



Issue Date: 03 January 2018

OALJ Case No.: 2018-TLC-00006

ETA Case No.: H-300-17342-522959

In the Matter of:

CONOHO FARMS, INC.,
Employer.

Certifying Officer: 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, Conoho Farms, Inc. (“the Employer”) has timely filed a request for expedited administrative review of the Certifying Officer’s December 15, 2017 Notice of Deficiency (AF¹ 1-3). The Decision and Order that follows is based on review of the entire administrative file, including the Employer’s request for review. Pursuant to federal regulations at 20 CFR §655.171(a) evidence that may be considered is that which was before the Certifying Officer at the time the appealed action was taken, no new evidence submitted on appeal may be considered.

STATEMENT OF THE CASE

On December 8, 2017, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer seeking temporary labor

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

certification for two farm workers to serve as seasonal “Agricultural Equipment Operators”, SOC Code 45-2091, from February 19, 2018 through December 8, 2018. (AF 56, 65-107).

On December 15, 2017, the ETA Certifying Officer (“CO”) issued a Notice of Deficiency finding that the Employer’s application failed to meet the criteria for acceptance because (AF 7-9) -

“In accordance with Departmental regulations at 20 CFR 655.121(1), ‘Prior to filing an Application for Temporary Employment Certification, the employer must submit a job order, Form ETA-790, to the SWA [State Workforce Agency] servicing the area of intended employment for interstate clearance, identifying it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H-2A workers.’

... The employer has failed to provide the NC [North Carolina] SWA a NCUI [North Carolina Unemployment Insurance] tax number in order to be eligible to use the NC job system recruitment. The North Carolina Department of Commerce Division of Workforce Solutions has indicated it is unable to create a Job Order until this deficiency is resolved.”

On December 15, 2017, Employer’s counsel filed a “Request for Administrative Review” in which he argues that the Employer “is not subject to federal (FUTA) or NCUI tax and therefore does not possess an NCUI account number. There is no federal, State or local law or regulation that requires an exempt employer to have a NCUI account number. No valid reason exists for CNPC not to accept the employer’s *Application for Temporary Employment Certification* for further processing and without further delay.” (AF 1-3).

On December 19, 2017 an “Order Setting Briefing Schedule” was issued. The Order directed the Certifying Officer to file the administrative file in this case by December 28, 2017. The administrative file was timely filed. The Order also gave leave to the Parties to file a final brief for consideration if completed no later than 10:00 AM, Tuesday, January 2, 2018.

On January 2, 2018, the Employer filed “Employer’s Brief” arguing that “there is no federal or State law or regulation that requires the Employer to submit an NCUI tax number with its H-2A job order to the SWA.” The Employer requests the case be remanded for acceptance and further processing. The Solicitor filed notice that there would be no brief or argument filed by the Department.

ISSUE

The issue in this case is whether the Employer’s application for two H-2A nonimmigrant Agricultural Equipment Operators complies with the provisions of 20 C.F.R. § 655.121(1) which requires an employer to submit a job order to the SWA servicing the area of intended employment prior to filing an *Application for Temporary Employment Certification* for H-2A workers.

DISCUSSION

The Employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program. *See* 20 C.F.R. § 655.161(a).

The Employer submits that it has not been required to obtain a NCUI account number for H-2A applications filed and processed since 2013 and that it is exempt from North Carolina unemployment insurance under those state laws and regulations. The Employer also argues that there is no place on the ETA Form 790 in which to write a NCUI account number while there is a place to record the federal tax identification number. It submits that “Requiring Employer’s UI tax number is beyond the purview of SWA review for purposes of a job order being submitted in connection with a future H-2A application to be filed with the Department of Labor.” The Employer submits that the “CO relies on a mere agency policy statement concerning internal quality control measures rather than any specific law or regulation applicable to the Employer. The section of that policy statement which has been cited by the CO does not state that an employer must possess a UI tax number or furnish a NCUI account number to the SWA. Rather the UI tax number is on a list of items to be reviewed for quality control purposes by Regional/State office staff when evaluating selected internal job orders, or Career Center staff when reviewing job orders written by employers.” Employer’s counsel avers that the “Employer is not subject to FUTA or NCUI because all employees of Conoho Farms in 2016 and 2017 were H-2A visa workers, and wages paid to H-2A visa workers aren’t subject to FUTA tax ... Employer has never been subject to NCUI tax and should not be imposed upon now to obtain a UI account number just so it can file an H-2A job order.”

I. The Employer has failed to establish by a preponderance of the evidence that the Certifying Officer acted in an arbitrary or capricious manner in finding that the *Application for Temporary Employment Certification* and/or job order fails to meet the criteria for acceptance.

In a December 8, 2017 letter to the Chicago National Processing Center (“CNPC”) Employer’s counsel averred that (AF 108) –

“On December 6, 2017, my office submitted to the North Carolina Department of Commerce – Division of Workforce Solutions (“NC SWA”) a job order in connection with a future H-2A application on behalf of the employer. On December 8, the FL (sic) SWA issued a Notice of Deficiency (“NOD”). The employer is unable to resolve the NOD with the NC SWA.

The nature of the dispute is that NC SWA is requiring the employer to submit a North Carolina Unemployment Insurance (“NCUI”) account number with the ETA Form 790. However, Conoho Farms, Inc. is not subject to NCUI tax and therefore does not possess an NCUI account number. There is no State or federal statute or regulation that requires Conoho Farms, Inc. to have an NCUI account number.

... Conoho Farms is not subject to FUTA or NCUI because all employees of Conoho Farms in 2016 and 2017 were H-2A visa workers.”

Previously, at 6:48 AM, December 8, 2017, T.B. Leggett as H2A Coordinator for the NC Department of Commerce, Division of Workforce Solutions provided a “Notice of Deficiency” to the Employer’s attorney by e-mail notifying him that before the job order and subsequent H-2A application can be accepted in North Carolina, the employer must submit his/her UI tax number with the ETA-790 for job order creation and recruitment purposes. (AF 110). T.B. Leggett subsequently explained that “Per Employer Accounts and Job Order Policy by the North Carolina Department of Commerce Division of Workforce Solutions, employers are required to provide their NCUI tax account number.” He added that “Employers who do not have a NCUI

tax account number or are exempt from paying UI taxes are still required to obtain a NCUI tax account number in order to enter a job order in [NC] system for recruitment purposes. ... Without a NCUI Tax Account number [the NC Department of Commerce] cannot proceed to create a job order number. ... Any accounts created in the labor exchange system with incorrect or no NCUI Tax Account number will be blocked and job orders will not be available to the public for recruitment purposes as required per federal regulations. ... If the employer completed all required information to obtain a NCUI Tax Account number, has a confirmation number and is still not able to obtain the account number, the NC SWA can follow up with the Division of Employment Security to assist in obtaining this account number.” (AF 109).

It is specifically noted that the ETA Form 790 “Agricultural and Food Processing Clearance Order” submitted by the Employer has not been processed by the SWA having jurisdiction over the place of intended employment. (AF 79, Sections 4 through 8.) On both the ETA Form 790 and the ETA Form 9142A the Employer indicates it and the worksite are located in Oak City, Martin County, North Carolina. (AF 66, 68, 79).

The North Carolina Department of Commerce, Division of Workforce Solutions maintains an on-line basic labor exchange known as NCWorks in order to fulfil North Carolina’s responsibility to the national labor exchange established under the Wagner-Peyser Act of 1933 as incorporated into Title III of the Workforce Investment Act of 1998, as amended July 22, 2014 and implemented by 20 C.F.R. Parts 651-654. (AF 19). States have discretion in how to meet the requirements for universal access to services provided under the Wagner-Peyser Act but must meet the minimum requirements set forth in 20 C.F.R. § 652.207 which includes “the capacity to deliver labor exchange services to employers and job seekers ... on a state-wide basis through: (i) Self-service, including virtual services; (ii) Facilitated self-help service; and (iii) Staff-assisted service ...” 20 C.F.R. § 652.207(b)(2). Minimal services to be provided by SWAs to migrant and seasonal farmworkers through one-stop centers and internet labor exchange systems are set forth in 20 C.F.R. Part 653. Regulations at 20 C.F.R. § 653.109(b)(9) require the respective SWA to collect data on agricultural clearance orders (ETA Form 790), including field checks and monitoring activities. Further 20 C.F.R. § 652.207(e) mandates SWAs to “periodically verify data required to be collected under this section [and] take necessary steps to ensure its validity.” Additional requirements regarding the agricultural recruitment system for U.S. workers to perform farm work on a temporary, less than year-round basis, are set forth in 20 C.F.R. Part 653, Subpart F.

In order to provide a secure on-line service and prevent scam employers from using NCWorks, employers must be verified to determine if the individual attempting to access the NCWorks system is representing a valid employer. As of January 26, 2016, part of the verification/security process in North Carolina for on-line services includes employers providing a valid unemployment insurance account number and valid federal employment identification number for the employer’s NCWorks profile. (AF 14-54). In order to access the NCWorks online job information network an employer must enter specific “Company Identification Information” which consists of the employer’s Federal Tax ID (“FEID”) number or social security number for individuals and sole proprietors; the employer’s North Carolina unemployment insurance account number; and the employer’s postal zip code. (AF 12). Where an employer does not have a valid unemployment insurance account number, or is exempt from paying North Carolina

unemployment insurance taxes, the employer may still obtain an NCUI account number from the North Carolina Department of Commerce, Division of Employment Security for use in accessing the NCWorks internet labor exchange system. (AF 19-24,44-48, 109) Without a NCUI, and employer cannot access the NC Works internet labor exchange system and the North Carolina SWA cannot create a job order that is available to the general public. (AF 109).

If the Employer elects to complete “all required information to obtain a NCUI Tax account number, has a confirmation number, and is still not able to obtain the [NCUI] account number, the NC SWA can follow up with the North Carolina Department of Commerce, Division of Employment Security, to assist in obtaining [an NCUI] account number.” (AF 109).

The Employer submitted no documentary evidence to the CO demonstrating that it had applied for the NCUI account number and was denied or otherwise impeded from obtaining the NCUI account number needed to access the NCWorks online labor exchange or to file a complete written ETA Form 790 with the SWA that would be available to the general public seeking employment in North Carolina. The administrative file did establish that without a valid NCUI being associated with placement of a job order, any job order generated therefrom would be blocked from public access on the NCWorks on-line labor exchange system. Such a result undermines the Wagner-Peyser Act, as amended and incorporated into the Workforce Investment Act, and prevents the CNPC Certifying Officer from determining if there are available, willing and qualified U.S. workers in the labor market to perform the job opportunity sought by the Employer.

After considering the entire administrative record and the Employer’s arguments, this Administrative Law Judge finds that the Employer has failed to establish by a preponderance of the evidence that it has exhausted administrative remedies available within the State of North Carolina related to its duties under the Wagner-Peyser Act as incorporated into Title III of the Workforce Investment Act and that the Employer has failed to establish by a preponderance of the evidence that the Certifying Officer acted in an arbitrary or capricious manner in finding that the Employer failed to submit a job order to the North Carolina SWA that would be available to the general public prior to filing its *Application for Temporary Employment Certification* for two H-2A foreign workers. Accordingly, the determination of the Certifying Officer to not accept the Employer’s application in ETA Case No. H-300-17342-522959 without a valid North Carolina SWA job order must be affirmed.

ORDER

It is hereby **ORDERED** that the Certifying Officer's **DENIAL OF CERTIFICATION** of December 15, 2017, is **AFFIRMED**.

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia