OALJ Case No.: 2021-TLC-00190
ETA Case No.: H-300-21140-330987

In the Matter of:

CENTRAL FRUIT HARVESTING, LLC,
Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Margarita Spaulding, Esq.
For the Employer

Before: Larry S. Merck
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION


STATEMENT OF THE CASE

On May 27, 2021, Central Fruit Harvesting, LLC (“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; (3) ETA Form 790, Agricultural Clearance Order; and (4) Attachments to Form ETA 790. (AF 84-123.)

1 “AF” is an abbreviation for the Administrative File.
is an H-2A Labor Contractor (“H-2ALC”) that provides agricultural labor service to fixed-site growers. Employer’s Application sought certification for forty farmworkers and laborers for crops from July 11, 2021 until October 1, 2021, based on an alleged seasonal need during that period. (AF 92.)

On June 1, 2021, the CO issued a Notice of Deficiency (NOD), identifying six deficiencies, including the following:

3. H-2A Labor Contractor- FLC Certificate 20 CFR 655.132(b)(2) Deficiency:

In accordance with Departmental regulations at 20 CFR sec. 655.132(b)(2), an H-2A Labor Contractor must provide a “copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. sec. 1801 et seq., identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.”

The employer, Central Fruit Harvesting, LLC is an H-2A Labor Contractor and provided two Farm Labor Contractor (FLC) Certificates of Registration with its application.

The first FLC Certificate of Registration included authority to transport and drive workers; however, that certificate expired February 3, 2021 and all authorized vehicles expired January, 2021.

The second FLC Certificate of Registration includes authority to only house workers and is valid until February 15, 2022. However, the employer is not authorized to transport and houseworkers; and there are no authorized vehicles listed on the certificate.

Additionally, the employer provided a FLC Certificate of Registration for Damian Carranza Guidino. However, this individual appears to be authorized to drive for D.C. Harvesting and does not appear to be authorized to drive for Central Fruit Harvesting, LLC. No agreement between the employer and Damian Carranza Guidino was provided with the application for that individual to drive workers for the employer.

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2 An H-2ALC is “[a]ny person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.” 20 C.F.R. § 655.103.

3 The regulations define a “fixed-site employer,” in relevant part, as any person engaged in agriculture “who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed.” 20 C.F.R. § 655.103(b).

4 SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop” and code 45-2092.02. (AF 90.)
Therefore, it is unclear how the employer plans to transport workers without current valid authorization, authorized vehicles and drivers to transport the 40 requested workers.

(AF 72.)

To resolve this deficiency, the CO required Employer to “provide a current FLC Certificate of Registration with sufficient authorization and vehicles to transport the requested workers. In addition, the employer must provide an agreement between itself and Damian Carranza Guidino to drive the workers.” (Id.)

On June 8, 2021, Employer responded to this deficiency with an email attachment of the “COI for transportation,” explaining that, “Damian Carranza Guidino is the owner of Central Fruit Harvesting, LLC. Mr. Carranza is waiting for his updated FLC from California that should arrive this week.”5 (AF 61.)

On June 14, 2021, the CO issued a Notice of Acceptance (NOA), conditioned on Employer’s submission of the requested FLC and FLCE certificates corresponding to the application. (AF 32-36.)

On June 21, 2021, Employer provided an FLC Certificate for Central Fruit Harvesting with the accompanying FLC Certificate for driver Damian Carranza Guidino. (AF 20.) However, the CO found that this documentation was the same insufficient documentation provided with Employer’s initial application. (AF 10.)

On July 7, 2021, the CO sent a Minor Deficiency Email (MDE), informing Employer that:

The Chicago NPC is in receipt of your application for Central Fruit Harvesting, LLC – H-300-21140-330987. In review of the employer’s application, we find the following deficiency, which prevents the Chicago NPC from further processing:

The Chicago NPC is in receipt of the employer’s initial recruitment report; however, as of July 7, 2021 the Chicago NPC has yet to receive the other requirements for certification outlined in the Notice of Acceptance. Specifically, number 7 of the Notice of Acceptance instructed the employer to provide:

The employer must submit the FLC and FLCE certificate(s) that correspond to this application. Note: If the FLC and/or the FLCEs expire before the end date of need, the employer must submit a signed written assurance that they will maintain the FLC and FLCEs throughout the dates of need.

To receive a favorable determination, the employer must provide the required documents outlined in the notice of acceptance.

(AF 14.)

5 Employer resolved the remaining five deficiencies identified by the CO. (AF 61.)
On July 14, 2021, Employer sent an email response to the CO’s MDE, stating, “Please see attached FLC cards. FLC will maintain the FLC and FLCE’s throughout the dates of need.” (AF 13.)

On July 15, 2021, the CO sent another e-mail correspondence to Employer, informing it that:

The employer must submit the FLC and FLCE certificate(s) that correspond to this application. Note: If the FLC and/or the FLCEs expire before the end date of need, the employer must submit a signed written assurance that they will maintain the FLC and FLCEs throughout the dates of need. The H-2ALC provided an FLC Certificate of Registration however; all of the employer’s listed vehicles are expired.

To receive a favorable determination, the employer must provide the required documents outlined in the notice of acceptance.

(AF 12.)

On July 23, 2021, the CO issued a Final Determination, stating that:

The H-2A Labor Contractor did not provide a valid FLC Certificate of Registration showing it is authorized to transport workers, nor does the certificate list any authorized vehicles to transport workers. Additionally, the employer did not provide a FLC or FLCE Certificate for a driver who is authorized to drive for the employer.

As of the date of this letter’s issuance, the employer has failed to provide proof of authorized means of transportation for its 40 workers requested that were to begin on July 11, 2021.

(AF 11.) Accordingly, the CO denied Employer’s application for 40 Farmworkers and Laborers.

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 present an argument or refer to any evidence that was not part of the record when the case was pending before the CO.
Deficiency Regarding 20 C.F.R. § 655.132(B)(2): FLC Certificates of Registration

In accordance with Departmental regulations at 20 C.F.R. § 655.132(b)(2), an H-2A Labor Contractor must provide a “copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. sec. 1801 et seq., identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.”

As detailed above, Employer did not provide a valid FLC Certificate of Registration showing it is authorized to transport workers, nor did the certificates provided list any authorized vehicles to transport workers while the case was pending before the CO. Additionally, Employer did not provide a FLC or FLCE Certificate for a driver who is authorized to drive for Employer, as required under the regulations. 20 C.F.R. § 655.132(B)(2). Although Employer’s request for review may have included the valid FLC Certificate as required under § 655.132(b)(2); Employer was prohibited from presenting or referring to any evidence that was not part of the record while the case was pending before the CO, pursuant to § 655.171.

Further, I may only render a decision based on “the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae.” 20 C.F.R. § 655.171. Based on the written record and evidence before me, I find that Employer has not established that it is eligible for H2-A program for temporary labor certification pursuant to the regulations at 20 C.F.R. Part 655, Subpart B.

CONCLUSION

As discussed above, Employer has not established that it is eligible for H2-A program for temporary labor certification. Accordingly, I find that the CO properly denied certification.

ORDER

For the foregoing reasons, it is HEREBY ORDERED that the Certifying Officer’s denial of the Employer’s Application for H-2A temporary labor certification is AFFIRMED.

LARRY S. MERCK
Administrative Law Judge