



Issue Date: 20 November 2020

OALJ Case No.: 2021-TLC-00027
ETA Case No.: H-300-20254-815850

In the Matter of

HARVESTCO, LLC,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On November 13, 2020, the Office of Administrative Law Judges (“OALJ”) received a copy of the Administrative File (“AF”) directly from the Certifying Officer (“CO”), which includes a copy of Harvestco, LLC’s (“Employer”) request for expedited administrative review dated November 4, 2020. This matter was assigned to me on November 13, 2020. On November 16, 2020, I issued a Notice of Docketing and Pre-Hearing Order (“Nov. 16 Order”). In that Order, I granted the parties three days from the date of receipt of the AF to file briefs. Nov. 16 Order at 1. The Employer submitted a brief on November 18, 2020.

Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five business days of the receipt of the AF.

BACKGROUND

The Employer filed ETA Forms 790A and 9142A on September 25, 2020. AF at 39, 49. The Form 790A requested six workers and listed the anticipated period of employment to span from “11/9/2020” through “4/30/2021.” AF at 51.

On September 29, 2020, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). AF at 24. The NOD¹ stated that on the Employer’s Migrant and Seasonal

¹ The NOD also denied the Employer’s application on the grounds that the Employer has not demonstrated a temporary or seasonal need. AF at 26–27. As I have found that the lack of valid means to transport the requested

Agricultural Worker Protection Act (“MSPA”) Farm Labor Contractor Certificate of Registration (“FLCR”), the Employer claimed “sufficient vehicle capacity for one driver to transport the six requested workers.” AF at 28. However, the CO identified that the Farm Labor Contractor Employee Certificate of Registration (“FLCE”), authorizing driving and submitted with the Employer’s FLCR, had expired on August 20, 2020. *Id.* Accordingly, the CO requested that the Employer “provide a valid FLCE Certificate of Registration for a driver to transport its requested workers” or explain “how it intends to transport workers without an authorized driver.” *Id.*

On October 15, 2020, the Employer requested that the NOD be re-sent, and on October 16, 2020, a Minor Deficiency E-mail including a copy of the NOD was sent to the Employer. AF at 14.

On October 28, 2020, the CO issued a Denial Letter (“Denial”). AF at 8. In the Denial, the CO reiterated its position that the application is deficient because the Employer lacks an FLCE authorizing driving and has not explained how it plans to transport the requested workers without a driver. AF at 11–12. The CO stated that “to date, the employer has not provided a response to nor satisfied” the deficiency identified in the NOD. AF at 12. In response to the Denial, the Employer filed its appeal of the CO’s decision on November 4, 2020. AF at 1.

DISCUSSION

I. Legal Standard

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. If the petition is denied by the CO, the standard of review is limited. When an employer requests an expedited review by an administrative law judge (“ALJ”), the ALJ may consider only the record and written submissions from the parties, which may not include new evidence. 20 C.F.R. § 655.171(a). The presiding ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. *Id.* The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011). The CO’s denial of certification must be upheld unless its decision was arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (March 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

H-2A Labor Contractors (“H-2ALC”) may receive Temporary Employment Certifications, provided they meet the requirements for employers in 20 C.F.R. § 655.103(b) and comply with additional regulations laid out in 20 C.F.R. § 655.132. This includes the requirement that the H-2ALC provide a copy of its MSPA FLCR “identifying the specific farm labor contracting activities the H-2ALC is authorized to perform.” 20 C.F.R. § 655.132(b)(2). Any employee of an H-2ALC who engages in farm labor contracting activities, including the

workers alone is sufficient grounds for affirming the CO’s denial of the application, I will not make a finding on the temporary need issue.

transportation of temporary or seasonal agricultural workers, must obtain a FLCR authorizing such activity from the Administrator of the Wage and Hour Division of the Department of Labor's Employment Standards Administration. *Elgidio Jacobo Gonzalez*, 2016-TLC-00030, slip op. at 4–5 (Apr. 1, 2016); *see* 29 C.F.R § 500.20(a), (i)-(m).

Employers are required to provide workers with transportation between living quarters and the worksite, and such transportation “must comply with all applicable Federal, State or local laws and regulations.” 20 C.F.R. § 655.122(h)(3)-(4). Accordingly, an H-2ALC's failure to submit an FLCR authorizing the H-2ALC or its employees to drive workers, or to offer an explanation as to how the H-2ALC plans to transport workers without driving, is proper grounds for denial. *Elgidio Jacobo Gonzalez*, slip op. at 5; *Global AG Labor, Inc.*, 2010-TLC-00146, slip op. at 3 (Oct. 5, 2010).

II. Analysis

It is undisputed that the Employer is an H-2ALC. AF at 55. The Employer submitted an FLCR and an FLCE with its Application for Temporary Employment Certification, one for the Employer, and one for Jesus Gonzalez Alvarez. AF at 55–58. The FLCR indicates that the Employer is not authorized for driving. AF at 55. While the FLCE for Jesus Gonzalez Alvarez granted authorization for driving, the authorization expired on August 20, 2020. AF at 58.

There is no valid FLCR or FLCE authorizing the Employer to drive workers in the AF, and the Employer has not provided an explanation as to how it plans to transport workers without driving. Accordingly, I find that the CO did not err in denying certification in this matter.

ORDER

Given the foregoing, the CO's Denial is **AFFIRMED**.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge