



Issue Date: 06 February 2018

BALCA Case No.: 2018TLC00007
ETA Case No.: H-300-17327-142613

In the Matter of:

MADRIGAL IRRIGATION,
Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Justin A. Greenberg, *Agent*
Lefelco
Las Vegas, NV
For the Employer

Jeffrey L. Nesvet, *Esq.*
Sarah M. Tunney, *Esq.*
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Peter B. Silvain, Jr.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor.¹ A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the Certifying Officer

¹ 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.²

STATEMENT OF THE CASE

On November 23, 2017, Madrigal Irrigation (“Employer”) filed the following documents with the Certifying Officer (“CO”): (1) Form ETA 9142, H-2A Application for Temporary Employment Certification (“Application”); (2) Appendix A.2 to Form ETA 9142; and (3) Form ETA-790, Agricultural and Food Processing Clearance Order. (AF 51-62).³ The Employer requested certification for ten general farm laborers⁴ to irrigate crops and fields as well as to install and repair farming irrigation systems from January 7, 2018, to July 30, 2018, based on an alleged seasonal need during that period. (AF 51-62).

On November 30, 2017, the CO rejected the Employer’s Application and issued a Notice of Deficiency (“NOD”). (AF 36). The NOD noted three deficiencies, including that the Employer failed to establish an emergency situation that would warrant a waiver of the filing timelines, that the Employer’s three-month experience requirement did not meet the requirements of 20 C.F.R. § 655.122(b), and that the Employer failed to provide assurance in the ETA Form 9142 that it controls the worksite location. (AF 38-41).

The Employer responded to the CO’s NOD on December 11, 2017. (AF 23). The Employer contested the rejection of the emergency waiver, alleging that it had good and substantial cause by virtue of its prior application, H-300-17230-285126, being unforeseeably denied. (AF 25-26). The Employer also permitted the CO to change the minimum qualification requirement for the positions to no experience required and provided its assurance that it controlled the worksite location. (AF 27).

Despite finding that the latter two deficiencies had been cured, the CO denied the Employer’s application on account of its failure to demonstrate its eligibility for an emergency waiver of the timeliness requirements on January 17, 2018. (AF 2-6). The CO first found that the Employer’s justification that the denial of its prior application was an unforeseeable event was not truly unforeseeable and, therefore, failed to establish good and substantial cause as contemplated by 20 C.F.R. § 655.134(b). (EX 5-6). Additionally, the CO concluded that the Employer failed to follow the procedural requirements of 20 C.F.R. § 655.134(b) by not filing a completed Application and a completed job order on Form ETA-790 with the Texas State Workforce Agency (“Texas SWA”) at the same time it filed with the Chicago National Processing Center (“NPC”). (*Id.*).

On January 24, 2018, the Employer appealed the CO’s decision to deny its Application. (AF 1). On January 30, 2018, I issued a Notice of Docketing and Order Setting Briefing Schedule, acknowledging the Employer’s request for expedited administrative review and permitting the parties to file briefs within three business days after receipt of the AF. On January 31, 2018, the Office of Administrative Law Judges received the AF from the CO. The

² 20 C.F.R. § 655.171.

³ AF is an abbreviation for the Administrative File.

⁴ SOC (O*Net/OES) occupation title “Agricultural Workers, All Other” and occupation code 45-2099. (AF 51).

CO provided a notice on February 2, 2018 that it was not filing a brief and requested an affirmance of the CO's final determination. The Employer did not submit a brief.

DISCUSSION AND APPLICABLE LAW

As part of the pre-filing procedures for a temporary labor certification, an “employer must submit a job order, Form ETA-790, to the 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.” 20 C.F.R. § 655.121(a).

In some situations, the CO may waive the time period for filing temporary labor applications. 20 C.F.R. § 655.134(b) provides:

(b) *Employer requirements.* The employer requesting a waiver of the required time period must 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.

Here, the CO found that the Employer did not satisfy the requirements of 20 C.F.R. § 655.134(b) because it: (1) did not file its emergency application concurrently with the Texas SWA and the Chicago NPC and (2) did not provide a sufficient reason to support an emergency filing. (AF 5-6). The Employer acknowledged in its statement of need that it was filing its petition late this year and requested emergency processing. (AF 79). Additionally, the AF reflects an email from the Chicago NPC to the Texas SWA asking, “Can you please confirm whether the employer filed with your office on November 23, 2017 or not...” (AF 30), to which the Texas SWA responded that the Employer “did not file concurrently with the SWA.” (AF 29-30). Thus, the CO properly denied the Employer's Application on the basis that the Employer did not concurrently file a completed Application, a completed job order on Form ETA-790, and a statement justifying the request of a waiver of the time period requirement with both the Texas SWA and the Chicago NPC.

The CO also properly denied the Employer's Application as the Employer's justification for a waiver of the time period was legally insufficient pursuant to the requirements of 20 C.F.R. § 655.134(b). The regulations provide two means by which an employer may obtain waiver of the filing requirements: (1) that the employer did not use the H-2A workers during the prior agricultural season or (2) good and substantial cause. 20 C.F.R. § 655.134(b). Here, the CO

denied waiver of the required filing time period after finding that the Employer did not establish good and substantial cause and that the Employer had previously used the H-2A program. The AF shows that the Employer used H-2A workers during the prior agricultural season, from November 2016 to July 2017. (AF 50). Thus, in order to obtain a waiver of the filing requirements, the Employer must have established good and substantial cause.

While not an exhaustive list, the regulations define “good and substantial cause” as 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.” 20 C.F.R. § 655.134(b). Here, in arguing that it had shown good and substantial cause, the Employer explained that it had previously filed a petition for the upcoming season, expecting it to be accepted, but it was subsequently denied. (AF 26). This denial was viewed by the Employer as an unforeseen circumstance, thus causing it to file a new petition under the emergency processing provisions of the regulations. (*Id.*).

This justification, however, does not constitute good and substantial cause. As noted by the CO, when an application does not comply with the requirements for certification and the employer is informed of the deficiencies and fails to correct them, the request for certification is foreseeably denied. According to the CO, the Employer’s previous application, H-300-17230-285126, contained a number of deficiencies that the Employer failed to correct after being given an opportunity to do so. (AF 5). Accordingly, the previous application was foreseeably denied. Under such circumstances, I find that a denial of an application cannot be considered an unforeseen circumstance and, therefore, fails to constitute good and substantial cause. Thus, as the Employer did not demonstrate good and substantial cause for a waiver of the time filing requirements, the CO also properly denied the Employer’s request for emergency processing.

Based on the foregoing, the CO appropriately denied the Employer’s Application on the basis that the Employer did not concurrently file a Form ETA-790 with the Texas SWA and the Chicago NPC and did not show that it was entitled to a waiver of the required time period.

ORDER

In light of the foregoing, the Certifying Officer’s decision is **AFFIRMED**.

PETER B. SILVAIN, JR.
Administrative Law Judge