



**Issue Date: 01 June 2017**

Case No.: 2017-TLC-00017

ETA Case No.: H-300-17109-003067

In the Matter of

**A.OSEGUERA COMPANY, INC.,**  
Employer

**DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER'S  
DENIAL OF THE EMERGENCY FILING WAIVER UNDER 20 C.F.R. § 655.134**

This matter arises out of a request for an administrative review of the U.S. Department of Labor Certifying Officer's (the "CO") May 11, 2017 denial of an emergency waiver relating to an H-2A temporary labor certification application filed by A Oseguera Co., Inc. (the "Employer"). See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); 20 C.F.R. § 655.134; 20 C.F.R. § 655.171(a). The Office of Administrative Law Judges received the Administrative File on May 25, 2017. The administrative law judge has five working days to issue a decision. 20 C.F.R. § 655.171(a).

**STATEMENT OF THE CASE**

On April 20, 2017, the United States Department of Labor, Employment and Training Administration ("ETA") received an Application for Temporary Employment Certification ("Application") from the Employer. AF 422, 311, 313.<sup>1</sup> The Employer stated that it had a seasonal temporary need for 500 workers from June 4, 2017 to November 30, 2017.<sup>2</sup> AF 433.

On April 27, 2014, the CO issued a Notice of Deficiency ("NOD"), citing seven deficiencies. AF 365-79. Specifically, the CO noted that the Employer did not file a job order, Form ETA-790, to the State Workforce Authority ("SWA") serving the area of intended employment no more than 75 calendar days and no fewer than 60 calendar days before the date of need in accordance with 20 C.F.R. § 655.121(a)(1). AF 368. Additionally, the CO stated that the Employer's application for temporary employment certification submitted to the Chicago National Processing Center ("NPC") indicated that the Employer filed the Form ETA-790 with the California SWA as an emergency filing, but that there was no indication that concurrent filing took place as required by 20 C.F.R. § 655.134(b). AF 367-68; 437. Therefore, the CO

<sup>1</sup> Citation to the Administrative File will be abbreviated "AF."

<sup>2</sup> It is noted that April 20, 2017 is less than 60 days from June 4, 2017 and would therefore be outside the regulatory required job order filing time period of no more than 75 calendar days and no fewer than 60 calendar days before the date of need in accordance with 20 C.F.R. § 655.121(a)(1).

provided the Employer with three options for Modification: (1) provide evidence that the Employer filed concurrently with both the California SWA and the Chicago NPC; (2) withdraw its application with the Chicago NPC, file with the California SWA, await the new job order, and re-file a new application with the Chicago NPC; or (3) appeal the NOD. AF 368.

On May 5, 2017, the Employer responded to the NOD with regard to above-mentioned deficiency stating, “[e]mergency filing requests will follow with the additional documents that are required to support this NOD response.” AF 325.

On May 11, 2017, the CO issued a denial of the Employer’s Application seeking labor certification under the H-2A temporary agricultural program. AF 311. The CO wrote that the Employer submitted no further documentation in support of its position after its May 5, 2017 response to the NOD, and explained that “on May 4, 2017 the California SWA informed the Chicago NPC that it did not receive an ETA Form 790 application from the Employer.” AF 314. Accordingly, the Chicago NPC concluded that the Employer did not comply with its obligations to correctly file a job order under the applicable regulations because the Employer failed to file concurrently with the California SWA and Chicago NPC; provide any supporting documentation to support an emergency filing; or submit a withdrawal request so that it could refile correctly with the California SWA. AF 314.

On May 17, 2017, the Employer responded to the CO’s Denial Letter<sup>3</sup> stating:

The ETA Form 790 was submitted to the SWA on the 4<sup>th</sup> of May. We understand that this was not per guidance on concurrent submittals. This was overlooked due to the enormity of this petition. Included in this response is [the Employer’s] emergency filling [sic] letter. This took some time to draft, due to various reasons listed in the response. We understand that emergency filling [sic] is granted under specific guidance and that we must meet that guidance. Lastly, we have included the requirements listed in the NOD in this response.”

AF 1. The Employer submitted a letter to the Office of Administrative Law Judges on May 17, 2017, which stated that it understood it was denied emergency filing “due to lack of responding in a timely manner,” and that its “main focus here is to follow through with the items that were not addressed in the NOD and to acknowledge the emergency filling [sic] letter our client has provided.”<sup>4</sup> AF 142. This letter has been construed as the Employer’s request for administrative review of the CO’s denial. *See* May 25, 2017 Notice of Assignment and Order Setting Briefing Schedule.

On May 25, 2017, the Office of Administrative Law Judges received the AF, and the Notice of Assignment and Order Setting Briefing Schedule was issued the same day. Briefing deadlines were set for no later than May 31, 2017, at 4:30 pm EST. *See id.* The CO submitted a

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<sup>3</sup> The Employer wrote that it was responding to a “Notice of Deficiency (NOD) dated May 4<sup>th</sup>, 2017.” AF 1. However, the CO did not issue the NOD on May 4, 2017; the CO issued the NOD on April 27, 2014. *See* AF 365. The CO issued the Denial Letter and Enclosure for Denial Letter on May 11, 2017. *See* AF 311. Because the Employer had already responded to the NOD on May 5, 2017, the record supports a finding that the Employer was responding to the CO’s May 11, 2017 Denial Letter and Enclosure for Denial Letter in this letter.

<sup>4</sup> It is presumed that the Employer is referring to the letter dated May 16, 2017 found at AF 18, which explains the Employer’s need for emergency filing.

brief in support of its decision on May 31, 2017. The Employer did not submit a brief within the allotted time period.

## DISCUSSION

*The Employer failed to concurrently file a completed Application for Temporary Employment Certification, a completed job order on the Form ETA-790, and a statement justifying the request for a waiver of the time period requirement with the Chicago NPC and California SWA in accordance with 20 C.F.R. § 655.134(b).*

20 C.F.R. § 655.134(b) requires an H-2A employer requesting waiver of the required filing time period to:

concurrently submit to the NPC and to the SWA serving the area of intended employment a completed *Application for Temporary Employment Certification*, a completed job order on the Form ETA-790, and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

The employer bears the burden of proving that it is entitled to labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). When considering a request for administrative review, an administrative law judge is not permitted to consider new evidence that was not before the CO. *See* 20 C.F.R. § 655.171(a).

The CO found that the Employer did not satisfy the requirements of § 655.134(b) because it did not: file concurrently with the California SWA and Chicago NPC; provide any supporting documentation to support an emergency filing; or submit a withdrawal request so that it could refile correctly with the California SWA. AF 314. The Employer acknowledged that it did not submit the required Form ETA-790 with the SWA until May 4, 2017, and that it “underst[ood] that this was not per guidance on concurrent submittals.” AF 1. The California SWA emailed the Chicago NPC on May 4, 2017 explaining that it “has not received an ETA 790 application from [the Employer.]” AF 364. Additionally, the Employer did not submit a statement supporting an emergency filing until May 17, 2017 when it submitted a letter explaining that it required a waiver of the filing time period requirement because of various commitments and scheduling issues. AF 1, 18.

The CO properly denied the Employer’s Application on the basis that the Employer did not concurrently file a completed Application, Form ETA-790, and statement justifying the request for a waiver of the time period requirement with both the California SWA and Chicago NPC because: (1) the Employer acknowledged that it did not concurrently file the Application in its May 17, 2017 letter; (2) it filed its Application with the Chicago NPC on April 27, 2014, and

alleged in its May 17, 2017 letter that it filed the ETA Form 790 with the California SWA on May 4, 2017; and (3) the California SWA stated on May 4, 2017 that it had in fact not received a Form ETA-790 from the Employer.

The CO also properly denied the Employer's Application on the basis that the Employer did not provide a statement supporting emergency filing. The CO issued its denial on May 11, 2017, and the Employer did not submit a statement to justify its request for waiver until May 17, 2017. Additionally, an Administrative Law Judge is not permitted to consider new evidence, so the Employer's statement will not be considered in this decision. *See* 20 C.F.R. § 655.171(a); *see also, e.g., In re Rodriguez Produce*, 2016-TLC-00013, at \*3 (OALJ Feb. 4, 2016) (refusing to consider three documents included for the first time on appeal); *Employment and Training Admin. v. Paintbrush Adventures*, 2015-TLC-00006, at \*3 (OALJ Nov. 24, 2014) (refusing to consider Employer's explanation of why the job the opportunity was seasonal work because it was submitted for the first time on appeal).

The Employer did not file its Application or Form ETA-790 with the appropriate SWA within the required time period under 20 C.F.R. § 655.121(a)(1). The CO correctly concluded the Employer was not entitled to a waiver of the time period pursuant to 20 C.F.R. § 655.134(b). Therefore, the Employer is not entitled to a temporary labor certification.

The CO appropriately denied the Employer's Application for Temporary Labor Certification on the basis that the Employer failed to file within the required time period and lacked entitlement to a waiver of the required time period, precluding approval of Employer's Application for a temporary labor certification. Therefore, the remaining deficiencies in the Employer's Application as outlined in the CO's NOD need not be addressed.

### **ORDER**

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

**LYSTRA A. HARRIS**  
Administrative Law Judge

Cherry Hill, New Jersey