

**U.S. Department of Labor**

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**Issue Date: 03 May 2018**

**BALCA Case No.: 2018-TLC-00018**

**ETA Case No.: H-300-15320-676538**

*In the Matter of:*

**WICKSTRUM HARVESTING, LLC,**

*Employer.*

Certifying Officer: Lynette Wills  
Chicago National Processing Center

Appearances: Lesli Downs  
Wickstrum Harvesting, LLC  
*For the Employer*

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Washington, D.C.  
*For the Certifying Officer*

Before: LEE J. ROMERO, JR.  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S  
DENIAL OF TEMPORARY LABOR CERTIFICATION**

This matter arises under the temporary agricultural guest worker provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B (collectively, H-2A program). It is before the undersigned on Wickstrum Harvesting, LLC's ("Employer") request

for an expedited administrative review pursuant to 20 C.F.R. § 655.171. For reasons stated below, the undersigned **AFFIRMS** the determination of the Certifying Officer to deny the application for temporary labor certification.

**STATEMENT OF THE CASE**

**I. Procedural History, Contentions of the Parties, & Jurisdiction**

Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a certification that—

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a).<sup>1</sup>

The implementing regulations at 20 C.F.R. Part 655, Subpart B, set forth a multi-step process by which this certification—known as a “temporary labor certification”—may be applied for and granted or denied. First, the petitioning employer must file a job order with the State Workforce Agency (“SWA”) serving the area of intended employment. 20 C.F.R. § 655.121. The SWA will review the job order for compliance with the regulations and, if it finds the job order acceptable, post the job order on its intrastate clearance system and begin the recruitment. 20 C.F.R. § 655.121(b), (c). If the SWA does not locate able, willing, and qualified workers to fill the positions for which the employer seeks certification, the employer may file an *Application for Temporary Employment Certification* (ETA Form 9142A) with the U.S. Department of Labor (“DOL”), Employment and Training Administration (“ETA”), Office of Foreign Labor Certification (“OFLC”). A Certifying Officer (“CO”) in the OFLC will review the application for compliance with the requirements set forth in the regulations. 20 C.F.R. § 655.140. If the

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<sup>1</sup> The Secretary of Labor delegated the authority to make this determination to the Assistant Secretary for the Employment and Training Administration, who in turn delegated it to the Office of Foreign Labor Certification. 20 C.F.R. § 655.101.

application is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the Certifying Officer will notify the employer within seven calendar days. 20 C.F.R. § 655.141(a).

On or around January 23, 2019, Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142A) with ETA's Chicago National Processing Center ("CNPC") for fourteen (14) "farmworkers" or "Agricultural Equipment Operators." The period of intended employment was to begin April 14, 2018 and continue through December 15, 2018. (AF 94-128).<sup>2</sup>

The CO issued a Notice of Deficiency ("NOD") on March 2, 2018, which informed Employer that, in accordance with Departmental regulations at 20 C.F.R. § 655.141, the application for temporary employment certification and/or job order failed to meet the necessary criteria for acceptance. (AF 19-20).

The CO noted five deficiencies, including the notice that "[t]he employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals the job offer must state the charge, if any, to the worker for such meals." Moreover, the regulations at 20 C.F.R. § 655.173 prohibit the employer from charging an employee more than \$12.07 per day for providing three meals per day. (AF 75-80).

In reviewing Employer's application, the CO found Item 14 ("Deductions") of the ETA Form 790 indicated that Employer planned to offer free and convenient cooking facilities so workers could prepare their own meals AND that employer will deduct \$12.07 per day for meals. Under Item 14, Employer indicated no costs would be deducted from the workers' wages for providing three meals a day. Thus, the CO ordered the Employer to clarify whether it is offering free and convenient kitchen facilities to workers or if it will provide three meals a day and deduct \$12.07 a day from worker's wages. (AF 75-80).

Employer responded to the NOD and argued that its ETA Form 790 did not state that the employer will **deduct** \$12.07/day for meals; rather the form indicated Employer will **pay** \$12.07/day for meals. Employer planned to pay \$12.07/day for meals when the employees were working away from the home base. Otherwise, the

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<sup>2</sup> In this decision, citations to the Appeal File will appear as follows: Appeal File: (AF \_\_\_).

employees would have access to free and convenient cooking facilities. (AF 68-74).

On March 14, 2018, the CO issued a Notice of Required Modifications indicating Employer's application and/or job order failed to meet the criteria for temporary labor certification. After reviewing Employer's response to the NOD, the CO observed, "a 'stipend' for food given to the workers is not equivalent to meals or providing meal preparation facilities, the employer has to pay the provider (e.g., motel or restaurant) directly (i.e. pay the bill for the provision of housing or meals); the employer cannot provide cash, per diem, stipend, or 'money' in some other form to the worker and shift the procurement and payment responsibility to the worker." Accordingly, the CO directed the Employer to amend its job order to indicate that it will either provide each worker with three meals a day (and the amount to be deducted for the cost of such meals) or that it will provide free and convenient cooking and kitchen facilities to the workers that will enable the worker to prepare their own meals. (AF 64-67).

In response to the Notice of Required Modifications, Employer revised Item 14 and attached a revised copy. Employer indicated (1) it will furnish free and convenient cooking and kitchen facilities so that workers may prepare their own meals and will provide transportation to assure workers access to stores where they can purchase groceries, when workers are at their home base; and (2) Employer will pay \$12.07/day for meals, when workers are away from home base. (AF 57-63).

Dissatisfied with Employer's response, the CO denied Employer's temporary labor certification application on April 16, 2018. According to the CO, Employer failed to indicate it would comply with the required obligations related to meals at 20 C.F.R. § 655.122(g) and its application did not meet the criteria for certification at 20 C.F.R.161(a). Specifically, the CO found that the regulations at 20 C.F.R. § 655.11(g) place the obligation to provide worker meals exclusively with the employer. In accordance with Departmental regulations at 20 C.F.R. § 655.122, "[t]he employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals the job offer must state the charge, if any, to the worker for such meals." As such, the CO found the regulations do not allow an employer to provide money in lieu of meals or cooking and kitchen facilities.

The CO went on to explain that a stipend for food does not satisfy the Employer's obligation to "provide each worker with three meals a day or [] furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals." The regulations do not prohibit an employer from using a third party to provide such meals, but the Employer must arrange for those meals and pay the provider directly. The Employer cannot provide cash, per diem, stipend, or 'money' in some other form to the worker and shift the procurement of meals and payment responsibility to the worker.

Ultimately, the CO found Employer failed to offer one of the two options available for satisfying its meal provision obligation: 1) provide each worker with three meals a day, or (2) furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. As Employer failed to indicate it will comply with the required obligations related to meals at 20 C.F.R. § 655.122(g), Employer's application failed to meet the criteria for certification at 20 C.F.R. § 655.161(a).

On April 16, 2018, Employer requested expedited administrative judicial review. In its request, Employer set forth the factual background of the matter in an attempt to illustrate the National Processing Center's lack of attention to the present application, which allegedly resulted in significant delays. (AF 1-3).

Moreover, Employer appears to allege its temporary labor certification was improperly denied, because in previous years identical applications have been certified by the NPC. Employer alleges not only has its prior applications been certified, but other nearly identical applications have been certified. Specifically, Item 14 of Employer's 2017 application indicated, "Employer will pay \$13.80/day for meals (when away from headquarters)." According to Employer, its 2017 application is identical to this year's application (with the exception of an updated daily subsistence rate). Thus, based upon its history with the NPC, Employer believes its application has been improperly denied. (AF 1-3).

Furthermore, Employer argues that 20 C.F.R. § 655.122(g) does not mandate **how** an employer must provide three meals a day, only that they must - if free and convenient cooking facilities are not available. Employer asserts that the regulations also do **not** preclude employers from providing money to workers to

purchase their meals, as evidenced by the NPC's confirmation of multiple cases with this provision.

Employer objects to the CO's statement that "...the employer must arrange for the meal provision and pay the provider directly..." According to Employer, such a statement is not a regulatory requirement and such a burden would be unreasonable and nonfeasible. Employer alleges that there are many instances in which the employer may not be at the same location as the worker, making it impossible to make meal provisions and pay the provider directly. Moreover, such a requirement would take the meal choice away from the worker. Employer also denies that the regulations prohibit an employer from providing cash, per diem, stipend, or 'money' to the worker. (AF 1-3).

According to Employer, the NPC has simply failed to act consistently in processing the case and failed to respond to very specific questions regarding the meal requirement. As such, Employer asserts that the NPC's basis for denial is not consistent with the regulations at 20 C.F.R. § 655.122(g). Thus, Employer requests thorough review of the regulatory requirements pertaining to meals, not interpretations. (AF 1-3).

