



Issue Date: 30 December 2019

OALJ Case No.: 2020-TLC-00027
ETA Case No.: H-300-19302-115544

In the Matter of:

FRANK PEDACE DBA SAN PASQUAL AVOCADO COMPANY,

Employer.

Certifying Officer: Lynette Wills
Chicago National Processing Center

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER OF DISMISSAL

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”). 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A). 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 certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges (“OALJ”). 20 C.F.R. § 655.171.

STATEMENT OF THE CASE

On November 13, 2019, Frank Pedace, doing business as San Pasqual Avocado Company, (the “Employer”) filed the following documents with the CO: (1) Form ETA 9142A, *H-2A Application for Temporary Employment Certification* (“Application”); (2) Appendix A to Form ETA 9142A; and (3) ETA Form 790, *Agricultural Clearance Order*. (AF 24-47.)¹ The

¹ In this Decision and Order, “AF” refers to the Administrative File.

Employer requested certification for six avocado harvesters,² from January 6, 2020, until June 6, 2020, based on an alleged seasonal need for workers during that period. (AF 24, 32.)

By letter dated November 19, 2019, the CO issued a Notice of Deficiency (“NOD”) outlining two deficiencies in the Employer’s Application. (AF 13-18.) The CO informed the Employer that in accordance with 20 C.F.R. § 655.142, the Employer could submit a modified Application within five business days from the date the Employer received the NOD. (AF 14.) Moreover, the CO explained that in accordance with 20 C.F.R. § 655.142(a), it would treat the Employer’s Application as abandoned if the Employer did not submit a modified Application within twelve calendar days after the NOD was issued. (*Id.*) Finally, the CO informed the Employer that under 20 C.F.R. § 655.142(c), it had five business days from receipt of the NOD to request expedited administrative review or a de novo hearing before OALJ. (AF 15.)

By letter dated December 3, 2019, the CO denied the Employer’s Application. (AF 5-6.) The CO explained that because the Employer neither filed a modified Application within twelve calendar days after the NOD was issued nor requested judicial review before OALJ, it was finally denying the Employer’s Application. (AF 5.) On the same day, December 3, 2019, the Employer filed a “Request for Appeal.”³ (AF 1.) In its letter, the Employer explained that it responded to the CO’s NOD on November 19, 2019, but sent its response to the wrong e-mail address. (*Id.*)

I received the Administrative File from the CO on December 19, 2019. The following day, on December 20, 2019, I issued a Notice of Docketing and informed the parties that they had three business days from receipt of the Administrative File to submit briefs. Neither the Employer nor counsel for the CO (“the Solicitor”) filed a brief.

DISCUSSION AND APPLICABLE LAW

The Employer bears the burden to establish that it is eligible for temporary labor certification. *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). When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding administrative law judge (“ALJ”) may only render a decision “on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae.” Accordingly, an employer may not refer to any evidence that was not part of the record when the case was pending before the CO.

In this case, the CO finally denied the Employer’s Application because the Employer neither submitted a modified Application nor appealed in a timely manner. (AF 5-6.) The applicable regulations give an employer five business days from the date of receipt of the CO’s NOD to submit a modified Application. 20 C.F.R. §§ 655.141(b), 655.142(a). Moreover, 20 C.F.R. § 655.142(a) provides that an employer’s Application “will be deemed abandoned” if it does not submit a modified Application “within 12 calendar days after” the CO issues the NOD.

² SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop” and code 45-2092.02. (AF 30.)

³³ OALJ did not receive the Employer’s “Request for Appeal” until the CO transmitted the Administrative File to OALJ. (AF 1-10.)

Furthermore, 20 C.F.R. § 655.141(b)(5) states that if an employer “does not comply with the requirements of” 20 C.F.R. § 655.142 “or request an expedited administrative review or a de novo hearing before an ALJ within 5 business days the CO will deny the Application.” Finally, it provides that the CO’s “denial is final,” meaning it “cannot be appealed,” and “the Department will not further consider that” Application. 20 C.F.R. § 655.141(b)(5).

In this case, the CO issued the NOD on November 19, 2019. (AF 14.) Although, in its “Request for Appeal,” the Employer stated that it submitted a modified Application on November 19, 2019, the Employer conceded that it sent its response “to the wrong address.” (AF 1.) Because the Employer did not send its modified Application to the correct address, the CO never received it. Thus, I find that the Employer did not respond to the NOD in accordance with the regulations. Moreover, I find that the CO sufficiently notified the Employer of the consequences of failing to either file a modified Application or file an appeal in a timely manner, as required by 20 C.F.R. § 655.141. The Employer filed its “Request for Appeal” fourteen calendar days after the CO issued the NOD. Therefore, because the Employer’s request for review was untimely, the CO’s denial of the Employer’s Application is final under 20 C.F.R. § 655.141(b)(5).

ORDER

Based on the foregoing, it is hereby **ORDERED** that this case is **DISMISSED**.

JOHN P. SELLERS, III
ADMINISTRATIVE LAW JUDGE