In the Matter of:

Border Labor Contracting, Inc.,
Employer.

Before: Noran J. Camp
Administrative Law Judge

Appearances: Monica Thode, Agent/Representative
LABOR CONSULTANTS INTERNATIONAL
Coeur d’Alene, ID 83814
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For the Employer

OFFICE OF THE SOLICITOR
U.S. DEPARTMENT OF LABOR
Washington, D.C.
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For the Certifying Officer

DECISION & ORDER AFFIRMING THE DENIAL DETERMINATION OF THE CERTIFYING OFFICER


For the reasons set forth below, the June 14, 2021 denial determination of the Certifying
Officer will be *affirmed*.

I. PROCUREMENT BACKGROUND

A. THE MAY 24, 2021 APPLICATION.

On or about May 24, 2021, Border Labor Contracting, Inc. (“Border Labor” or “Employer”), and its “Attorney or Agent,” Labor Consultants International, filed an Application for Temporary Labor Certification (“Application”) under the H-2A program. AF 44, 59. Employer is an “H-2A Labor Contractor” (“H-2ALC”) (AF-44 at A-2), meaning that it is an entity that recruits H-2A workers who will be employed to work for farmers, ranchers and other “fixed-site employers.” See 20 C.F.R. § 655.103(b). The Application was signed by Monica Thode for Labor Consultants (AF-47), and by Yvette Arredondo, Director, for Employer (AF-49). The Application sought certification for 16 “seasonal” H-2A farm workers (“Farmworkers and Laborers, Crop”), to harvest chili peppers.

Employer ran into trouble with the next part of the Application. Employer was required to list the names of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers,” along with their locations. 20 C.F.R. § 655.132(b)(1). Employer listed the following four businesses:

- “Billy the Kid”
- “Kidd-O Ranch”
- “Mark Franzoy-Delay Haynes”
- “Brian Franzoy-Simmons Farm”

AF 50, 52, 53, 61-62. Employer was also required to include copies of “the fully-executed work contracts with each fixed-site agricultural business” listed above. 20 C.F.R. § 655.132(b)(4). Employer included a document that reads:

*Mimbres Ranch* is employing Border Labor Contracting Inc. to help with our harvesting season. We are requesting 16 workers from July 8th, 2021 through October 29th, 2021.

AF 67 (my emphasis).1 It is signed by “Billy Franzoy” for “Mimbres Ranch,” and Noe Arredondo for Employer. *Id.*

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1 The CO refers to this document as a “work contract.” AF 11 (“The H-2ALC provided a work contract for Billy Franzoy”). The regulations define a “work contract” between the employer and the worker. See 20 C.F.R. § 655.103(b). In the absence of that contract (“entered into between the employer and the worker”), “the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract.” 20 CFR 655.122(q). However, I find no similar regulatory escape for the absence of a work contract between the employer and the H-2ALC.
B. THE MAY 28, 2021 NOTICE OF DEFICIENCY.

On May 28, 2021, the Certifying Officer ("CO"),2 issued a Notice of Deficiency ("NOD"). AF 31. The CO asserted that Employer had failed to include the required labor contracts for the four (4) fixed site agricultural businesses it had listed in the Application. AF 33.

C. EMPLOYER’S JUNE 1, 2021 RESPONSE TO THE NOD.

On June 1, 2021, Employer responded to the May 28, 2021 NOD. AF 29. The response stated that it was attaching “the updated work contract that correctly lists the ranch names that Border Labor will be providing labor for.” Id. The attached document reads:

Kidd-O Ranch, Billy the Kid, Mark Franzoy farms and Brian Franzoy farms are employing Border Labor Contracting Inc. to help with our harvesting season. We are requesting 16 workers from July 8th, 2021 through October 29th, 2021.

AF 30. The document is signed by “Billy Franzoy” (no affiliation noted) and Noe Arredondo for Border Labor Contracting. Id.

D. THE CO’S JUNE 3, 2021 NOTICE OF REQUIRED MODIFICATIONS.

On June 3, 2021, the CO issued a Notice of Required Modifications ("NRM"). AF 25.3 The NRM acknowledged that Employer had “provided a work contract for Billy Franzoy.” AF 27. But, the CO asserted, Employer “failed to indicate the location of each [applicable] fixed-site agricultural business and a description of the crops and activities the workers are expected to perform at such fixed site.” Id. The CO also asserted that Employer “failed to provide work contracts for Mark Franzoy, Kidd-O Ranch, and Billy the Kid.” Id. The CO required Employer to modify its Application to include the assertedly missing items. Id.

E. EMPLOYER’S RESPONSE TO THE NRM.

On June 10, 2021, Employer re-submitted its June 1, 2021 Response to the May 28, 2021 NOD. AF 29. It included no additional information or attachments. See AF 29-32.

F. CO’S FINAL DETERMINATION.

On June 14, 2021, the CO issued a final Denial letter. AF 9. The letter explained that the

2 The Certifying Officer acts on behalf of the Office of Foreign Labor Certification ("OFLC"), Employment and Training Administration ("ETA"), U.S. Department of Labor ("DOL").

3 The CO re-issued this NRM on June 7, 2021. AF 20.
Application was denied because Employer “failed to provide work contracts” for each applicable business, and that the document that was provided did not indicate that “Billy Franzoy” represented all the businesses listed there. AF 13.4

G. EMPLOYER’S APPEAL.

On June 18, 2021, Employer’s Agent filed a request for an administrative review of the denial. See 20 C.F.R. § 655.171(a).5 The appeal states that it “included the contracts that were originally supposed to be included with the NOD response.” AF 1. Attached to the appeal are documents apparently purporting to be contracts between Employer and: Kidd-O-Ranch (AF 3); Brian Franzoy Farm (AF 6); and Mark Franzoy Ranch (AF 7). Each document is signed by Noe Arredondo for Employer, and counter-signed by “Billy Franzoy,” whose affiliation is not identified.

On June 30, 2021, the CO filed the Administrative File with the Office of Administrative Law Judges, and I issued a Notice of Docketing on July 1, 2021. The Notice identified the appeal as one seeking “expedited Administrative Review,” and invited the parties to submit optional briefs no later than July 6, 2021.

On July 6, 2021, Employer’s agent filed a letter stating that it seeks to overturn the denial of certification for three (3) of the original four (4) worksites: Kidd-O Ranch; Brian Franzoy Farms; and Mark Franzoy Farms. Appeal at 1. The appeal attached “contracts” for those three, and stated that it was “removing” Billy the Kid from its requested certification.

II. STANDARD OF REVIEW

Under expedited Administrative Review, I am instructed to make a decision “on the basis of the written record and after due consideration of any written submissions (which may not include new evidence).” 20 C.F.R. § 655.171(a). I know of no other review standards, and accordingly, I will apply the applicable law to the record as it existed before the CO. I will not consider any “new evidence,” which I interpret to mean any evidence that was produced after the final denial letter.

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4 The CO also noted that Employer had failed to clear up the “Mimbres” matter, but this was not cited as a reason for the denial.

5 The appeal does not specify whether it is a “de novo” or an “expedited administrative” review. However, it “implores” the DOL “to reopen the case as it stands.” AF 1 (my emphasis). I interpret this to be a request for an expedited administrative review under 20 C.F.R. § 655.171(a). I notified the parties that I would be considering the case as such, and invited briefing, and no party objected or indicated it had a different understanding of the nature of the appeal.
III. THE LAW

The H-2A visa program allows domestic employers to hire nonimmigrant foreign workers for agricultural labor on a “temporary” or “seasonal” basis. See Hispanic Affairs Project v. Acosta, 901 F.3d 378, 382 (D.C. Cir. 2018) (“By law, H-2A visas may issue only if the employer’s need for the worker is temporary or seasonal.”). The burden of establishing its entitlement to a certification to hire H-2A workers is upon the employer. See 20 C.F.R. § 655.161(a) (certification may issue only if “employer has established” its need, and its compliance with all applicable regulations) (my emphasis).

Where, as here, an H-2A Labor Contractor (“H-2ALC”) is applying for the certification of workers whom it will supply to employers, it must comply with the filing requirements set forth at 20 C.F.R. § 655.132. Among those requirements are that the H-2ALC submit with its Application:

Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (b)(1) of this section.

20 C.F.R. § 655.132(b)(4).

IV. DISCUSSION

The Application Employer submitted did not include the required fully executed “work contracts with each fixed-site agricultural business.” See AF 44-74. It does contain a document stating that “Mimbres Ranch is employing” the Border Labor. AF 67. However, “Mimbres Ranch” is not among the fixed-site agricultural businesses for which labor certification was sought.

When notified of this deficiency, Border Labor submitted a document which states that the four (4) agricultural businesses named in the Application are employing Border Labor. AF 30. This single document, however, is counter-signed by “Billy Franzoy.” Id. The document gives no indication of who Billy Franzoy is, or who – if anyone – he represents, other than “Billy Franzoy,” the name at the top of the letter. The only other mention of “Billy Franzoy” in the record indicates that he is someone affiliated with “Mimbres Ranch.” See AF 67. There is nothing in the record to indicate that he has anything to do with any of the four (4) businesses seeking labor certification.

The CO did not interpret this document to be the required labor contracts. AF 27. Indeed, the CO specifically states that Border Labor “failed to provide work contracts for Mark Franzoy, Kidd-O Ranch, and Billy the Kid.” AF 27. I find that it is reasonable for the CO to conclude that this one (1) document does not comprise the four (4) required contracts. As for the required
contracts, this document appears only to advise the CO that they exist.\textsuperscript{6}

When advised of the deficiency again (AF 20; AF 25), Border Labor simply re-submitted the same inadequate letter, and again failed to attach the required contracts. AF 14-18.\textsuperscript{7}

On appeal, Border Labor submitted documents which it identifies as the missing contracts. AF 1, 3-7. However, as noted above, I can only consider the record that was in front of the CO when he issued the final denial letter. These documents, even assuming they would satisfy the requirements of 20 C.F.R. § 655.132(b)(4) if timely filed, were not in front of the CO, and therefore I will not consider them.

The record before the CO therefore shows that Employer failed to provide the fully-executed work contracts required by 20 C.F.R. § 655.132(b)(4), either in its Application, or at any time prior to the CO’s final denial letter.

\textbf{V. CONCLUSION AND ORDER}

For the reasons stated above, \textbf{IT IS HEREBY ORDERED} that the June 14, 2021 Denial Determination of the CO is \textbf{AFFIRMED}.

\textbf{SO ORDERED.}

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\textsuperscript{6} I don’t know what to make of the CO’s statement that Border Labor “provided a work contract for Billy Franzoy.” AF 27. “Billy Franzoy” is not one of the businesses listed in the Application.

\textsuperscript{7} According to the Administrative Record Index, this document was re-submitted on June 10, 2021.