On April 25, 2018, the Office of Administrative Law Judges ("OALJ") received the Appeal File in this case requesting expedited administrative review. On April 26, 2018, the matter was assigned to the undersigned. On April 27, 2018, the undersigned received the Certifying Officer's Brief. On April 30, 2018, the undersigned issued a Notice of Docketing and Order Setting the Briefing Schedule providing Employer until Wednesday, May 2, 2018, to file its own brief in the present matter.

### **DISCUSSION**

In an expedited administrative review, as is the case here, the undersigned has jurisdiction pursuant to 20 C.F.R. §§ 655.141(c), 655.171(b)(2). Moreover, the Decision and Order that follows must be based solely on the written record, and may not be based on new evidence. 20 C.F.R. § 655.171(a). When an employer requests an administrative review, the administrative law judge's decision may affirm, reverse, or modify the CO's determination, or remand to the CO for further action. 20 C.F.R. § 655.171(b)(2). The administrative law judge's decision is the final decision of the Secretary. Id. In light of the foregoing standards, the undersigned will discuss the merits of this case below.

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b); Salt Wells Cattle Co., LLC, 2011-TLC-00185, slip op. at 4 (Feb. 8, 2011). The employer, therefore, must demonstrate that the CO's determination was based on facts that are **materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible.** See Catnip Ridge Manure Application, Inc., 2014-TLC-00078 (May 28, 2014). Consequently, a CO's denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. J & V Farms, LLC, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); Midwest Concrete & Redi-Mix, Inc., 2015-TLC-00038, slip op. at 2 (May 4, 2015).

The regulation at issue, 20 C.F.R. § 655.122(g) provides for the necessary contents of job orders regarding meals. Specifically, the regulation provides:

The employer must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173.

20 C.F.R. § 655.122(g).

As noted above, the CO found that Employer failed to satisfy its meal provision obligation to: 1) provide each worker with three meals a day, or (2) furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. According to the CO, the Employer's offer to provide a stipend for meals did not satisfy the Employer's obligation to "provide each worker with three meals a day or [] furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals." Thus, the CO denied Employer's temporary labor certification application, because Employer failed to establish that its application complies with Departmental regulations at 20 C.F.R. § 655.122(g).

In brief the Solicitor asserts the CO correctly concluded, based on the evidence in the Administrative File, Employer

failed to carry its burden to demonstrate that it was entitled to certification. The Solicitor alleges the H-2A regulations are explicit and do not permit Employer to provide workers with money in lieu of meals or cooking and kitchen facilities. Moreover, the Solicitor rejects Employer's allegation that its application should be certified because previous applications, in which the employers stated they would provide the workers with money for meals, were certified. DialogueDirect, Inc., 2011-TLN-00038, at n.5 (Sept. 26, 2011); Newsham Hybrids (USA), Inc., 1998-TLC-00011, at 5 (May 29, 1998); Rollins v. Sprinkler, 2017-TLN-00020, at 8 (Feb. 23, 2017) (holding certification of another H-2B application did not mean that a similar application should also be certified, since the other certification could have been granted in error).

Employer filed no brief.

Based upon the foregoing, the undersigned finds the CO's denial of certification was not arbitrary, capricious, or otherwise not in accordance with law. The regulations clearly require an employer to **provide** each worker with three **meals** a day or furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. The regulations do not provide for the employer to **provide money** instead of meals. This concept is furthered by the second sentence of §655.122(g) which states, "[w]here the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals." The regulation indicates, when an employer is not furnishing free and convenient cooking and kitchen facilities, but instead is **providing meals**, the employer must state the charge, if any, for such meals. The regulations do not provide for the employer to "state the stipend" allotted for such meals. Nor do the regulations provide for the employer to provide money instead of meals. The option of **providing meals** to workers rather than free and convenient cooking facilities carries with it the actual burden of providing the meal.

Whether prior applications granting such circumstances have been certified or not is irrelevant to the present proceeding. A strict reading of the regulations, as requested by Employer, does not permit the employer to **provide money**. Rather, the regulations require the employer to **provide meals** (or, in the alternative, to provide convenient cooking and kitchen facilities). Accordingly, the CO's denial of Employer's application is hereby **AFFIRMED**.

**ORDER**

In light of the foregoing discussion, it is hereby **ORDERED** that the Certifying Officer's denial of the Temporary Labor Certification is **AFFIRMED**.

**ORDERED** this 3<sup>rd</sup> day of May, 2018, in Covington, Louisiana.

**LEE J. ROMERO, JR.**  
Administrative Law Judge