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Issue Date: 19 July 2019

OALJ Case No.: 2019-TLC-00067

ETA Case No.: H-300-19102-676739

In the Matter of

Aga Mendoza Resources, LLC,
Employer

Appearance: Javier Mendoza
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For the Employer

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For the Certifying Officer

Before: Theresa C. Timlin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

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

On April 15, 2019, Employer submitted an application requesting H-2A temporary labor certification for ninety-nine Farmworkers and Laborers. (AF 70-79¹.) The nature of temporary need was listed as seasonal and the period of intended employment was listed as June 1, 2019 to November 30, 2019. (Id.)

The Chicago NPC issued a Notice of Deficiency (“NOD”) on April 22, 2019. (Id. at 56-61.) The NOD addressed five deficiencies:

1. Under 20 C.F.R. § 655.132(b)(2), an H-2A Labor Contractor (H-2ALC) must provide “[a] copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. § 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.” The FLC Certificate of Registration provided by Employer showed that the vehicle authorizations had expired on March 15, 2019. Furthermore, the two vehicles included on the FLC have only twenty-eight seats combined and no FLC Employee Certificate of Registrations with driving authorizations were included in the applications. Therefore, the Certifying Officer (“CO”) found that Employer had not retained a sufficient number of authorized vehicles and drivers to transport the ninety-nine workers requested. Employer was directed to submit proof of a sufficient number of authorized vehicles and drivers to transport the ninety-nine workers requested or provide a detailed explanation as to how the employer will transport its workers.
2. Under 20 C.F.R. § 655.122(e)(1)-(2), Employer must provide workers’ compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker’s employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State’s workers’ compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker’s employment that will provide benefits at least equal to those provided under the State workers’ compensation law for other comparable employment. Furthermore, the employer must provide the CO with proof of workers’ compensation insurance coverage meeting the requirements of this paragraph, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage. Here, Employer provided workers’ compensation insurance that expires October 26, 2019, which is before the end of the period of need. However, Employer did not provide a signed written assurance that the worker’s compensation insurance will be renewed prior to its expiration and throughout the period of intended employment. Employer was directed to submit a valid workers’ compensation insurance certificate. If the

¹ For purposes of this opinion, “AF” stands for “Appeal File.”

certificate expires prior to the requested end date of need, the employer must provide a signed written assurance that the worker's compensation insurance will be renewed prior to its expiration.

3. Under 20 C.F.R. § 655.141(a), “[i]f the CO determines the Application for Temporary Employment Certification or job order are incomplete, contain errors, or inaccuracies, or do not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO’s receipt of the Application for Temporary Employment Certification.”
 - a. Employer’s listed training was inconsistent between ETA Form 9142 and ETA Form 790. Employer was directed to clarify the training it will provide to workers, to be consistent between forms, and provide the Chicago NPC permission to amend the application.
 - b. Employer listed a post-hire drug testing requirement in the work contract and on Page 4 of the ETA Form 790 Attachments. However, Item 16.2 of the ETA Form 790 and the ETA Form 9142 do not include this requirement. Employer was directed to amend its drug testing requirement, to be consistent between forms, and provide the Chicago NPC with permission to amend the application accordingly.
 - c. In the ETA Form 790 Attachment, page 4, Employer listed its job duties as: Weeding: Workers will remove weeds by use of a hoe/pickaxe from walk-way and remove all weeds growing around plants by hand. Workers will remove weeds from the growing area by raking piles of debris and dispose of it as directed by the supervisor. Plastic and drip-tape removal: Unhook drip-tape from main water line, walk down row while pulling drip-tape up and pulling plastics down the bed until it is completely removed. Remove plastics by pulling plastics up, take removed plastics and drip-tape to proper disposal or burning station, as instructed by the supervisor, located at the end of the row. General Farm Labor: Some of the work required from the worker to be performed that is incidental to farming crops listed in this application may be described as performing hand cultivation duties, weeding or hoeing crops, cleaning, repairing seed beds and racks, setting up and moving irrigation pipes and equipment. However, these job duties were not included in the ETA Form 9142. Employer was directed to confirm its job duties and grant the Chicago NPC permission to amend its application accordingly.

On April 30, 2019, in response to the Notice of Deficiency, Employer sent an email to the Chicago NPC. (*Id.* at 50-55.) This email contained the following: an Assurance Letter that Employer is renewing its FLC Certificate of Registration and will have two buses with forty-

eight seats each and one van with fourteen seats, an Assurance Letter that Employer will renew its workers' compensation insurance before it expires, two pages from its ETA Form 790 that describe job duties and requirements, and a letter granting the Chicago NPC permission to amend Employer's application. (Id.)

On May 2, 2019, the Chicago NPC issued a Notice of Acceptance Letter to Employer, stating that Employer's application has been reviewed and accepted for processing. (Id. at 43-49.) Employer was directed to submit a written recruitment report by May 9, 2019, actual proof of workers' compensation coverage, a copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC as well as any FLC or FLCE certificates of authorized drivers, and an original surety bond as required by 29 CFR 501.9. (Id. at 43-49.)

Email correspondence between Employer and the Chicago NPC ending on May 7, 2019 included Employer's recruitment report and workers' compensation certificate, which had an expiration date of October 26, 2019. (Id. at 36-39.)

On May 10, 2019, the Chicago NPC sent an email to Employer, writing that Employer's application contained a deficiency which prevents further processing. Specifically, Employer's workers' compensation certificate expires on October 26, 2019, which is before the end of Employer's period of need. Employer was directed to provide a signed written assurance that its workers' compensation insurance will be renewed prior to its expiration. (Id. at 35.)

On May 16, 2019, the Chicago NPC sent another email to Employer, writing that they had yet to receive the following documents: Employer's assurance that it will renew its workers' compensation policy and the other requirements for certification outlined in the Notice of Acceptance. (Id. at 34.)

On May 21, 2019, Employer wrote an email to the Chicago NPC, which contained a signed Assurance Letter indicating that Employer will renew its workers' compensation before it expires. (Id. at 31-33.) Additionally, Employer wrote that its FLC certificate is being processed and it will forward copies of both the FLC certificate and surety bond when they are received by Employer. (Id.)

On June 3, 2019, Employer forwarded to the Chicago NPC a copy of an FLC Certificate of Registration for Adonay Resources, LLC, which expires on September 10, 2019. (Id. at 29-30.) The FLC authorized Adonay Resources to provide transportation. Furthermore, five vehicle were authorized to transport workers. (Id.) These vehicles included a 1991 International with twenty-four seats and an authorization ending June 24, 2019, a 1991 Dodge with fourteen seats and an authorization ending March 15, 2019, a 2009 Ford with fourteen seats and an authorization ending March 15, 2019, and 1999 Bluebird with twenty-four seats and an authorization ending July 24, 2019, and a 1997 Ford with twenty-four seats and an authorization ending July 24, 2019. (Id.)

On June 4, 2019, the Chicago NPC emailed Employer, writing that its application still contained deficiencies. (Id. at 28.) Specifically, both the FLC Certificate of Registration and vehicle authorizations expire before the end date of need and Employer provided no assurance to

renew the FLC Certificate of Registration. (Id.) Additionally, Employer did not provide FLCE certificates with driver authorizations for the number of workers requested. (Id.) Employer also failed to provide an original surety bond. (Id.)

On June 7, 2019, Employer's agent sent an email to the Chicago NPC, which included a copy of Employer's surety bond and indicated that an original would be mailed to the Chicago NPC office. (Id. at 24-27.) The email also indicated that the FLC Certificate of Registration was emailed by Adonay Resources to the Chicago NPC.

On June 12, 2019, the Chicago NPC issued a Notice of Required Modifications ("NRM"). (Id. at 17-23.) Upon review of the job duties contained in Employer's application, the Chicago NPC determined that the crop packing duties do not appear to meet the definition of agriculture labor or services as defined by H-2A regulations. The NRM explained that Employer is filing as an H-2A Labor contractor while the packing duties do not appear to be performed by the farmer or direct employees of the farmer. Additionally, Employer did not clearly indicate where the packing house is. Employer was directed to provide a written statement describing how its application should properly be considered as agricultural labor or services as those terms are defined for purposes of the H-2A program and provide an amended itinerary that includes packing as one of the activities of the workers and identifies where the packing houses are located.

The second deficiency concerned the FLC Certificate, which included transportation and vehicle authorization, submitted by Employer. The certificate is valid. However, the transportation and vehicle authorizations are set to expire prior to the end date of need and Employer did not provide any assurance that it would renew them. Additionally, Employer did not provide FLCE certificates with driver authorizations for the number of workers requested. Employer was directed to provide an assurance to renew the FLC certificate, all vehicles listed on the certificate, and the FLCE documents provided. Employer was also directed to submit either FLCE Certificates for its employees or FLC Certificates of Registration from independent farm labor contractors that it has retained to transport workers.

On June 17, 2019 Employer responded to Notice of Required Modifications. (Id. at 11-16.) Attached to this email was Employer's ETA Form 790, which included the address of the packing house, written permission for the Chicago NPC to amend Employer's ETA Form 9142 to include the address of the packing house, a letter from Employer indicating that the owner of the farm will pack his own produce on a daily basis, a letter from Employer amending the job duties to exclude packing, and an Assurance Letter that Employer will renew its FLC Certificate of Registration before it expires. (Id.)

On June 20, 2019, the Chicago NPC issued a Denial Letter. (Id. at 7-10) In the Denial Letter, the CO explained that Employer provided an FLC with vehicle authorizations that expired on March 15, 2019. According to the letter, only two vehicles, with a total of twenty-eight seats combined, are included on the FLC.² Additionally, the letter stated that no FLC Employee Certificate of Registrations with driving authorizations were included in the application.

² This is clearly incorrect. Employer has five vehicles. See AF, page 30.

Because of this, the CO wrote that it appears that Employer has not retained a sufficient number of authorized vehicles and drivers to transport the ninety-nine workers requested. As of June 20, 2019, the letter further stated, Employer had yet to submit its FLC Certificate of Registration³ or any FLC/E Certificates for any authorized drivers.

SCOPE OF REVIEW

Where the employer has requested administrative review, within five business days after receipt of the ETA administrative file the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the OFLC Administrator, and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary. 20 C.F.R. § 655.171(a).

DISCUSSION

I. HAS EMPLOYER SUBMITTED ITS FLC CERTIFICATE OF REGISTRATION?

Under 20 C.F.R. § 655.132(b)(2), an H-2A Labor Contractor (H-2ALC) must provide “[a] copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. § 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.”

In the Notice of Required Modifications dated June 12, 2019, the CO found issues with Employer's FLC Certificate of Registration. The CO explained that the FLC Certificate of Registration submitted by Employer, which included transportation and vehicle authorizations, was currently valid but would expire prior to the end date of need and the employer did not provide any assurance to renew any of the documents. Employer was directed to submit an assurance to renew the FLC certificate and all vehicles listed on the certificate.

On June 17, 2019, in response to the Notice of Required Modification, Employer's agent emailed several attachments to the Chicago NPC, including an Assurance Letter that Employer would renew its FLC Certificate before it expired. On June 20, 2019, the CO issued a Denial Letter, finding that Employer had failed to submit FLC Certificate of Registration as required by 20 C.F.R. § 655.132(b)(2).

The undersigned finds that Employer has submitted its FLC Certificate of Registration. In an email dated June 3, 2019, Employer's agent emailed the Chicago NPC a copy of Employer's Farm Labor Contractor Certificate of Registration. See AF 29-30. Employer's Certificate of Registration expires on September 10, 2019 and authorizes Employer to provide transportation to its workers. Because Employer's Certificate of Registration expires on September 10, 2019, which is before the end date of need of November 30, 2019, the CO, in the

³ Again, this is also incorrect. Employer sent the FLC Certificate of Registration on June 3, 2019. See AF, page 30.

Notice of Required Modifications on June 12, 2019, ordered Employer to provide an assurance to renew its FLC Certificate of Registration. In an email from Employer's Agent to the Chicago NPC dated June 17, 2019, Employer's Agent attached an Assurance Letter that Employer will renew its FLC Certificate of Registration before it expires. Therefore, because Employer provided a copy of its FLC Certificate of Registration, and subsequently sent an Assurance Letter to the Chicago NPC that it will renew its FLC before it expires, the undersigned finds that Employer has complied with the requirement to submit its FLC Certificate of Registration.

II. HAS EMPLOYER SUBMITTED FLCE OR FLC CERTIFICATES OF REGISTRATION FOR AUTHORIZED DRIVERS?

Regulations promulgated under the MSPA require that any employee of an H-2ALC who engages in farm labor contracting activities—including transporting migrant or seasonal agricultural workers— must obtain an FLCE Certificate authorizing such activity from the Administrator of the Wage and Hour Division of the Department of Labor's Employment Standards Administration (the WHD). See 29 C.F.R. § 500.20(a), (i)-(m). The MSPA regulations also require independent contractors who perform farm labor contracting activities for FLCs to register as FLCs in their own right. See 29 C.F.R. § 500.20(m).

In the Notice of Required Modifications dated June 12, 2019, the CO found issues with Employer's FLC Certificate of Registration and its transportation arrangements. The CO was unclear how workers would be transported to and from the worksite. There was neither FLCE Certificates of Registration for employees authorized to drive the workers nor was there an FLC Certificate of Registration for an independent contractor hired to transport the workers. Employer was directed to submit either an FLCE Certificates of Registration for its employees or an FLC Certificate of Registration from an independent farm labor contractor that it has retained to transport workers.

On June 17, 2019, Employer's agent responded to the Notice of Required Modifications and forwarded several documents to the Chicago NPC. There was not, however, any FLCE Certificates of Registration for employees authorized to drive the workers or an FLC Certificate of Registration for an independent contractor hired to transport the workers. On June 20, 2019, the CO denied Employer's application, finding that Employer failed to submit any FLC/E Certificates for its authorized drivers as required by 20 CFR 655.132(b)(2).

The undersigned finds that Employer failed to comply with the transportation provisions of the MSPA and therefore the CO properly denied it application. Employer is required to provide transportation for its workers and therefore must have authorized drivers. Employer could have acquired authorized drivers in one of two ways. First, it could obtain FLCE Certificates of Registration for its own employees. Alternatively, Employer could have hired an independent contractor, who has its own FLC Certificate of Registration, to transport its workers. Employer did neither and therefore has no authorized drivers for its workers. Failure to submit a sufficient number of FLCE certificates for employees to drive workers to and from the worksite is grounds for denial. See Three Sisters Farm Services, 2009-TLC-00043 (April 16, 2009) (affirming CO's denial of H-2A application where employer requested sixty-three workers but did not submit any FLCE Certificates and did not explain its transportation arrangements); Jaime

Campos, 2010-TLC-000005 (November 5, 2009) (affirming denial of application where employer did not have a sufficient number of authorized drivers and registered vehicles.)

Because Employer failed to submit any FLCE Certificates of Registration for its own employees or an FLC Certificate of Registration for an independent contractor, and thus has no authorized drivers as required by 20 C.F.R. § 655.132(b)(2), the Certifying Officer properly denied Employer's H-2A Application for Temporary Employment Certification.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2A Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey