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Issue Date: 09 October 2019

Case No.: 2019-TLC-00080
ETA Case No.: H-300-19127-824395

In the Matter of:

DAN AVILA & SONS,
Employer.

RULING ON CERTIFYING OFFICER'S MOTION TO DISMISS

1. Nature of Motion. The above-captioned case 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) and its implementing regulations found at 20 C.F.R. Part 655 Subpart B. Pursuant to 29 C.F.R. § 18.70(c), the Certifying Officer (CO) filed a Motion to Dismiss on the grounds Employer's appeal is moot because its temporary workers' visas have expired. In response, Employer agrees its appeal is moot for the reasons set forth in the CO's motion.

2. Procedural History and Findings of Fact.

a. On May 29, 2019, the CO granted certification for 48 "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" job opportunities for a period of employment from June 16, 2019 to September 14, 2019.

b. On August 24, 2019, Employer filed an application for an extension of temporary labor certification for 48 temporary workers with the CO until November 14, 2019.

c. On September 3, 2019, the CO issued a "Denial of Long Term Extension Request" to Employer.

d. On September 9, 2019, Employer requested expedited administrative review and a de novo hearing before an administrative law judge.

e. On September 18, 2019, the undersigned issued a Notice of Case Assignment and Prehearing Order.

f. On October 4, 2019, the CO filed a Motion to Dismiss. In support of the motion,

the CO stated “Employer’s instant appeal is moot and, notwithstanding a determination from this Tribunal, no relief may be granted because the period of employment in the temporary labor certification has already passed, the workers’ visas have expired, and any workers were required to depart the United States.” The CO further stated that “because neither the CO nor this Tribunal may accord Employer the requested relief, Employer’s request for a de novo hearing is moot.”

g. On October 7, 2019, the undersigned issued an Order Requiring Employer to Show Cause why the relief requested in the CO’s motion should not be granted.

h. On October 8, 2019, Employer timely filed a reply as required by the undersigned’s Order. In its response, Employer agreed the appeal is moot because its temporary workers’ visas expired and they departed the United States on September 14, 2019.

3. Applicable Law and Analysis.

a. *H-2A Program.* The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

b. *Burden of Proof.* Throughout the labor certification process, the burden of proof in alien certification remains with the employer. *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a). 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).

c. *Extensions.* An employer may apply for an extension of more than two weeks. 20 C.F.R. § 655.170(b). “Such requests must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions).” *Id.*

d. *Analysis.* In this matter, both Employer and the CO agree that Employer’s instant appeal is moot. Specifically, the parties agree the period of employment in the temporary labor certification has elapsed, the workers’ visas expired as of September 14, 2019, and the temporary workers have departed the United States. Thus, because the relief requested by Employer cannot

be accorded in this matter, Employer's instant appeal is moot. *See* 8 C.F.R. § 214.2(h)(2)(v) (USCIS regulations specifying that "[s]pecial criteria for admission, extension, and maintenance of status apply to H-2A petitions and are specified in paragraph (h)(5) of this section"); 8 C.F.R. § 214.2(h)(5)(vii) ("An approved H-2A petition is valid through the expiration of the relating certification for the purpose of allowing a beneficiary to seek issuance of an H-2A nonimmigrant visa, admission or an extension of stay for the purpose of engaging in the specific certified employment.").

4. Ruling.

- a. The CO's Motion to Dismiss is GRANTED.
- b. This case is DISMISSED with prejudice.

SO ORDERED.

TRACY A. DALY
Administrative Law Judge