

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 November 2018

BALCA CASE NO.: 2019-TLC-00004
ETA CASE NO.: H-300-18270-501622

In the Matter of:

ROSALBA GONZALEZ,
Employer.

Certifying Officer: John T. Rotterman
Chicago National Processing Center

Before: Paul C. Johnson, Jr.
Administrative Law Judge

ORDER GRANTING MOTION TO DISMISS

This matter was docketed in the Office of Administrative Law Judges on November 6, 2018, after Employer Rosalba Gonzalez requested a de novo hearing on the Certifying Officer's denial of an application for temporary labor certification of 103 farm workers. On November 20, 2018, the Administrator filed a motion to dismiss or, in the alternative, for summary decision. For the reasons set forth below, the motion to dismiss will be granted. Employer was allowed until November 23, 2018 to respond, and filed a timely response.

Procedural History

On September 27, 2018, Employer filed a Form ETA-9142A, H-2A Application for Temporary Employment Certification, seeking labor certification for 103 "Farmworkers and Laborers." Appeal File (AF) pp. 47, 57-101. The stated period of need was from November 11, 2018 through February 8, 2019. On October 4, 2018, the Certifying Officer (CO) issued a Notice of Deficiency, advising Employer that the application failed to meet the criteria for acceptance in several respects, and that Employer would be permitted to file a modified application. AF, pp. 25-34. After Employer provided additional information, the CO issued a final denial of the application by letter dated October 24, 2018. The denial letter advised Employer:

As provided by Departmental regulations at 20 CFR § 655.164(b), you have the opportunity to request an expedited administrative review of the denial or a de novo hearing of the denial before an Administrative Law Judge. To obtain this review or de novo hearing, you must file within seven (7) calendar days of the date of the denial, by facsimile or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge, U.S.

Department of Labor, 800 K Street NW, Suite 400-N, Washington, DC 20001-8002, with a simultaneous copy to this office. You may submit any legal arguments that you believe will rebut the basis of the Certifying Officer's action.

If you do not request an expedited administrative judicial review or a de novo hearing before an Administrative Law Judge within seven (7) calendar days, the denial is final and the Department of Labor will not further consider the application.

It is unclear from the file whether the denial letter was mailed to Employer on October 24. The letter was sent as an email attachment to Employer's authorized agent on October 29, 2018. AF, pp. 1-2. The "event history" maintained by the Office of Foreign Labor Certification indicates that although some activity occurred on October 24, the CO (John Rotterman) did not act until October 29, 2018, and the notice of denial was sent by email at 9:43 a.m. on that day. AF pp. 2, 45. Thus, I conclude that the denial letter was not sent to Employer's agent until it was sent by email on October 29, 2018.

On November 6, 2018 – 13 days after the date of the denial letter, and 8 days after the email forwarding it – Employer filed by fax a letter dated November 2, 2018, by which Employer requested a hearing before an administrative law judge.¹

Discussion

Under 20 C.F.R. § 655.164(b), an employer is allowed seven days from the date of the notice of denial of temporary labor certification to request a de novo hearing before an administrative law judge. Failure to make a timely request results in the CO's determination being final; the regulation provides that "the denial is final and the Department will not further consider that *Application for Temporary Employment Certification*."

In this case, the denial letter is dated October 24, 2018; however, the evidence shows that it was forwarded to Employer's authorized agent as an attachment to an email dated October 29, 2018. Contrary to the Administrator's argument, the regulation does not allow seven days from the date of the denial letter; it allows seven days from the date of the notice of denial. In this case, the notice of denial was issued on October 29, 2018 by email.

Because the seven-day period to request de novo review was triggered on October 29, 2018, Employer's request for hearing before an administrative law judge was required to be filed not later than seven calendar days later, or by November 5, 2018. It was filed on November 6, one day late. Accordingly, it was untimely.²

¹ Both the fax header on Employer's request for hearing and the fax cover sheet establish that it was sent to the Office of Administrative Law Judges on November 6, 2018.

² Employer's response to the Administrator's motion consisted of several documents that are already part of the Appeal File, but it did not include any evidence or argument regarding the timeliness of its hearing request.

As Employer's request for a de novo hearing was untimely filed, the CO's decision is the final decision of the Secretary, and I am precluded from further consideration of the application for temporary employment certification.

ORDER

Based on the foregoing, IT IS ORDERED:

1. The Administrator's motion to dismiss is GRANTED; and
2. The Certifying Officer's denial of Employer's application for temporary labor certification is final.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ,JR./jcb
Newport News, Virginia