



Issue Date: 05 December 2019

OALJ Case No.: 2020-TLC-00010
2020-TLC-00011
ETA Case No.: H-300-19273-061569
H-300-19273-763346

In the Matter of:

FRESH HARVERST INC.,
Employer.

Certifying Officer: Lynette Wills,
Chicago National Processing Center

Appearances:

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For the Employer

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For the Certifying Officer

Before: Steven D. Bell
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF TEMPORARY LABOR
CERTIFICATION**

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 (“Department”).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 CO denies

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

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 October 2, 2019, Fresh Harvest (“Employer”) filed (1) Form ETA 9142, *H-2A Application for Temporary Employment Certification* (“Application”); (2) Appendix A and Appendix A.2 to Form ETA 9142; (3) ETA Form 790, *Agricultural and Food Processing Clearance Order* with corresponding attachments; (4) Workers Compensation Insurance Documentation; (5) Form G-28; (6) FLC Documentation; (7) Housing Documentation; (8) Work Contracts; (9) Original Surety Bond; (10) Worksite Maps and Directions; and (11) Emergency Request Letter for each of the claims at issue.³ The Employer requested certification for five field workers,⁴ from October 28, 2019 until May 17, 2020⁵ and November 1, 2019 until December 31, 2019,⁶ based on an alleged seasonal need during that period.

On October 9, 2019, the CO issued an identical Notice of Deficiency (“NOD”) in each claim, stating that (1) Employer failed to submit the job order no more than 75 calendar days and no fewer than 60 calendar days before the date of need pursuant to 20 C.F.R. § 655.121(a)(1), or to provide written justification which establishes good and substantial cause for waiver of the time filing period under § 655.134(a)-(b), and that (2) the positions requested did not meet the definition of agricultural labor under § 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g) or § 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f), as required by 20 C.F.R. § 655.103(c).⁷

The CO noted that Employer had requested an emergency filing based notices of deficiency received for Case Nos. H-300-19256-042407 and H-300-19256-174553, and the “subsequent removal of truck driver job responsibilities; facilitating the need to re-file an application that includes those duties.”⁸ The CO found this to be an insufficient reason for waiving the time limit because it was “not due to unforeseen weather, crop conditions, pandemic health issues, or similar conditions.”⁹ In order to cure the deficiency under 20 C.F.R. § 655.134, the CO stated that Employer should “do one of the following:”

1. Withdraw its application with the Chicago NPC, file timely with the SWA and receive a job order (adjusting its start date of need to no earlier than 60 days from filing with the SWA), and re-file a new application with the Chicago NPC;

² 20 C.F.R. § 655.171.

³ AF-10 at 87-230; AF-11 at 59-179. In this Decision and Order, “AF-10” refers to the Administrative File from 2020-TLC-00010 and “AF-11” refers to the Administrative File from 2020-TLC-00011. The documents are presented in a different order for each of the claims, and AF-11 does not include Worksite Maps and Directions.

⁴ SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” and occupation code 45-2092. AF-10 at 87; AF-11 at 59.

⁵ AF-10 at 87

⁶ AF-11 at 59.

⁷ AF-10 at 53-58; AF-11 at 46-52.

⁸ AF-10 at 54; AF-11 at 47.

⁹ *Id.*

2. Appeal the NOD;
3. The employer may amend on this application its start date of need to no earlier than 60 days from filing with the SWA, and contact the Chicago NPC with the adjusted start date of need and authorization to amend the start date on this application.¹⁰

Employer responded to the NODs via email, stating that it had previously timely filed applications for the same positions, but that “in order to salvage as much of the harvesting season as possible, Fresh Harvest was forced to remove 5 farmworkers from th[ose] application[s] and any reference to “truck driving” in the application[s].”¹¹ It argued that “good and substantial cause” was not limited to weather related loss of workers or changes in work conditions, or to pandemic health issues, and that because they had been previously granted applications for the same positions in years past, the doctrine of estoppel applies with regard to the time limits. It also argued that the fact that their produce will start to rot without workers is sufficient to establish good and substantial cause for waiving the time limit.¹²

In Denial Letters dated October 25, 2019, the CO found that

[T]he employer did not provide a request due to unforeseen weather, crop conditions, pandemic health issues, or similar conditions.”

