

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 November 2020

OALJ Case No.: 2021-TLC-00029
ETA Case No.: H-300-20292-881236

In the Matter of

MICHAEL DOLL,
Employer.

Certifying Officer: Lynette Wills
Chicago National Processing Center

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF 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.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 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 21, 2020, Michael Doll (“Employer”) filed an Application for Temporary Employment Certification (ETA Form 9142A), ETA Form 9142A Appendix A, ETA Form 790, 790A and Addendums, Statement of Temporary Need, and Agent Agreement. (AF 19-37).³ The Employer requested certification for 3 farmworkers and laborers, crop⁴ for its New Salem, North Dakota farm to “operate tractors with feed wagons and feed cattle daily” and to perform other duties such as grinding hay and corn, vaccinating cattle, minor repairs and maintenance, and

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

² 20 C.F.R. § 655.171.

³ In this Decision and Order, “AF” refers to the Administrative File.

⁴ SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop” and occupation code 45-2092.02. (AF 20).

checking animal pens. (AF 27). The Employer requested workers from December 17, 2020 to May 30, 2021, based on an alleged seasonal need. (AF 27, 19).

On October 28, 2020, the CO issued a Notice of Deficiency outlining two deficiencies in the Employer's application. (AF 8-13). The Employer was provided 5 business days to provide a modified Application. (AF 9). The Notice of Deficiency also stated:

Under Departmental regulations at 20 CFR § 655.142(a), the application will be deemed abandoned if the employer does not submit a modified application within 12 calendar days after the Notice of Deficiency was issued.

(AF 9).

The Employer did not file a response to the Notice of Deficiency. On November 4, 2020, the Employer's representative sent an e-mail to the CO regarding a separate case noting that she had previously withdrawn an old application for Michael Doll and "filed a new application for the winter months of 2020-21 and received a deficiency on the new case." (AF 4). The representative stated that she then "received a notice of correspondence pertaining to the case Britton Bina which had all the information listed as Britton Bina on the application that pertained to Michael Doll" as the ETA case number assigned to the Britton Bina case was the same ETA case number assigned to the old, withdrawn Michael Doll claim: H-300-19354-209764. The representative inquired as to how the issue could be resolved. *Id.*

On November 10, 2020, the CO issued a Notice of Denial ("Denial"), stating that the claim was being denied as the Employer neither submitted a modified application within twelve (12) calendar days after the Notice of Deficiency was issued nor requested an expedited administrative appeal or a de novo hearing. (AF 5-7). That same day, the Employer's representative sent another e-mail inquiring why Michael Doll's case was denied before the CO responded to her previous e-mail. (AF 3).

The Administrative File was docketed on November 17, 2020. The case was assigned to me on November 19, 2020. On that same day I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the parties to file briefs within three business days after receipt of the Administrative File. Neither party has submitted a brief.

DISCUSSION AND APPLICABLE LAW

The standard of review in H-2A is limited. When an employer requests a review by an administrative law judge ("ALJ") under §655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The 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 shown by the employer to be arbitrary,

capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op.at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

In this case, the CO denied the application because the Employer failed to submit a modified Application or file an appeal in a timely manner. The applicable regulations give the Employer five business days from the date of the receipt of the Notice of Deficiency to submit a modified Application. 20 C.F.R. §§ 655.141(b), 655.142(a). Further, under regulation 20 CFR § 655.142(a), the application will be deemed abandoned if the employer does not submit a modified application within 12 calendar days after the Notice of Deficiency was issued.

The CO issued the Notice of Deficiency on October 28, 2020. Although an e-mail referencing Michael Doll was received from the Employer's representative on November 4, 2020, the e-mail was sent as an inquiry in a separate case (Britton Bina ETA case number H-300-19354-209764) and made no reference to the current ETA case number for Michael Doll, H-300-20292-881236. (AF 4). Further, in this e-mail the representative acknowledged receiving the October 28, 2020 Notice of Deficiency for the new Michael Doll claim but made no attempts to provide a modified Application or address the noted deficiencies in the application. She also raised no argument as to how the mistakes contained in the Britton Bina case would prevent her from providing a modified Application in this current Michael Doll claim with ETA case number H-300-20292-881236.

Based on the above, I find that the Employer did not respond to the Notice of Deficiency 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. Therefore, because the Employer did not properly respond to the Notice of Deficiency in a timely manner, 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 the CO's decision denying the Employer's Application is **AFFIRMED**.

For the Board

LARRY A. TEMIN
ADMINISTRATIVE LAW JUDGE