



Issue Date: 29 December 2020

BALCA CASE NO.: 2021-TLC-00043

ETA CASE NO: H-300-20315-905864

*In the Matter of:*

ARBOR GLENN NURSERIES, INC.,  
*Employer.*

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Arbor Glenn Nurseries, Inc.'s (Employer) request for administrative review of the Certifying Officer's (CO) decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a temporary or seasonal basis, as defined by the United States Department of Homeland Security. See 8 U.S.C. § 101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142A, H-2A Application for Temporary Employment Certification. A CO in the Office of Foreign Labor Certification ("OFLC") of the Employment and Training Administration reviews applications for temporary labor certification. If the employer receives an unfavorable determination, the employer may request administrative review before the Board of Alien Labor Certification Appeals (BALCA). 20 C.F.R. § 655.171(a). For the reasons set forth below, the CO's denial of Employer's application is affirmed.

**Statement of the Case**

On November 10, 2020, Employer filed an application for temporary employment certification. Appeal File (AF) 243-56. Employer requested certification for five Nursery Field Laborers beginning January 22, 2021 through October 22, 2021. AF 248.

On November 12, 2020, the CO issued a Notice of Deficiency. AF 230-36. The CO identified four deficiencies in the application. *First*, the Employer "did not submit sufficient information regarding the event or pattern that has created its seasonal need." AF 233. *Second*, the CO wrote the requirement the worker have 12 months of experience was "excessive" for the job, and that a "maximum of 3 months of experience" is acceptable. AF 234. *Third*, the Employer "did not state how the employees will have access to stores where they can purchase their own groceries to

make their own meals in the provided kitchen.” AF 235. *Fourth*, the Employer did not state “transportation will be free of charge to employees.” The CO requested Employer “provide a detailed explanation as to why this job opportunity is seasonal rather than permanent in nature,” and supporting documents,<sup>1</sup> and requested permission to amend the application to correct the other noted deficiencies. AF 233-35.

On November 16, 2020, Employer filed its response to the Notice of Deficiency. AF 183-229. Employer’s response included Employer’s 2017 tax return, January – December 2017 Sales By Item summary, 2017 Sales By Month, 2017 Total Sales, and 2017 payroll summary. *Id.* The response also included an email from Eric Buzby; he wrote:

On page 3 Item 1 you are requesting 3 years of payroll and sales records.

I have this information saved in PDF and EXCEL, which I have include 2017 in this email email [sic] [.]

How do I attach these files in the document and years 2018 and 2019 which are the same size as 2017[?]

AF 183-84.

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<sup>1</sup> Employer was specifically asked to produce:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. If applicable, a detailed explanation with documentation as to how the weather in the employer’s area of intended employment serves to tie its need to a certain time of year;
3. Summarized monthly production numbers for three calendar years that clearly show the number of plants produced each month by workers in the requested occupation at the employer’s worksite location, or equivalent facility;
4. Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Nursery Workers, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
5. If contractors or other entities were used by the employer to address the need, or portions of the need, described in this application, three years of contracts/receipts detailing the services provided and dates of said services must be provided. If family members or other individuals not directly employed by the employer were used, signed affidavits attesting to their work schedule and duties must be provided; and
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

AF 233.

On November 17, 2020, the CO issued a Minor Deficiency Email. AF 180-82. The CO advised Employer had only “partially responded to the Notice of Deficiency” and again requested the documents and authorizations described in the Notice of Deficiency. AF 181. The CO acknowledged Mr. Buzby’s email and advised “these documents can be sent via email or uploaded directly to FLAG.” *Id.*

On November 20, 2020, Employer sent an email to the Chicago National Processing Center. AF 179. Employer asked, “We have another application in our case file H-300-20315905864 from November 12, 2020 should we withdraw this application given that JO-A-300-20321-914300 has been approved[?]” *Id.* On November 23, 2020, the Chicago National Processing Center responded to the inquiry, stating it recommended Employer continue with the current application (H-300-20315-905864) and withdraw application H-300-20321-914300. AF 178.

On December 1, 2020, the CO sent another Minor Deficiency Email. AF 175-77. The CO warned that failure to respond by December 3, 2020 would result in an unfavorable determination. AF 177. On the same day, Employer sent an email to the Chicago National Processing Center. AF 172-74. Eric Buzby wrote:

We have received the attached Notice of Deficiency. The documentation requested by The Chicago NPC is extremely large. We have tried several times to forward this documentation via FLAG but have been unsuccessful and it is to [*sic*] large to FAX. Is it possible to email these files with my application, if so can you provide a detailed procedure how to accomplish this[?]

Is it possible to speak with some [*sic*] over the telephone[?]

AF 172. On December 2, 2020, the Chicago National Processing Center responded to inquiry, advising Employer should upload its response to the Notice of Deficiency and supporting documents using FLAG. AF 171.

On December 9, 2020, the CO issued a Final Determination denying Employer’s application. AF 162-70. The CO concluded Employer did not establish the job opportunity was temporary in nature and that neither the 2017 payroll summaries nor the 2017 sales records support the claimed period of need. AF 167. The CO furthermore denied the application because Employer did not provide the requested permissions to amend the application. AF 167-69.

On December 10, 2020, Employer filed its request for administrative review. AF 1-161. In its request for review, Employer wrote:

Arbor Glenn Nurseries is requesting an expedited administrative review per you December 9th 2020 email which denied are request For the H-2A program[.]

On November 23, 2020 we forwarded the attached documentation in response to your Minor Deficiency of November 17th and 23rd of 2020.

It appears this was not received by The Chicago National Processing Center. We assume this error is our your [sic] email of December 9th 2020 list the same deficiencies as your November 23rd email.

AF 1. Employer attached to its request for review a Statement of Business, History, Activities, and Schedule of Operation; a copy of modified application; January 2017 – December 2019 Sales by Item Summary; 2017-2019 Total Sales; and 2017-2019 payroll summaries. AF 3-161.

This matter was docketed with BALCA on December 18, 2020. By order dated December 21, 2020, the parties were invited to file briefs no later than December 28, 2020. Neither Employer nor the Solicitor filed a brief, and the time for doing so has passed.

### **Discussion**

“Where the employer has requested administrative review ... the [administrative law judge] will, 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, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action.” 20 C.F.R. § 655.171(a).

In this case, the CO denied the application because Employer failed to establish the job opportunity is temporary in nature and there were minor errors in the application that remained uncorrected, although permission to amend was requested.

Employer attempted to cure the deficiencies by filing documents with its request for administrative review. This evidence, however, may not be considered, as it was not submitted to the CO prior to him issuing the Final Determination. 20 C.F.R. § 655.171(a). Employer contends it produced these documents on November 23, 2020. AF 1. The record clearly refutes this assertion. On December 1, 2020, Mr. Buzby sent an email to the Chicago National Processing Center saying, “We have tried several times to forward this documentation via FLAG but have been unsuccessful and it is [too] large to FAX.” AF 172. It is apparent from this email Employer did not believe it had successfully uploaded the documents the CO requested.

Employer bears the burden of establishing entitlement to certification at all relevant times. *MacFarlane Pheasants, Inc. (Missouri)*, 2020-TLC-00060 (April 13, 2020). The application contained multiple minor errors and as a result the application did not comply with the regulations. See 20 C.F.R. § 655.122(b),(g),(h). At no point before the Final Determination was issued did Employer grant the CO

permission to fix these errors. As the application did not comply with the regulations, the denial of Employer's application will be affirmed.<sup>2</sup>

**ORDER**

Based on the foregoing, IT IS ORDERED that the Certifying Officer's Final Determination denying Arbor Glenn Nurseries, Inc.'s application for temporary alien labor certification is AFFIRMED.

**SO ORDERED.**

PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

PCJ/PML/ksw  
Newport News, Virginia

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<sup>2</sup> I need not address whether Employer demonstrated a temporary need through its 2017 payroll summaries or sales reports. Although the CO would have been justified in denying the application for failure to provide the requested records, the CO did not deny the application on that basis. See AF 165-67.