Further, the employer failed to amend its dates of need to be within the filing timeline, and therefore this application is denied.¹³

Employer submitted an appeal of both claims on November 1, 2019, requesting a de novo hearing and arguing that:

The waiver provisions in Section 655.134(b) explicitly state that “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.”¹⁴

It argued that the CO had incorrectly limited the definition of good and substantial cause and that the Department had reversed its policy on these types of positions, which had been approved in prior years, based on which it believed it was entitled to estoppel on the issue of timing. In addition, it again argued that the fact that their produce will start to rot without workers is sufficient to establish good and substantial cause for waiving the time limit.¹⁵

¹⁰ AF-10 at 54; AF-11 at 47.

¹¹ AF-10 at 38; AF-11 at 38.

¹² AF-10 at 38-39; AF-11 at 38-39.

¹³ AF-10 at 30; AF-11 at 30.

¹⁴ AF-10 at 5; AF-11 at 5.

¹⁵ *Id.* at 5-6.

On November 12, 2019, I issued a Notice of Docketing. Upon receipt of the appeal file for 2020-TLC-00010, I held a telephone conference, in which counsel for Employer and for the CO participated, in which a hearing date was agreed upon. I held a hearing on this claim on November 25, 2019.

Employer and CO both filed briefs on December 3, 2019.¹⁶

Employer has argued that:

Although the CO cited the emergency filing timeline as an additional basis for denying the applications, the emergency filing is inextricably intertwined with the substantive issue regarding whether the work involved is “agricultural labor or services.” As discussed during the hearing, the Court will either decide that the work in these job orders is “agricultural labor” and should be certified, or is not “agricultural labor.” In the latter scenario, that determination ends the analysis, as the timeline for the start date would be entirely moot. But, in the former scenario, the CO’s original Notices of Deficiencies and pressure on Fresh Harvest to withdraw the work covered by the current applications would have been erroneous *ab initio*.¹⁷

It argued that although the denials referred to pandemic health crises, weather related disasters, and act-of-God emergencies, the regulations did not limit the CO to these grounds for finding good and substantial cause. It argued that Employer has had these positions approved in the past and that the denial of the earlier claim constituted an “unanticipated disaster” caused by the CO because Employer had expected to be certified. It also argued that the potential loss of the citrus crop qualified as good and substantial cause. Finally, it argued that since the 60 days has now passed, after the hearing, the timing concerns are “self-created by the CO’s substantive error as to eligibility” and moot.¹⁸

The CO has argued that the CO may waive the normal filing time period only if the applicant demonstrates “good and substantial cause” for doing so, and that here, the CO reasonably determined that Fresh Harvest’s receipt of a NOD on its prior applications did not satisfy the standard. The CO pointed out that prior acceptance does not guarantee certification, and pointed to prior cases in which waiver of the filing time period was not granted based on a denial of a previous claim, and that such cases should have provided it notice that its acceptance was not guaranteed. In addition, the CO argued that estoppel does not apply as certifying officers

¹⁶ *Emp. Post-Hg. Bf.* refers to Employer’s Post-Hearing Brief, and *CO Post-Hg. Bf.* refers to the CO’s Post-Hearing Brief. On December 4, 2019, the CO filed a motion to strike a piece of evidence filed with Employer’s brief. Employer filed a brief in opposition on December 5. I note that I have not considered this evidence in writing this opinion, as it does not impact the issue addressed.

¹⁷ *Emp. Post-Hg. Bf.* at 9.

¹⁸ *Id.* at 10-11.

cannot be made to apply an incorrect interpretation simply because it has been previously used.¹⁹ It argued that:

Although the Supreme Court has “never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations,”... anything short of “affirmative misconduct” cannot result in estoppel, and even then, it is unclear if “affirmative misconduct” will lead to estoppel.²⁰

The CO noted that Employer had not argued there was the presence of affirmative misconduct, and that absent this, there could be no estoppel.²¹

DISCUSSION AND APPLICABLE LAW

Employer bears the burden to establish eligibility for temporary labor certification.²² In this case, the Employer has appealed the CO’s decision to deny its application.

Under 20 C.F.R. § 655.134:

The CO *may* waive the time period for filing for employers who did not make use of temporary alien agricultural workers during the prior year’s agricultural season or for any employer that has other good and substantial cause²³

This waiver is discretionary and *may* be granted at the discretion of the CO. Although Employer is correct that “good and substantial cause” is not limited to the situations described in the regulation,²⁴ this does not mean that the CO is required to waive the time period based on any prior denial, as Employer argues. In addition, this issue of whether the CO should have waived the filing time period is not “inextricably intertwined” with the issue of whether the positions applied for were considered agricultural labor, as the CO could have denied the claim based on the missed filing period without ever considering the merits of the claim.²⁵

Employer has not provided any evidence of emergency reason for its late filing aside from the Notice of Deficiency its previous claim and the fact that its fruit must be picked before

¹⁹ *CO Post-Hg. Bf.* at 14-16.

²⁰ *Id.* at 17 (citations omitted).

²¹ *Id.* at 17-19.

²² See e.g. *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); see also *Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015).

²³ 20 C.F.R. § 655.134(a) (emphasis added).

²⁴ *Id.* at (b) (“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.”)

²⁵ 20 C.F.R. § 655.121(a)(1).

it rots.²⁶ The mere purpose of the positions requested by the application is not sufficient to be considered a good and substantial cause for waiving the time limit, as it would defeat the purpose of having a time limit at all, since every application is filed in the face of harvesting fruit that will rot if it is unpicked.

As noted by the CO, it has been found by BALCA that “denial of an application cannot be considered an unforeseen circumstance and, therefore, fails to constitute good and substantial cause.”²⁷ Employer’s attempt to distinguish between a Denial and a Notice of Deficiency in which the CO warns that that a denial will be issued if the deficiencies are not corrected, is illogical as the two situations stem from the same problem. In addition, the doctrine of estoppel does not apply here, as an employer must establish that each application meets the requirements for certification, and prior approval does not guarantee that certification will be granted.²⁸ The fact that the time period has now passed is irrelevant to whether waiver should have been granted and the fact that the earlier claim’s NOD prompted the new application is not a good and substantial cause for the reasons stated above.

I therefore find that Employer has failed to establish that it had a good and substantial cause to waive the filing time period required under the regulations. Its claim was therefore untimely. Accordingly, the CO’s denial of certification is hereby affirmed.

As a consequence of my determination that the claim was untimely, I do not consider the issue whether the positions requested are agricultural labor.

ORDER

It is hereby **ORDERED** that the CO’s decision denying temporary labor certification be, and hereby is, **AFFIRMED**.

Steven D. Bell
Administrative Law Judge

²⁶ *Em. Post-Hg. Bf.* at 9-11. Employer’s witnesses at the hearing did not provide any testimony related to any emergency situation outside of the company’s belief that it would be approved based on earlier applications. Hearing Transcript (“Tr.”) 18-55, 89-90.

²⁷ *Madrigal Irrigation*, 2018-TLC-00007, at 4 (Feb. 6, 2018).

²⁸ *Lowery Hauling, Inc.*, 2019-TLC-00074 at 16 (Sep. 9, 2019) (“Employer’s 19 prior applications being certified is not a persuasive reason to circumvent the regulatory requirements of 20 C.F.R. § 655.132. As the CO properly cited in her brief, an employer must establish that *each* application that it files is eligible for certification. *See* Co Br.at 18; *ATP Agri-Services, Inc.* 2019-TLC-00050 at 9 (May 17, 2019)(“[T]he fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial.”); *Double J Harvesting, Inc.*, 2019-TLC-0005 at 6–7(July 2, 2019)(same); *Wickstrum Harvesting, Inc.*, 2018-TLC-00018 at 8 (May 3, 2018)(finding that the certification of prior applications “is irrelevant to the present proceeding”))