



Issue Date: 25 August 2016

OALJ Case No.: 2016-TLC-00061
ETA Case No.: H-300-16123-897706

In the Matter of
T. BELL DETASSELING, LLC

Before: Richard A. Morgan
Administrative Law Judge

**DECISION AND ORDER REVERSING THE CERTIFYING OFFICER'S DENIAL OF
EMPLOYER'S PETITION FOR HIGHER MEAL CHARGES**

On July 6, 2016, T. Bell Detasseling, LLC ("Employer") filed a request for a de novo hearing in regard to the Certifying Officer's June 23, 2016, Denial of Request to Increase Meal Charges, in the above-captioned temporary agricultural labor certification matter arising under the Immigration and Nationality Act, as amended, and the implementing regulations promulgated by the United States Department of Labor. 8 U.S.C. §1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B. This matter was assigned to Administrative Law Judge Richard A. Morgan for de novo hearing and decision.

The Administrative File was received from the Certifying Officer on July 12, 2016. Telephone conference calls with the parties were held in regard to the scheduling of this matter for hearing, on July 14, 2016, August 4, 2016, and August 8, 2016. The parties initially requested a delay in the scheduling of a hearing while they attempted to resolve this dispute. On August 8, 2016, Employer agreed to waive his right to a hearing and the parties requested that this matter be decided on the record, after the submission of the additional evidence discussed by the parties at the August 8, 2016 conference call, and closing briefs.

Statement of the Case

Employer, T. Bell DeTasseling, LLC, is a farm labor contractor who supplies farm workers to various farms and agricultural businesses in Indiana and Michigan to perform corn detasseling farm work. In this capacity, the workers are employed at various different worksites which may be up to 100 miles or more apart and often in remote locations.

By cover letter dated April 26, 2016, Employer submitted to the Certifying Officer its H-2A job order for Temporary Labor Certification, which included Employer's Petition for a higher meal charge. AF 206-207.¹ Employer stated:

¹For purposes of this opinion, "AF" refers to "Administrative File."

T. Bell will provide 3 meals per day plus 2 snacks. They have an arrangement with a local restaurant to have meals provided at a discounted rate. The lunch meal is picked up and take (sic) to the fields for the workers. The evening meal the workers will sit down and eat a hot meal. As you can see by the attached pictures of the menu, the rate at which the meals are provided are at much lower rate than the general public that enters to eat these meals. Last season they charged \$16.32 per day for each worker. This season while the entire season shows a slightly high amount, once its broken down by the week of 7/10/15-7/18/15 the rate is actually \$15.33 a day. Attached you will find the receipts available, and list of workers fed that week. 67 workers were fed that week for a total of 1428.

Employer provided documentation consisting of historical data, including receipts from the previous year, 2015. Employer asserted that the receipts provided showed a total cost for meals in 2015 of \$7289.94 for 1,428 meals which amounts to \$5.11 per meal or \$15.33 per worker per day. AF 142. Employer reasoned that its cost for meals in 2016 would be similar and therefore argued that this information supported its position that it would cost \$15.33 per day to provide meals for each worker in 2016. See AF 142-178.

Employer also provided other documentation pertaining to its application for temporary labor certification including specific information regarding employer's contracts, worksite locations and housing arrangements.

On May 9, 2016 the Certifying Officer issued a Notice of Deficiency pertaining to this application noting the following deficiencies:

1. A required surety bond had been submitted in the amount of \$20,000 (for 74 workers) rather than 75,000 which was the correct amount for certification of 100 workers since total should include the 74 foreign and 26 domestic workers which total 100.
2. Labor contractor was offering a wage of \$12.02 rather than the minimum of \$12.07 applicable to the geographical area.
3. Labor contractor provided an illegible certificate of occupancy for the public accommodations.
4. Lifting requirements stated in ETA Form 790 were not consistent with those stated in ETA Form 9142.

No deficiencies pertaining to the Petition for higher meal charges were noted. (AF 48-52).

Employer, T. Bell Detasseling, responded to the Notice of Deficiency by email on May 11, 2016, correcting all deficiencies. In addition Employer corrected an error in its application where it had incorrectly noted the requested meal charge as \$17.19 in ETA 790, rather than the correct amount of \$15.33 per day. (AF 43-44).

By letter dated May 18, 2016 the CO notified Employer that its application for temporary labor certification had been accepted for processing. (AF 28-33). On May 26, 2016, the CO notified the Employer that its application had been certified, noting however, that the Employer's petition for a higher meal charge under 20 C.F.R. § 655.173 was still under review. (AF 17)

On June 23, 2016 the CO issued a Denial of Request to Increase Meal Charges. The CO cited the regulation at 20 C.F.R. §655.173(b) and determined that the Employer's petition was insufficient to justify charging its workers more than the \$12.09 daily rate, giving the following two reasons:

- 1) The Employer failed to provide any explanation as to why higher meal charges were necessary;
- 2) The documentation submitted by the Employer indicates that nearly all charges were attributable to the purchase of meals from restaurants or caterers. Because meals purchased from restaurants include some kind of mark-up to cover the restaurants' overhead and profit –costs which are explicitly prohibited by 20 C.F.R. §655.173(b)(1) – the receipts submitted by the employer are insufficient documentation to support the meal charge increase to \$15.33 per day.

(AF 5-6).

The CO further stated that the Employer's petition lacked justification for higher meal charges because the documentation provided by the Employer included costs prohibited by regulation and therefore, the employer's petition for a meal charge increase was denied. (AF 6).

On July 6, 2016, the Office of Administrative Law Judges received a letter from Leon R. Sequeira, Esq., on behalf of T. Bell Detasseling, LLC ("Employer") stating that he requests a de novo hearing on the June 23, 2016 Certifying Officer's Denial of Employer's Petition for Higher Meal Charges.

After granting the request of the parties for a decision on the record, the parties were given the opportunity to submit closing briefs which were received by the undersigned on August 19, 2016. In addition, Employer submitted as Employer Exhibit 1, additional receipts dated May 2015 through August 2015.

Issue

Whether the Employer has "justified" the meal charges in its petition for higher meal charges and submitted the necessary documentation required by 20 C.F.R. §655.173(b)(1) of the regulations.

Scope of Review

The current case arises from the Employer's request for a de novo hearing in regard to the CO's denial of the Employer's Petition for a higher meal charge under 20 C.F.R. § 655.173. The regulation pertaining to appeals of the CO's determinations in H-2A labor certification matters states, in cases where a de novo hearing has been requested, that the procedures in 29 C.F.R. Part

18 will apply and that the ALJ will schedule a hearing within 5 business days after receipt of the administrative file, if the employer so requests.

The regulations applicable to H-2A cases provide that after a de novo hearing “the ALJ must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken... The Decision of the ALJ is the final decision of the Secretary.” 20 C.F.R. §655.171(b)(2).

At a conference call held on July 14, 2016 Employer waived its right to a hearing within five days and therefore the scheduling of the hearing was delayed so that the parties could attempt to reach a resolution of this dispute. During a conference call with the parties on August 8, 2016, it was determined that settlement discussions were futile and that a mutually agreeable resolution of the issues in this case could not be reached by the parties. At that time the Employer waived its right to a hearing and the parties requested a decision on the record following the Employer’s submission of certain additional documentation, which was provided to the Solicitor.² The undersigned granted the request for a decision on the record and provided the parties the opportunity to submit written closing briefs by August 19, 2016.³

Applicable Law

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and
- (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In this case, Employer’s application for certification of 74 workers included a Petition for Higher Meal Charge which is governed by 20 C.F.R. § 655.173 of the regulations. This regulation provides, in pertinent part, that an employer may file a petition for higher meal charges “if the employer justifies the charges and submits to the CO the documentation required by paragraph (b)(1) of this section.”

² The parties may move for a decision on the record under 29 C.F.R. §18.70(d).

³ In its brief the Solicitor incorrectly states that the request for a decision on the record changes the employer’s appeal to an expedited administrative review of the CO’s determination rather than the de novo hearing process before the ALJ. This is incorrect. The part 18 regulations clearly provide for a decision on the record in a de novo hearing proceeding under certain circumstances, including that which is applicable here, where there is a limited need for the introduction of new evidence. See 29 C.F.R. §18.70(d).

Documentation submitted must include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and electricity, and other utilities used for the food service operation and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included.

(20 C.F.R. §655.173(b)(1)).

Discussion

To support its petition for higher meal charges, Employer provided documentation in the form of historical data consisting of receipts showing the actual cost which it incurred, in the previous year, in providing meals to a similar number of workers in the same geographical area. The Employer further provided a breakdown of the cost per worker and calculated its cost per meal and the cost per day to provide three meals and two snacks to each worker. In so doing, Employer argues in its brief, that it has provided the justification required by the regulation for the higher charge of \$15.33 requested.

In this case the CO provided two reasons for denying the Employer's petition for higher meal charges in its June 23, 2016 denial finding that the employer's petition was insufficient to justify charging its workers more than the \$12.09 daily rate. The CO stated:

First, the employer failed to provide any explanation as to why higher meal charges were necessary. Second the documentation submitted by the employer indicates that nearly all charges were attributable to the purchase of meals from restaurants or caterers. Because meal purchases from restaurants include some kind of mark-up to cover the restaurants' overhead and profit—costs which are explicitly prohibited by 20 C.F.R. 655.173(b)(1)—the receipts submitted by the employer are insufficient documentation to support the meal charge increase to \$15.33 per day.

(A.F. 5-6)

Employer argues in its brief, that the first reason given by the CO adds an additional component to the requirements of the regulation by requiring that the Employer prove the need for the additional meal charge, rather than merely providing a “justification” for the additional charge as stated in the regulation.

I find that an accurate reading of the language in the regulation requires the Employer to justify its additional charge which it has done in part, by showing the actual cost of the meals which it has provided to the workers in the prior year.

To the extent “justify” may also imply an element of reasonableness in the amount charged, the Employer has also provided support for the reasonableness of his request by the fact that he is providing three meals and two snacks to his workers, he is providing a restaurant quality meal to his workers at a charge which he asserts is less than that which is charged by the restaurant to its customers, and Employer has reduced the amount requested from the prior year by a dollar per day from \$16.32 to \$15.33.

The Employer is also required by the regulation at Section 655.173(b) to provide documentation required by Section (b)(1) of that regulation. In his second reason for denying the Employer’s petition for higher meal charge the CO states that “the documentation submitted by the Employer indicates that nearly all charges were attributable to the purchase of meals from restaurants or caterers.”

Contrary to the CO’s reasoning, there is nothing in the regulation which specifically prohibits the Employer from utilizing restaurants or caterers in providing meals. Although not required to do so, Employer has provided additional justification for its decision to use restaurants and caterers, by pointing out that the workers it employs are employed at many different job sites which would make the operation of one kitchen facility in one location impractical because the location could not be convenient for all of the workers at the various job sites many miles apart.

The CO also based his denial on the premise that “meal purchases from restaurants include some kind of mark-up to cover the restaurants’ overhead and profit—costs which are explicitly prohibited by 20 C.F.R. 655.173(b)(1)”

In this regard, the CO both misstates and misinterprets the regulation. Although the CO stated that overhead and profit are costs explicitly prohibited by 20 C.F.R. §655.173(b)(1), the regulation makes no mention of profit whatsoever. The regulation does prohibit the charging of overhead which is typically defined as the general cost of operating a business. The Merriam Webster online dictionary defines overhead as “business expenses (as rent, insurance, or heating) not chargeable to a particular part of the work or product.”

Assuming this general definition of overhead, the regulation prohibits an employer from transferring general operating expenses to an employee when charging for the meals provided. Thus, an Employer would be prohibited from “marking up” the actual cost of an item with general or vague costs involved in operating its business.

The regulation specifically allows an employer to charge for certain costs including the following:

food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations...fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation.

On the other hand, the regulation prohibits an employer from charging for “transportation, depreciation, overhead and similar charges.” See 20 C.F.R. §655.173(b)(1).

Therefore the regulation does not allow an employer to transfer vague, general operating costs to a worker in the meal charge, but does allow for the costs which are readily and clearly attributable to the cost of the meals. To this extent the CO is correct in finding that an employer is not allowed to profit from the requirement that it provide meals to the workers. However, the employer may clearly charge for the specific costs attributable to providing meals to his workers.

The CO is incorrect in finding that prohibited overhead includes the overhead or profit of a supplier of food or services to the employer and that the employer must shoulder those costs, rather than passing them along to the workers in the allowable meal charge. This interpretation of the regulation would prohibit an employer from charging for the direct costs attributable to providing meals to his employees, which is clearly not the intent of the regulation. Nor does the regulation in any way impose on the employer the obligation to subsidize the meals by assuming the overhead and profit charges of his food suppliers or vendors. Such an interpretation is wholly unreasonable.

Therefore, the CO’s basis for denying the Employer’s documentation, i.e., the fact that Employer utilized restaurants or caterers who include overhead or profit, instead of preparing its own meals in which Employer purchases food from food suppliers who also include overhead and profit, must be rejected as illogical. The CO fails to recognize that anyone from whom the Employer obtains supplies or services will include overhead and profit in the price of their goods or services.

In his brief, the Solicitor argues primarily, that the documentation provided by the Employer for the higher meal charge, was inadequate and therefore Employer has failed to prove that its requested charge was justified. The Solicitor’s argument is not persuasive for two reasons. First, the CO could have addressed any technical issue with the documentation when it provided the Employer with its Notice of Deficiency in which it notified the Employer of other technical deficiencies in its application, and provided the employer the opportunity to correct or explain any such deficiencies.

Secondly, and even more importantly, the CO did not question the adequacy of the documentation when giving his reasons for rejecting the Employer’s petition for higher meal charge. Instead, the CO rejected the petition for the reasons stated above, which as discussed, are not based on a reasonable or logical interpretation of the applicable regulation.

I find that the documentation previously provided to the CO, which included a specific calculation of cost per day of providing the three meals and two snacks per day to each worker, utilizing historical data derived from the 2015 year, involving a similar number of workers, in a similar geographical area, provides adequate documentation and justification for the Employer’s petition for a higher meal charge of \$15.33 as requested in the Employer’s H-2A application. As the amounts documented by the Employer represent the actual cost incurred by the Employer and do not include the Employer’s overhead or a markup which represents profit to the Employer, the

requested and documented amount is in compliance with the applicable regulation at 20 C.F.R. §655.173(b)(1).

Although I have also considered the additional information submitted by the Employer as Employer Exhibit 1, which was provided with the Employer's brief, I find this information does not include a specific calculation or other appropriate analysis which would provide sufficient documentation to increase the Employer's meal charge beyond the original \$15.33 which was requested.

Employer also raises a valid point in its brief that the certification period may have ended in this case, but the legal issues raised must be resolved notwithstanding any claim of mootness, since the issue raised falls within the exception to the mootness doctrine. Employer points out the exception is applicable in a case such as this, where the challenged action is too short in duration to be fully litigated prior to expiration and there is a reasonable expectation that the same party will be subject to the same action again, citing *Kingdomware Tech v. U.S.*, No. 14-916, slip op. at 7 (U.S. June. 16, 2016).

In this regard it should be made clear that this decision finds that the CO's interpretation of the regulation and its denial of the Employer's petition for a higher meal charge on the grounds that Employer had utilized a restaurant which included overhead and profit, and that those costs were inappropriately included in the Employer's meal charge, was based on an invalid interpretation of the applicable regulation at 20 C.F.R. §655.173(b)(1) and therefore should be reversed.

ORDER

Accordingly, it is **ORDERED** that the Certifying Officer's decision to deny Employer's Petition for Higher Meal Charge is **REVERSED** and the case is **REMANDED** to the CO who is instructed to approve the Employer's petition for a higher meal charge of \$15.33 per day.

SO ORDERED.

RICHARD A. MORGAN
Administrative Law Judge