



Issue Date: 01 April 2016

OALJ Case No.: 2016-TLC-00030

ETA Case No.: H-300-16032-547636

In the Matter of

ELGIDIO JACOBO GONZALEZ,
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).

Elgidio Jacobo Gonzalez (“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 February 1, 2016, ETA received an application from Employer for temporary labor certification of “Farmworkers and Laborers.” AF 67.¹ Employer stated that it had a seasonal temporary need for 80 farm workers from March 15, 2016 to October 30, 2016. AF 59. On February 8, 2016, the CO issued a Notice of Deficiency (“NOD”), citing eight deficiencies, only one of which will be addressed on appeal. AF 34-43.² Under the first deficiency, the CO found that Employer is an H-2A Labor Contractor (“H-2ALC”) rather than a fixed-site employer and

¹ Citations to the 96-page Administrative File will be abbreviated “AF” followed by the page number.

² Based on the record before me, the Employer adequately cured the other alleged deficiencies prior to the CO’s Final Determination. Therefore, this Decision will focus on the alleged deficiency Employer failed to cure.

must therefore comply with the H-2ALC regulations. AF 36. The CO directed Employer to provide the following documentation:

1. A copy of the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”) Farm Labor Contractor (“FLC”) Certificate of Registration, if required under MSPA at 29 U.S.C. sec. 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.
2. Where the fixed-site agricultural business will be providing housing or transportation to the workers, proof that: all transportation between the worksite and the workers living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. sec. 1841 and 29 CFR sec. 500.105 and 500.120 to 500.128, except where workers compensation is used to cover such transportation as described in 20 CFR sec. 655.125(h).

AF 36-37.

The CO noted that Employer submitted a valid FLC Certificate of Registration with its original application. AF 39. The FLC indicated that Employer is “Driving Authorized” and has transportation authorization for three vehicles. *Id.* However, the CO noted that Employer requested 80 workers but provided proof of only one driver authorized to transport the workers. *Id.* Accordingly, the CO asked Employer to explain “how it intends to transport all 80 workers with only one authorized driver.” *Id.* The CO wrote that if Employer intends on having another person transport the workers, Employer must submit a Farm Labor Contractor Employee (“FLCE”) Certificate of Registration for each driver. *Id.*

On February 8, 2016, Employer responded to the NOD, providing an assurance letter and an FLCE application for Diego Domingo-Perez.³ AF 23-33. In the assurance letter, Employer explained that it has submitted the attached FLCE application to the Wage and Hour Division but has not yet received an FLCE Certificate of Registration. AF 24. Employer went on to state that “we will transport the workers in multiple trips” and that “[t]he farmer is also going to provide transportation to the workers if necessary.” *Id.* Michelle Patten, of Patten Blackberry Farm, signed under this assurance.⁴ *Id.*

On March 1, 2016, the CO issued a Notice of Required Modifications (“NRM”), citing two deficiencies, only one of which is on appeal. AF 17-22. The CO found that Employer did not comply with 20 C.F.R. § 655.132(b)(2) which requires employers to provide a copy of an FLC Certificate of Registration. AF 19. The CO listed three reasons underlying Employer’s deficiency. First, the CO reiterated its original findings; stating that Employer only has one driver to transport 80 farm workers. *Id.* The CO noted Employer’s assurance letter, in which Employer wrote that it will transport workers in multiple trips. *Id.* However, the CO concluded that based on the addresses listed on Employer’s application, it would take Employer at least four

³ Employer provided other documents which are not relevant to the issues on appeal.

⁴ Patten Blackberry Farm is the fixed-site agricultural business that hired Employer to perform agricultural work. *See, e.g.*, AF 26.

hours to transport all 80 workers each work day. *Id.* The CO calculated that the distance between the housing location and the worksite location is 29.3 miles, or approximately a 35-minute drive each way. *Id.* The CO concluded that four hours is an unreasonable amount of time to transport all the workers. *Id.*

Second, the CO found that Employer failed to provide evidence that all transportation will comply with applicable Federal, State and local law. The CO noted Employer's assurance that "the farmer is also going to provide transportation to the workers if necessary." *Id.* The CO explained that because the fixed-site employer will provide transportation, the fixed site employer must provide a signed and dated assurance that all transportation complies with all applicable Federal, State, or local laws and regulations. *Id.*

Third, the CO noted that Employer provided an FLCE application for Diego Domingo-Perez but failed to provide an actual FLCE Certificate of Registration. AF 20.

In light of these deficiencies, the CO requested the following:

1. The employer must explain how it intends to transport all 80 workers with its authorized drivers and how many trips it intends to make to and from the housing locations and the worksite locations including how many workers will be transported in each trip and how long each trip will take round trip.
2. The employer must provide a FLCE certificate for Diego Domingo-Perez once received; and
3. The fixed site employer must provide a signed and dated assurance that all transportation complies with the applicable Federal, State or local laws and regulations and must provide at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance age required in 29 1841 and 29 500.105 and 500.120 to 500.128, except where workers' compensation is used to cover such transportation as described in 655.125(h).

Id.

On March 2, 2016, Employer responded to the NRM, attaching an unsigned assurance letter from Patten Blackberry Farm and an unsigned Transportation Assurance Letter from Employer.⁵ AF 15. The Patten Blackberry Farm assurance letter states that the farmer will provide transportation for the workers to and from work and that the farmer's transportation complies with all applicable Federal, State, or local laws and regulations. *Id.* The Transportation Assurance Letter states that the housing locations listed in the ETA Form 790 are owned by Employer and that the farmer will help Employer transport workers to and from the housing location to the worksite. AF 16.

On March 16, 2016, the CO issued a Final Determination denying the Employer's application (the "Denial Letter"), citing one deficiency. AF 9. The CO wrote that Employer was required to explain how it intended to transport 80 workers with its authorized driver, including

⁵ The fixed-site employer's assurance letter is signed as "Patten Blueberry Farm." Substantial evidence in the record demonstrates that the actual name of the farm is "Patten Blackberry Farm."

“how many trips it intended to make, how many workers will be transported in each trip and how long each trip will take round trip.” AF 11. Employer was also required to provide an FLCE certificate for Diego Domingo-Perez and a signed and dated assurance that all transportation complies with applicable Federal, State, or local laws. *Id.* The CO noted that in its response to the NRM, Employer provided an unsigned transportation assurance and an unsigned housing assurance. AF 12. Consequently, the CO denied the Employer’s application because Employer failed to explain how it plans to transport its workers, did not provide an FLCE certificate for its driver, and did not provide a signed transportation assurance. *Id.*

By letter dated March 16, 2016, Employer appealed the CO’s denial. AF 2. Along with the letter, Employer attached Patten Blackberry Farm’s and Employer’s signed transportation assurance. AF 7-8. On March 25, 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. 20 C.F.R. 655.171(a).

Pursuant to an Order dated March 25, 2016, the parties had three business days to file any briefs they wished to submit. On March 29, 2016, Employer submitted an FLCE Certificate for Diego Domingo Perez. On March 30, 2016, OALJ received the CO’s brief.

DISCUSSION

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.”⁶ 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 a signed copy of Patten Blackberry Farm’s transportation assurance letter, and a signed copy of Employer’s transportation assurance letter. Employer also submitted an FLCE Certificate two weeks after the CO issued his final denial. As this new evidence was not a part of the record before the CO, it will not be considered on review, under § 655.171.

FLC/FLCE Certificates

The CO found that Employer failed to provide sufficient documentation to establish compliance with the registration requirements of the MSPA. *See* 29 U.S.C. §§ 1801 *et seq.* As an H-2ALC, Employer must comply with additional filing requirements in the regulations at 20 C.F.R. § 655.132. Section 655.132(b)(2) states that an H-2ALC must provide “a copy of the [MSPA] Farm Labor Contractor (FLC) Certificate of Registration . . . identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.” Regulations promulgated under the MSPA require that any employee of an H-2ALC who engages in farm labor contracting activities—including transporting migrant or seasonal agricultural workers—must obtain an FLCE Certificate authorizing such activity from the Administrator of the Wage

⁶ Section 655.171 affords ALJs the ability to “affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.”

and Hour Division of the Department of Labor's Employment Standards Administration (the WHD). *See* 29 C.F.R. § 500.20(a), (i)-(m).

Employer did not dispute its classification as an H-2ALC. Employer included a valid FLC certificate in its original application which indicated that Employer was authorized for "transportation" and "driving." AF 92. Employer also submitted an FLCE application for one of its drivers but failed to provide an FLCE certificate.⁷ Failure to submit a sufficient number of FLCE Certificates for employees authorized for driving workers to and from the worksite is grounds for denial. *Global AG Labor, Inc.*, 2010-TLC-0014 (October 5, 2010). Accordingly, the CO correctly found that Employer failed to comply with the MSPA by failing to obtain an FLCE Certificate for every employee engaging in farm labor contracting activities.

Employer also failed to provide sufficient evidence that it has adequate transportation for its requested workers. As explained by the CO, Employer requested 80 farm workers but only submitted evidence of one driver authorized to transport these workers. In the NRM, the CO asked Employer to explain how it plans to transport 80 workers with only one driver, including details on the duration of each trip and how many workers would be transported per trip. Despite the CO's request, Employer failed to provide any detail or description on its intended method of transportation.

The H-2A regulations require employers to provide transportation between housing and worksite at no cost to the worker. 20 C.F.R. §655.122(h)(3). All transportation must comply with all applicable Federal, State, or local laws and regulations and provide "the same transportation safety standards, driver licensure and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 29 CFR 500.120 to 500.128." 20 C.F.R. §655.122(h)(4). Some of these safety standards include limitations on the number of passengers in a motor vehicle and limitations on a driver's hours of service. 29 CFR §500.105(b)(2)-(4).

Denial of an H-2A application is appropriate where an employer did not provide evidence of sufficient transportation for its workers. *See e.g., Three Sisters Farm Services*, 2009-TLC-00043 (April 16, 2009) (affirming CO's denial of H-2A application where employer requested 63 workers but did not submit any FLCE Certificates and did not explain its transportation arrangements); *Jaime Campos*, 2010-TLC-000005 (November 5, 2009) (affirming denial of application where employer did not have a sufficient number of authorized drivers and registered vehicles). As Employer did not explain how it intends to transport its workers, Employer did not demonstrate that its transportation complies with the regulations' requirements. Consequently, Employer has not proven that it can provide adequate transportation for its workers, and accordingly, the CO properly denied certification.

Written Assurances

Pursuant to the regulations at § 655.132, if a fixed-site agricultural business is providing transportation to workers, an H-2ALC must provide evidence that "all transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business

⁷ As discussed above, the FLCE Certificate was not part of the record before the CO and thus cannot be considered now on appeal.

complies with all applicable Federal, State, or local laws and regulations.” 20 C.F.R. §655.132(b)(5)(ii). Employer provided an unsigned transportation letter and an unsigned assurance letter from Patten Blackberry Farm stating that its transportation will comply with all applicable Federal, State, or local laws. An unsigned letter from a fixed-site employer is not sufficient to establish that the fixed-site employer’s transportation is in compliance with all applicable Federal, State, or local laws. Without a signature from the fixed-site employer, it is unclear whether Employer drafted the assurance letter and submitted it to the CO without the fixed-site employer’s review.⁸ Consequently, Employer has failed to establish compliance with §655.132(b)(5)(ii) and 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

⁸ As discussed above, Employer submitted the signed copies of Patten Blackberry Farm’s transportation assurance letter and Employer’s assurance letter after the CO’s denial. Documents submitted after the CO issued his determination are not part of the written record in expedited administrative review cases. 20 C.F.R §655.171.