



Issue Date: 07 May 2020

OALJ Case No.: 2020-TLC-00066
ETA Case No.: H-300-20036-299513

In the Matter of:

**NAGOG FRUITERS, INC., d/b/a NAGOG
HILL FARM/NAGOG ORCHARDS,**
Employer.

DECISION AND ORDER OF DISMISSAL

On May 4, 2020, I issued a Notice of Docketing and Order to Show Cause Why Appeal Should Not Be Dismissed (the “May 4 Order”) in this matter. In the May 4 Order, I stated this case was docketed on May 1, 2020, and thus “I must issue a decision in this case by May 8, 2020.” May 4 Order at 1 (citing 20 C.F.R. § 655.171(a)).

In the May 4 Order, after recounting the procedural history of this matter, I stated:

The AF [Appeal File] indicates that neither the Employer nor its Agent submitted a timely response to the NOD [Notice of Deficiency]. As outlined above, the NOD was sent to the Employer’s Agent by email on April 7, 2020. The deadlines for a timely response to the NOD are thus based on that date. The AF indicates that neither the Employer nor its Agent submitted a modified application within five business days, or within 12 calendar days, of the Employer’s Agent’s receipt of the NOD. The AF also indicates that neither the Employer nor its agent submitted a request for expedited administrative review or a de novo hearing within five business days of the Employer’s Agent’s receipt of the NOD. Indeed, there is nothing in the AF that indicates anyone on behalf of the Employer submitted anything to the CO concerning this matter from April 7, 2020, to April 23, 2020.

The regulation governing NODs states that if an employer does not timely submit a modified application or a request for expedited administrative review or a de novo hearing in response to an NOD, the CO [Certifying Officer] “will deny the *Application for Temporary Employment Certification*.” 20 C.F.R. § 655.141(b)(5) (emphasis in original). The regulation then states “[t]hat denial is

final[,] cannot be appealed[,] and the Department will not further consider that *Application for Temporary Employment Certification.*” *Id.* (emphasis in original).

As outlined above, the AF is consistent with the CO’s statement in the Final Determination that the denial in this matter was based on the Employer’s failure to make a timely response to the NOD, either by submitting a modified application or by requesting an expedited administrative review or de novo hearing. The applicable regulation makes clear that an appeal is not available under these circumstances.

It thus appears that the appeal in this matter may have been docketed in error. **Employer is granted two business days from the date this order is issued to show cause why this appeal should not be dismissed.**

As this order is being issued on Monday, May 4, 2020, Employer must submit its response to OALJ-Headquarters-DC@dol.gov by Wednesday, May 6, 2020.

May 4 Order at 2-3 (emphasis in original).

I have reviewed the Office of Administrative Law Judges’ Case Tracking System. There is no indication that Employer submitted a response to the May 4 Order by the deadline of May 6, 2020. I therefore find that Employer has failed to show cause why this appeal should not be dismissed.

Accordingly, I find that this appeal was docketed in error because 20 C.F.R. § 655.141(b)(5) makes clear that an appeal is not available when an employer fails to make a timely response to a NOD, either by submitting a modified application or by requesting an expedited administrative review or de novo hearing. As Employer did not make a timely response to the NOD in this case, the CO’s “denial is final[,] cannot be appealed[,] and the Department will not further consider” Employer’s application. 20 C.F.R. § 655.141(b)(5). The appeal of this matter is therefore **DISMISSED**.

I am requesting that this order be served by email.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge