



Issue Date: 31 May 2016

OALJ Case No.: 2016-TLC-00050
ETA Case No.: H-300-16130-176709

In the Matter of:

LAKE CREEK FARMS,
Employer.

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **ALAN L. BERGSTROM**
Administrative Law Judge

DECISION AND ORDER – AFFIRMING CERTIFYING OFFICER’S DENIAL OF TEMPORARY LABOR CERTIFICATION

The above-captioned case involves a request for certification of nonimmigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. In this case, Lake Creek Farms (“the Employer”) has filed a timely request for expedited administrative review of the Certifying Officer’s May 25, 2016 denial of temporary labor certification (AF¹ 2, 4). The Decision and Order that follows is based on review of the entire administrative file, including the Employer’s request for review and written argument. Pursuant to federal regulations at 20 CFR §655.171(a) evidence that may be considered is that which was before the Certifying Officer, no new evidence submitted on appeal may be considered.

STATEMENT OF THE CASE

On May 9, 2016, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer seeking temporary labor certification for two farm workers to serve as “Agricultural Equipment Operators” from May 20, 2016 through December 31, 2016. (AF 53-61). The application listed the following job duties: “Drive trucks and tractors to perform a variety of crop raising duties. Field, repair implements and equipment. Harvest crops. Plant, cultivate crops using tractor drawn machinery. Operate,

¹ Citations to the Appeal File in this case will be abbreviated “AF” followed by the page number(s).

repair farm implements.” (AF 55, Item F.a.5). No education or training requirements were listed, but job applicants were expected to have at least three months of farming experience; a clean driving record; and an employment reference. (AF 56, Item F.b). The worksite address was listed as 1378 CR 4620, Cooper, Texas. (AF 56, Item F.c).

On May 13, 2016, the ETA Certifying Officer (“CO”) issued a Notice of Deficiency finding that the Employer’s application failed to meet the criteria for acceptance for several reasons. (AF 29-32). First, the Employer had failed to provide good and substantial cause for the CO to waive the required application filing period of no later than 45 days prior to the date of need time period; Second, the hourly work schedule was listed as 8:00 am to 5:00 pm in Section F.a.3 in the ETA Form 9142 but listed as “n/a” in Item 12 of the ETA Form 790. Third, in Item 17 of the ETA Form 790 the employer indicated both “yes” and “no” that they were deducting state taxes from the employee’s paychecks. The CO provided a method to correct the noted deficiencies.

By e-mail of May 13, 2016, employer’s agent requested that Item 12 of the ETA Form 790 be amended “with an hourly work schedule of 8:00 am to 5:00 pm” and that Item 17 of the ETA Form 790 be amended “by only checking ‘No’ since there are no state taxes in Texas. The employer’s agent asserted that “According to 20 CFR 655.134, the employer’s emergency request qualifies for emergency processing as it is considered an unforeseen event affecting the work activities to be performed.” Employer’s agent did not amend the requested start date of need from May 20, 2016 to no earlier than June 26, 2016 as offered by the CO to cure the first deficiency; but did offer to “adjust the start date to 5/22/16.” (AF 27-28)

By e-mail of May 20, 2016, employer’s agent was notified that the CO “has denied the employer’s request for emergency filing. In accordance with the instructions in the NOD, the employer may either file and appeal or amend start date of need to June 26, 2016. Failure to do so will result in a denial of the application.” (AF 15-16) Employer’s agent replied the same day arguing that her e-mail of May 13, 2016 (AF 27-28) “provided proof that the employer meets the emergency filing requirements” and requested “a detailed explanation for the basis of your denial as the employer clearly meets the regulatory requirements and your office has accepted this reason for emergency processing in other cases. The employer can respond to the deficiency as soon as this information is received.” (AF 15)

On May 25, 2016, the CO denied the Application for Temporary Labor Certification because the employer had failed to cure the first deficiency by either amending the start date of need to June 26, 2016 or appealing the denial of emergency processing. (AF 4-14) Employer’s agent timely filed a timely request for expedited administrative review of the CO’s denial on May 25, 2016. (AF 1-2)

In expedited administrative review cases, the administrative law judge has five working days after receiving the Appeal File to issue a decision on the basis of the written record after due consideration of any written submissions not including new evidence. 20 C.F.R. § 655.171(a). The Appeal File for this case was received by this Administrative Law Judge on Friday, May 27, 2016. The Employer’s request for administrative review, the Appeal File, and employer’s agent’s written argument contained within the Appeal File constituted the entire administrative file and were considered in deliberation.

POSITION OF THE PARTIES

Employer's position:

Employer's agent submits that "On May 9th, 2016, Lake Creek Farms submitted an H2A application, ETA 790 and ETA 9142, requesting emergency processing based on the acquisition of additional acres. Because the purchase of additional land was totally unanticipated and unforeseen, the employer's request qualifies for emergency processing according to 20 CFR 655.134 ... Furthermore, the NPC has granted such requests for emergency processing for other employers who have purchased land unexpectedly (reference H-300-16130-176709)." She submits that nowhere in the regulations does it state that an emergency situation must be out of the control of the employer. She restated the provisions of 20 CFR §655.134(a) for employers that used temporary alien agricultural workers during the prior year's agricultural season. She argues that the Employer's request qualifies for emergency processing and that in other (cited) cases emergency processing has been granted for a similar reason. (AF 27-28, 15, 8-9)

Certifying Officer's position:

The CO's rationale for denying emergency processing under the provisions of 20 CFR §655.134 was that when an employer requests emergency processing, the employer must concurrently submit its ETA Form 790 and ETA Form 9142A along with a statement justifying its request for waiver of the time period requirements for filing the ETA Form 9142A, pursuant to 20 CFR §655.134(b). In this case the reason given for filing the ETA Form 9142A on May 9, 2016 was that the employer had purchased additional acres and needed more laborers that originally anticipated as quickly as possible. The CO restated the provision in 20 CFR §655.134(a) that for employers who had used temporary alien agricultural workers during the prior year's agricultural season the time period for filing an application could be waived if the employer has other good and substantial cause for the waiver and the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by 20 CFR §655.100. (AF 31)

ISSUE

The issue in this case is whether the Employer's application for two H-2A nonimmigrant workers was submitted under conditions warranting emergency processing in accordance with 20 CFR §655.134(c) such that the start date of need of May 20, 2016 is appropriate.

DISCUSSION

The Employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program. 20 CFR §655.161(a) In administrative review of a denial by the Certifying Officer, only the evidence before the Certifying Officer at the time of the final determination may be considered. 20 CFR §655.171(a)

The evidence of record demonstrates that at the time the current application was processed, the Employer received certification for 2 farmworkers for the March 10, 2016 to December 31, 2016 season in ETA Case No. H-300-16014-450370 and that an application for 2 farmworkers for the

June 10, 2016 to December 31, 2016 season in ETA Case N. H-300-16146-758991 was pending review. (AF 52)

The “H2A Application for Temporary Employment Certification” (ETA 9142A) indicated in Item B.9 “Statement of Temporary Need” that “The employer has purchased an additional acres of land and needs more laborers than originally anticipated as quickly as possible. Emergency processing is requested.” (AF 54) Employer’s agent certified in ETA Form 9142A, Appendix A, Section A, that the information contained in ETA Form 9142A “is true and correct” on January 13, 2016. (AF 59) Employer’s secretary restated that certification in ETA Form 9142A, Appendix A, Section B, also on the reflected date of January 13, 2016. (AF 61) Official notice is taken that January 13, 2016 is 128 days before the May 20, 2016 start date of need set forth in ETA Form 9142A Item B.5. (AF 53)

As indicated in the “Agricultural and Food Processing Clearance Order” (ETA Form 790), Item 27, the work order was prepared by the Employer’s secretary on January 13, 2016. (AF 67) Also 128 days before the stated date of need set forth in ETA 790, Item 9. (AF 62)

The evidence of record does not reflect the date the employer acquired additional acreage; but because of the entries in ETA Form 9142A, Item B.9, the land acquisition must have occurred no later than January 13, 2016, the date Employer’s agent and secretary certified the truth of the information set forth therein.

Federal regulations at 20 CFR §655.130(b) requires that “a completed ‘Application for Temporary Labor Certification’ must be filed no less than 45 days before employer’s date of need” though 20 CFR §655.134 provides for emergency situations.

In this case Employer’s agent filed the ETA 9142A on May 9, 2016; 11 days before the Employer’s stated date of need and 117 days after the ETA 9142A was completed by Employer’s agent and secretary. The evidence of record fails to set forth any rational basis to explain why Employer’s agent failed to submit the completed ETA forms by April 6, 2016, which was 45 days before the stated date of need and 84 days after the January 13, 2016 ETA form completion date.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Employer has failed to establish an emergency situation existed such that waiver of the period for filing is warranted in this case; and that the CO reasonably concluded that the Employer has not established an emergency situation existed such that emergency processing was appropriate.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial determination is **AFFIRMED**.

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia