2 (May 4, 2015).

Employer failed to timely submit a response to the CO’s NOD under 20 C.F.R. §655.142(a). Employer has not provided any evidence that the CO’s decision was arbitrary or capricious or otherwise not in accordance with the law. Furthermore, Employer has not cured two deficiencies listed in the NOD. Consequently, as Employer failed to establish compliance with 20 C.F.R. §655.142(a), the CO properly denied certification on this basis.

ORDER

In light of the foregoing discussion, it is hereby ORDERED that the Certifying Officer’s decision denying the above-captioned H-2A temporary labor certification matter is AFFIRMED.

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey