



Issue Date: 29 November 2016

Case No.: 2017-TLC-00002
ETA Case No. H-300-16227-452046

In the Matter of

USA SPECIALTY SERVICES, CORPORATION
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. USA Specialty Services, Corp. (“Employer”) timely filed a request for expedited administrative review of the Certifying Officer’s denial of temporary labor certification it requested. 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.

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).

Statement of the Case

H-2A Application and Notice of Deficiency

Employer is an HR Management and Consulting firm focused on farming operations in the Immokalee Florida area. AF 159. Employer is a farm labor contractor (“H-2A Labor Contractor” or “H-2ALC”) who supplies prequalified workers to growers. *Id.* On August 14, 2016, the DOL’s Employment and Training Administration (“ETA”) received an Application for Temporary Employment Certification from Employer. AF 201.¹ In this application, Employer requested temporary labor certification for farmworker employees to begin employment on August 15, 2016. AF 201.

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

On August 17, 2016, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) citing 17 deficiencies. AF 199-213. The NOD notified Employer that it must submit a modified application within five business days from Employer’s receipt of the letter. AF 199. By letter dated August 19, 2016, Employer responded to the NOD, requesting more time to submit the modified application. AF 198. ETA responded to Employer’s email on August 23, 2016, asking Employer to provide a full response to the NOD “as soon as possible in order to avoid additional delays.” AF 196. On August 28, 2016, Employer responded to the NOD, providing explanations and documents to cure the deficiencies. AF 156.

On September 6, 2016, the CO issued a Notice of Required Modifications (“NRM”), citing nine deficiencies. AF 144-155. Employer responded to the NRM on September 15, 2016, submitting the requested modifications. AF 99. Employer submitted a second response on September 22, 2016 after receiving notice that the first response was insufficient. AF 54.

The CO’s Denial

On October 14, 2016, the CO denied Employer’s application citing three deficiencies. AF 5-10. First, the CO found that Employer failed to provide an original surety bond. AF 7. The CO wrote that under 20 CFR §655.132(b)(3), an H-2A Labor Contractor must provide “proof of its ability to discharge financial obligations under the H-2A program by including an original surety bond. *Id.* In its NOD response, Employer stated that it annexed a surety bond to its letter, however, the CO noted that the Chicago National Processing Center never received it. AF 8. Furthermore, although Employer indicated that it needs 300 H-2A workers, Employer has not given any information regarding whether it plans to hire U.S. workers in corresponding employment, thus, the CO found that it is impossible to calculate the dollar amount for which the surety bond should be issued. *Id.*

Second, the CO found that Employer failed to provide work contracts under 20 C.F.R. §655.132(b)(4). AF 9. Under this section, an H-2A Labor Contractor must provide “copies of the fully executed work contracts with each fixed site agricultural business.” *Id.* Employer provided a work contract with a fixed-site agricultural business in its modification response, however, the CO found that the work contract was not signed or dated by both Employer and the fixed site grower. *Id.*

Third, the CO found that Employer failed to provide a Farm Labor Contractor (“FLC”) Certificate of Registration. *Id.* The CO wrote that under 20 C.F.R. §655.132(b)(2), an H-2A Labor Contractor must provide a “copy of the Migrant and Seasonal Agricultural Worker Protection Act (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.” *Id.* Employer submitted only one FLC certificate with authorization for only one vehicle with a capacity of 45 people and the Employer explain to indicate how it plans on transporting the remaining 255 workers. AF 9-10. Furthermore, the only FLC Employee Certificate authorized to drive the workers was unsigned. AF 10.

Employer's Appeal and Procedural Background

By letter dated October 17, 2016, Employer appealed the CO's decision, requesting a *de novo* hearing. AF 3. In its hearing request, Employer wrote that it is applying for H-2A certification for the first time and was not familiar with some of the special requirements. *Id.* Employer explained that it plans to mobilize seven international busses but presumed that it needed to show evidence of just one bus for licensing purposes. *Id.* Employer stated that it intends to be compliance with every single requirement and would like more time to complete the process. *Id.* A pre-hearing telephonic conference call was held on October 25, 2016 between the parties. At the conference call, Employer waived its right to a hearing.² Counsel for the CO stated that the CO would agree to a remand of the case if Employer provided the following three missing documents by October 28, 2016: 1) original surety bond; 2) fully executed work contracts; and 3) signed FLC certificates.

On October 26, 2016, an order was issued outlining the directives given to the parties during the conference call. The order directed counsel for the CO to notify this office, by October 31, 2016, if Employer submitted documents sufficient for certification. The order notified the parties that if the submitted documents were not sufficient for certification, a decision would be made on the record, after the time allotted to the parties for submission of any additional evidence had expired.

On October 31, 2016, counsel for the CO notified this office, via email, that Employer's document submission was insufficient for certification. She stated that Employer resolved the issues related to the surety bond and the work contracts; Employer's submissions were acceptable to the CO. However, Employer failed to submit valid Farm Labor Contractor Employee ("FLCE") certificates of registration, which are needed to demonstrate Employer's capacity to transport workers. Counsel for the CO explained that Employer submitted only one FLCE. Consequently, Employer's submission does not demonstrate how it intends to transport 300 workers with only one certified driver and seven certified vehicles with a 45 person capacity each.

Because Employer failed to satisfy its obligations by the deadline, on November 3, 2016 an order was issued setting the deadlines for submission of evidence and informing the parties that a decision will be made on the record. Employer was given until November 10, 2016 to submit additional evidence.

On November 9, 2016, Employer submitted, via email, a request for extension of time to submit additional evidence. In that request, Employer did not specify how much time it needed to submit such evidence. In its extension request, Employer wrote that it was unable to obtain the FLCE certificates because, after completing the screening and hiring protocol for the drivers, the Program Manager from the Atlanta Office informed Employer that "there are expected delays in processing the documents because this office will be relocating to San Francisco, CA."

² A request for a decision on the record does not change Employer's appeal to an expedited administrative review of the CO's determination. *T. Bell Detasseling, LLC*, 2016-TLC-00061 (Aug. 25, 2016) (the regulations found at 29 C.F.R. part 18 regulations provide for a decision on the record when a *de novo* hearing has been requested in such circumstances where there is a limited need for the introduction of new evidence).

Counsel for the CO responded to Employer's extension request, via email, on November 14, 2016 stating that the CO does not object to the additional time request. She noted that Employer had yet to submit the original surety bond, as well as FLC driver certificates. Counsel for the CO further noted that certification on remand is not guaranteed.

On November 15, 2016, an order was issued denying Employer's request for additional time to submit evidence. The order explained that the H-2A regulations impose an expedited review process for temporary labor certification and Employer had several opportunities to submit the necessary documents. On November 16, 2016, Employer submitted a letter, via email, requesting reconsideration of the order denying an extension of time. In the letter, Employer explained that it is waiting on the San Francisco Wage and Hour Division Office to process its FLCE applications and that it would request 21 days to submit the documents.³

Issue

Did Employer cure the deficiencies as listed in the Denial by submitting the original surety bond, work contracts and FLCE certificates?

Applicable Law

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).

This case arises from Employer's request for a *de novo* hearing of the CO's decision denying Employer's application in light of three deficiencies. The regulations provide that in *de novo* cases, the procedures in 29 C.F.R. Part 18 will apply and the ALJ will schedule a hearing within five business days after receipt of the administrative file, if the employer so requests. The regulations also 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." 20 C.F.R. §655.171(b)(2).

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

³ In its request, Employer wrote "I thought that your office would consider allowing my company the standard 21 days' time frame to deliver the requested documents." Employer did not, however, cite to any law or regulation as support for such a time frame. An ALJ has discretion in granting extensions of time. 20 C.F.R. §18.32(b). Good cause has not been shown for reconsidering the denial of Employer's request for additional time to submit evidence. Employer has a right to a *de novo* review of the CO's decision denying its labor certification application, not to use the hearing process as opportunity to modify or supplement that application.

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

Analysis and Findings

Employer submitted valid vehicle FLC certificates and one FLCE certificate for one of its authorized drivers. Employer failed to provide sufficient evidence that it has adequate transportation for its requested workers. As explained by the CO, Employer requested 300 farm workers but only submitted evidence of one driver authorized to transport these workers. 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); *see also, 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).

Employer failed to timely submit a sufficient number of FLCE certificates. Consequently, as Employer failed to establish compliance with 20 C.F.R. §655.132(b)(2), the CO properly denied certification.

ORDER

The CO’s decision in the above-captioned H-2A temporary labor certification matter is **AFFIRMED**.

LYSTRA A. HARRS
Administrative Law Judge

Cherry Hill, New Jersey