



Issue Date: 16 November 2017

OALJ Case No.: 2018-TLC-00001

ETA Case No.: H-300-17039-474042

In the Matter of

DOUBLE J. HARVESTING INC.,
Employer

ORDER GRANTING CERTIFYING OFFICER'S MOTION TO DISMISS

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (the "DOL" or the "Department") 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 Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

STATEMENT OF THE CASE

The CO certified Employer's *Application for Temporary Employment Certification* under the H-2A temporary agricultural program. On October 11, 2017, the CO denied Employer's Request for Determination of Contract Impossibility, finding that "the event leading to contract termination fails to constitute contract impossibility under Departmental regulations at 20 CFR 655.122(o)." (CO's Denial.) On October 16, 2017, Employer filed a request for review of the CO's denial. In support of its request for review, Employer attached a letter from Moore Haven Melons, LLC dated September 20, 2017.

On November 1, 2017, the CO filed a Motion to Dismiss, arguing that an Administrative Law Judge ("ALJ") does not have jurisdiction of a CO's contract impossibility determination under 20 C.F.R. §655.171. (Motion to Dismiss at 1.) In support of this position, the CO cited to 20 C.F.R. §655.171 which provides that an employer may request administrative review or a *de novo* hearing before an ALJ "where authorized by this subpart." (*Id.* at 2.) The CO noted that the INA does not permit administrative appeal of H-2A contract impossibility determinations because these determinations are neither a denial nor a revocation of certification. 8 U.S.C. 1188(e)(requiring expedited administrative appeals "for the review of a denial of certification under subsection (a)(1) or a revocation of such certification.") The CO explained that other

provisions of 20 C.F.R. Part 655 explicitly authorize administrative review. (Motion to Dismiss at 3.)

LEGAL FRAMEWORK

I. The Three-Fourths Guarantee and Contract Impossibility

Under the H-2A program, an employer must guarantee a worker employment for a total of three-fourths of the workdays under the work contract. 20 C.F.R. §655.122(i). An employer may terminate the work contract “for reasons beyond the control of the employer,” that make the fulfillment of the contract impossible. 20 C.F.R. §655.122(o). The regulations provide that “[w]hether such an event constitutes a contract impossibility will be determined by the CO.” *Id.* This regulation was enacted to provide flexibility to employers:

The Department is aware that certain circumstances or events beyond the control of the employer may make the fulfillment of the contract impossible, and the Final Rule includes a provision that, upon a finding of contract impossibility by the CO, the employer is relieved of the full three-fourths guarantee obligation and is instead permitted to reduce the guarantee to the time period from the start of the work until the time of the contract's termination. The Department has determined that the contract impossibility provision strikes an appropriate balance between ensuring fairness to workers and flexibility to employers.

Temporary Agricultural Employment of H-2A Aliens in the United States, 75 FED. REG. 6883, 6913 (Feb. 12, 2010).

II. Administrative Review of a CO's Decision

The INA provides for expedited administrative appeals of certain determinations. 8 U.S.C. § 1188(e). Specifically, the INA directs the regulations to provide “an expedited procedure for the review of a denial of certification under subsection (a)(1) or a revocation of such certification, or, at the applicant’s request, for a de novo administrative hearing respecting the denial or revocation.”¹ 8 U.S.C. § 1188(e)(1). Pursuant to this directive, the regulations provide that “where authorized in this subpart, employers may request an administrative review or a de novo hearing before an ALJ of a decision by the CO.” 20 CFR §655.171.

Part 655 subpart B contains several sections which explicitly provide for administrative review or a de novo hearing before an ALJ. Specifically, an employer can appeal: a Notice of Deficiency under §655.141(c), a denial of a modified *Application for Temporary Employment Certification* under 655.142(c), the CO’s determination as to whether there are qualified replacement U.S. workers available under §655.166(a), a denial of an extension request under §655.170(b), a denial of a petition for a higher meal charge under §655.173(c), and a revocation of a labor certification under §655.181(b)(3). These are the only sections which explicitly grant an employer a right to appeal a CO’s determination.

¹ Section 1188(a)(1) addresses the conditions under which the Attorney General may approve a petition for H-2A workers.

ALJ's have not previously addressed whether an ALJ has jurisdiction to review a CO's contract impossibility determination. In Rodrigo Gutierrz-Tapia, 2013-TLC-00036 (Jun. 14, 2013), the ALJ granted a motion to dismiss agreeing he lacked jurisdiction to review the CO's denial of a post certification request to modify an application since the regulation did not provide for any such appeal. In J.E. Cooley Farms, 2014-TLC-00054 (Mar. 26, 2014), an employer filed an appeal because the CO delayed issuing the certification beyond the regulatory requirements. The decision discusses, but does not definitively determine, whether appeals based on "constructive denials" are viable but concludes that no such appeal would be available on these facts since, *inter alia*, the statute is silent concerning the consequences of a delay in adjudicating an application.

DISCUSSION

Based on the H-2A program's statutory and regulatory language, an employer does not have a right to appeal a CO's contract impossibility determination to an ALJ. The regulations explicitly grant appeal rights under some sections and not others. Section 655.122(o) does not provide employers a right to appeal a CO's determination, nor does this regulation foreclose the right to appeal. However, §655.171 states that an employer may request review *where authorized by this subpart*. Accordingly, the regulations only grant appeal rights under sections that explicitly authorize administrative reviews or de novo hearings. ALJs have previously found that an employer does not have appeal rights in cases where the regulations or statute does not grant explicit appeal rights. Rodrigo Gutierrz-Tapia, 2013-TLC-00036; J.E. Cooley Farms, 2014-TLC-00054.

Consequently, because §655.171 authorizes administrative review or a de novo hearing only "where authorized in this subpart," an ALJ does not have jurisdiction to review a CO's contract impossibility determination under §655.122(o).²

ORDER

In light of the foregoing discussion, it is hereby ORDERED that the Certifying Officer's Motion to Dismiss is GRANTED.

² From a policy perspective, the ALJ's lack of jurisdiction over a CO's contract impossibility determination may appear fundamentally unfair to the employer. Based on the regulatory language, the CO's determination is final and an employer has no recourse. An employer may, however, choose not to meet the three-fourths guarantee and risk an enforcement action by the Wage and Hour Division. Only then would an employer be able to argue before an ALJ that it was unable to meet the three-fourths guarantee due to contract impossibility.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey