U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 10 October 2019

BALCA Case No.: 2019-TLC-00077
ETA Case No.: H-300-19115-932184

In the Matter of

FAMILY FRESH HARVESTING LLC,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification ("H-2A") program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On August 14, 2019, Family Fresh Harvesting LLC ("Employer") filed a request for administrative review of the final determination ("Request") issued by the Certifying Officer ("CO") in the above-captioned H-2A temporary alien labor certification application.[1] I received the Administrative File ("AF") from the Employment and Training Administration on October 3, 2019.[2] Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five business days of the receipt of the AF.

STATEMENT OF THE CASE

On May 2, 2019, Employer filed an H-2A Application for Temporary Employment Certification on ETA Form 9142 ("Application").[3] The Application requested certification

[1] In its Request, Employer stated as follows: "I am filling [sic] an appeal to request that my case be rereviewed [sic]." Administrative File 3. I interpret that to mean Employer seeks administrative review in lieu of a de novo hearing under 20 C.F.R. § 655.171.

[2] The Employer and CO were permitted to file a brief no later than October 8, 2019, but neither did.

[3] AF 159-168.

for 25 "Farmworkers and Laborers, Crop, Nursery, and Greenhouse[.]"[4] The Application included a copy of a surety bond for $5,000.[5]

On May 9, 2019, the CO issued a Notice of Deficiency outlining six separate deficiencies under 20 C.F.R. Part 655, Subpart B.[6] Among those deficiencies was Employer's failure to submit an original surety bond document as required by 20 C.F.R. 501.9.[7]

On May 21, 2019, Employer submitted a revised Application requesting 20 workers, thus reducing the amount required by the surety bond from $10,000 to $5,000.[8]

On June 17, 2019, the CO issued a Notice of Acceptance ("NOA"), detailing the additional regulatory requirements Employer had to complete prior to granting certification.[9] Among other requirements, the NOA instructed Employer to provide an original surety bond:

> In order to receive a final determination on your temporary labor certification application, you are required to: … fully comply with the requirements of 20 CFR 655.132 including providing an *original* surety bond as required by 29 CFR 501.9. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety and specify the amount of the bond (as calculated pursuant to 29 CFR 501.9.) and any identifying designation utilized by the surety for the bond.[10]

On June 21, 2019, Employer responded to the Notice of Acceptance with a recruitment report, but not the original surety bond.[11] The CO requested the original

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[4] AF 159.

[5] AF 146.

[6] AF 144-151. In light of my disposition of this matter, it is unnecessary to discuss other deficiencies noted by the CO or any remedial measures undertaken by Employer.

[7] AF 144-151.

[8] AF 81. AF 87.

[9] AF 64-69.

[10] AF 68 (citations in original)(emphasis supplied).

[11] AF 56. AF 60-63.

surety bond on June 24, 2019.[12] On June 25, 2019, and again on June 26, 2019, Employer submitted its recruitment report but not the original surety bond.[13]

On July 10, 2019, the CO again requested the original surety bond.[14] Employer responded that it had "already sent over the original surety bond" on May 3, 2019 and would resend it again.[15]

On August 7, 2019, the CO determined, *inter alia*, that Employer had not met the regulatory requirements as detailed in the NOA and, therefore, denied the Application.[16] Specifically, the CO found that as of August 7, 2019, the CO had not received an original surety bond and therefore Employer failed to submit an original surety bond document.[17]

On August 13, 2019, Employer filed its Request.[18] The Request stated that Employer had "sent in original surety bond information in [sic] twice."[19] Employer stated in its Request that it was sending "another original copy of the surety bond to the Chicago National Processing center."[20] The CO received a "duplicate original" surety bond signed on August 9, 2019 for $5,000, which was received on August 16, 2019.[21]

DISCUSSION

The scope of review in H-2A cases is limited. I may consider the written record and any written submissions from the parties, which may not include new evidence.[22] The standard of review is de novo. That is, I may affirm the denial of certification only if

[12] AF 11. AF 59.

[13] AF 46. AF 60.

[14] AF 14.

[15] AF 12.

[16] AF 6-8.

[17] AF 11.

[18] AF 3-5.

[19] AF 3.

[20] AF 3.

[21] AF 4.

[22] 20 C.F.R. § 655.171(a).

the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.[23]

To be eligible for the H-2A program, an Employer must comply with all of the provisions contained in 20 C.F.R. Part 655, Subpart B,[24] including 20 C.F.R. § 655.132.

Pursuant to § 655.132(b)(3), an H-2A employer must provide proof of its ability to discharge financial obligations under the H–2A program by including an original surety bond with the *Application for Temporary Employment Certification*.[25] The surety bond "must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond (as calculated pursuant to 29 C.F.R. 501.9) and any identifying designation used by the surety for the bond."[26] The preamble to the regulations specifically notes that this "requirement to provide the original bond is intended to ensure that the Department has legal recourse to make a claim to the surety against the bond following a final order finding violations."[27]

Here, Employer stated on June 24[28] and July 11[29] that it had submitted an original surety bond on May 3, 2019. However, the record does not contain any evidence of an original surety bond submitted May 3, 2019.

The only surety bond in the record is a "duplicate original" surety bond that Employer references in its Request, which was signed on August 9, 2019, and not received by the CO until August 16, 2019.[30] An Employer may not refer to any evidence that was not a part of the record as it appeared before the CO.[31] Since this new evidence was not a part of the record before the CO, it will not be considered on review

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[23] The regulation is silent as to the appropriate standard of review to be applied on administrative review of a CO's decision. *See* 20 C.F.R. § 655.171(a). I find persuasive the rationale articulated in *Crop Transport, LLC*, 2018-TLC-00027, slip op. at 3 (Oct. 19, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a). *See also E&A Farming*, 2019-TLC-00053, slip op. at 5 (May 29, 2019) (applying de novo standard).

[24] 20 C.F.R. § 655.161.

[25] 29 CFR § 501.9.

[26] 20 C.F.R. § 655.132(b)(3).

[27] 75 Fed. Reg. 6,884, 6,942 (Feb. 12, 2010).

[28] AF 207-209.

[29] AF 12.

[30] AF 207-209.

[31] 20 C.F.R. § 655.171(a).

under Section 655.171.[32] Therefore, Employer failed to timely submit an original surety bond as required by Section 655.132(b)(3).

Accordingly, Employer does not meet the criteria for certification.[33]

ORDER

For the reasons stated above, the denial of Employer's H-2A Application for Temporary Employment Certification is **AFFIRMED.**

SO ORDERED.

THEODORE W. ANNOS
Administrative Law Judge

Washington, DC

[32] *See also Paloma Harvesting, Inc.*, 2016-TLC-00051, slip op. at 2-3 (June 13, 2016) ("an employer may not refer to any evidence that was not a part of the record as it appeared before the CO"); *Rodriguez Produce*, 2016-TLC-00013, slip op. at 3 (Feb. 4, 2016) ("an employer may not refer to any evidence that was not a part of the record as it appeared before the CO . . . [a]s this new evidence was not a part of the record before the CO, I am unable to consider it in my review, under § 655.171"); and, *Paintbrush Adventures*, 2015-TLC-00006, slip op. at 3 (Nov. 24, 2014) ("an employer may not refer to any evidence that was not a part of the record as it appeared before the CO . . . [a]s this new evidence was not a part of the record before the CO, I am unable to consider it in my review").

[33] 20 C.F.R. § 655.161.