BALCA CASE NO.: 2020 TLC 00192

ETA Case No.: H-300-21173-418391

In the Matter of

DAVID STOCK FARM SERVICES INC.
Employer.

DECISION AND ORDER AFFIRMING
DENIAL OF APPLICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its 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 July 19, 2021, David Stock Farm Services Inc. (Employer) timely filed a request for administrative review (Request) of the Certifying Officer’s (CO) denial of its H-2A temporary alien labor certification application.1 The Administrative File (AF) was docketed at the Office of Administrative Law Judges on August 2, 2021, and I received the file on August 3, 2021. Following a teleconference on August 4, 2021, I set a deadline of August 5, 2021 for Employer and CO to file briefs. Pursuant to 20 C.F.R. § 655.171(a), this Decision and Order is based on the written record only and is issued within five business days of the receipt of the AF.

Factual Background

On June 30, 2021, Employer filed an H-2A Application for Temporary Employment Certification on Form ETA-9142A (Application). AF at 31. On the Application, Employer represented that it was not operating as an H-2A Labor Contractor (H-2ALC) and listed its business address as 15545 Co Hwy 112, Fergus Falls, Minnesota. Id. The Application requested certification for six Agricultural Equipment Operators from September 1, 2021 to December 15, 2021. AF at 39. The place of employment listed is the same as the business address supplied by Employer. AF at 40. The application was signed under penalty of perjury by Jennifer Frank as Secretary-Treasurer of Employer. AF at 36.

1 The Request is labeled “Request for Administrative Review and Motion for Remand.” AF at 1.
On July 7, 2021, the CO issued a Notice of Deficiency under 20 C.F.R. § 655.141. AF at 20. Specifically, the CO explained that the application failed to meet the criteria for acceptance because it was unclear whether Employer met the definition of “fixed-site employer” under 20 C.F.R. § 655.103(b). AF at 22. The CO explained that the classification was unclear because Employer’s previous application indicated that Employer was an H-2A Labor Contractor at the same address for an overlapping time period. Id. The CO requested one of two modifications. First, if acting as an H-2A Labor Contractor, Employer was instructed to provide all required documentation and written assurances required by 20 C.F.R. § 655.132(b). AF at 23. Second and alternatively, if asserting that it was properly classified as a fixed-site employer, Employer was instructed “to provide evidence that it owns or controls the worksite listed in the application.” Id. The CO did not identify any other deficiencies in the application.

Employer responded to the Notice of Deficiency on July 9, 2021. AF at 12. In its response, Employer asserted that it was applying as a fixed-site employer. Id. Employer stated that it leased the specified worksite from the landowner and is now operating the farm with full control of the worksite, rather than providing services to the farmer as it had in prior years. AF at 13. Employer attached a copy of the farm rental agreement (Lease) dated January 1, 2021 to its response. AF at 14. The Lease, titled as a “[r]ental agreement,” states in total that “[t]he parties agree that David Stock Farm Services, Inc., a family farm corporation, will lease the farm located at 15545 County Highway 112 Fergus Falls, MN 56537 owned by Stockville Grain, LLC for farming purposes. This agreement will remain in force unless cancelled by either party.” Id. The Lease is signed by both parties. Id.

On July 19, 2021, the CO denied Employer’s Application. AF at 6. The CO explained that because the Lease “does not contain an end date, does not reflect consideration flowing in either direction, and, most importantly, is vague as to the terms and degree of control that the employer/lessee is being given over the farm,” it is insufficient evidence that Employer is the operator of the farm. AF at 10. The CO therefore determined that Employer failed to establish that it is a fixed-site employer under the regulations. AF at 11. As Employer did not submit the documentation necessary to comply with the regulations applicable to an H-2A Labor Contractor, the application was denied. Id.

On July 19, 2021, Employer filed its Request. The Request asserts “that the evidence submitted to the record is sufficient to warrant certification.” AF at 2.

On August 5, 2021, Employer and the Certifying Officer timely filed briefs in support of their positions.

Discussion

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 employer bears the burden of establishing its entitlement to a certification to hire H-2A workers. 20 C.F.R. § 655.161(a) (employer is required to establish its need and compliance with all applicable regulations).
The certifying officer reviews an employer’s application to ensure compliance with the program’s requirements. 20 C.F.R. § 655.140(a). If the certifying officer determines that the application is incomplete, contains errors, or does not meet the regulatory requirements, the certifying officer issues a notice of deficiency to the employer. 20 C.F.R. § 655.141(a). The notice of deficiency must set forth the reason why the application fails to meet the criteria for acceptance. 20 C.F.R. § 655.141(b)(1). In addition, the notice of deficiency must allow the employer an opportunity to submit a modified application or job order within five business days and must specify what modification the employer must make in order for the certifying officer to issue a notice of acceptance. 20 C.F.R. § 655.141(b)(2). Accordingly, the regulations require the certifying officer to identify the reasons that the application is deficient and allow the employer an opportunity to make corrections. See 20 C.F.R. § 655.141.

Within seven calendar days of receiving a Final Determination letter denying an application for temporary labor certification, an employer may file a request for an expedited administrative review. 20 C.F.R. § 655.164. On administrative review, “the ALJ 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 Certifying Officer's decision, or remand to the Certifying Officer for further action.” 20 C.F.R. § 655.171(a).

The regulation is silent as to the appropriate standard of review to be applied on administrative review of a certifying officer’s decision. See 20 C.F.R. § 655.171(a). In its brief, the CO takes no position regarding the standard of review whereas Employer advocates an arbitrary and capricious standard. Prior ALJ decisions are split regarding whether to review a case de novo or apply an arbitrary and capricious standard. Compare, e.g., Crop Transport, LLC, 2018-TLC-00027, slip op. at 3 (Oct. 19, 2018) (applying de novo) and J and V Farms, LLC, 2016-TLC-00022, slip op. at 3 n.1. (Mar. 4, 2016) (applying arbitrary and capricious). In this case, I would reach the same conclusion regardless of the standard applied.

The single issue in this appeal is whether the CO properly concluded that Employer was an H-2ALC and not a fixed-site employer. A fixed-site employer is defined as:

Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart, 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 and who recruits, solicits, hires, employs, houses, or transports any worker subject . . . as incident to or in conjunction with the owner’s or operator’s own agricultural operation.

20 C.F.R. § 655.103(b) (emphasis supplied). In contrast, an H-2ALC is defined as “[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.” 20 C.F.R. § 655.103(b). In short, H-2ALCs are employers who do not qualify as fixed-site employers. The major difference between the two types of employers is that
H-2ALCs are subject to the additional regulatory requirements listed in 20 C.F.R. § 655.132. The additional obligations are required because the Department of Labor’s enforcement experience shows agricultural labor contractors have lower compliance rates than fixed-site agricultural employers. 75 Fed. Reg. 6839, 6886 (Feb. 12, 2010).

There is no dispute that Employer did not submit the additionally required information to establish itself as an H-2ALC. There is also no dispute that Employer does not own the farm in question. Thus, the dispute turns on whether the Employer provided sufficient evidence of control of the farm to establish that it is the operator. Neither party cited to a specific regulation which outlines the criteria for determining whether an employer actually operates a farm.

The CO contends Employer’s submission was insufficient because the Lease did not contain sufficient detail to show that Employer has full control over the farm. The CO concedes that a lease could provide the requisite detail but argues that in this case the “bare assertion” that the Lease is for “farming purposes” is insufficient. CO Brief at 3. Additionally, the CO asserts that the Lease is defective as it did not contain an end date, the consideration between the parties or a description of the degree of control that Employer is being given over the farm. CO Brief at 2. In issuing the denial, the CO acknowledged Employer’s written position that it had full control of the farm but found the Lease to be insufficient evidence for establishing that Employer was a fixed-site employer. AF at 8, 10.

Employer argues that the Lease establishes the requisite level of control; that the CO’s rejection of the Lease is based on a flawed interpretation of Minnesota laws; and that the CO improperly rejected Employer’s sworn attestation. I address each of these arguments in turn.

First, in its brief, Employer offers that “[w]hether a person operates a farming establishment depends on the factual circumstances and degree of control over the worksite activities.” Employer Brief at 6. I agree that this is a reasonable approach for assessing operational control. However, I disagree that Employer provided the factual circumstances to support that it currently has full control over the farm. Specifically, Employer offered conclusions (i.e., its own assertions) rather than the facts necessary to establish the required control over the worksite activities. This is what distinguishes Medoza v. Wight Vineyard Management, 783 F.2d 941 (9th Cir. 1986), a case relied upon by Employer. In Medoza, a vineyard management company argued that it was the operator of vineyards and provided sufficient detail to support that it “perform[ed] all of the operations necessary for the management of vineyards . . . throughout the yearly cycle of preparation, growth, and harvest.” 783 F.2d at 943. In particular, the management company presented a contract that outlined the specific range of activities that it was to perform. Id. The Lease offered by Employer in this case provides no such detail.

Second, Employer argues that the CO missed the mark by relying on perceived legal deficiencies with the Lease when concluding that it was insufficient to establish operational control. Relying on landlord tenant laws, Employer argues that there is no requirement under Minnesota law for a contract to be written or contain all elements of the agreement. Employer Brief at 9. Even if Employer is correct that the Lease is enforceable as is under Minnesota law, it is not enough to meet its burden. The mere fact that a lease exists is not sufficient to confirm
that an employer is in actual control of the farm operations. See, e.g., Patout Equipment Co., 2015-TLC-00063, slip op. at 5 (Aug. 17, 2015) (while an H-2ALC may be permitted to operate on the land, it does not mean that the H-2ALC becomes the operator for purposes of the H-2A program). Moreover, here, even if enforceable, the Lease may be cancelled by either party at any time and there are no details as to the amount of notice required for termination. Thus, the Lease does not support that Employer will have control of the worksite for the duration of the employment of the H-2A workers.

Finally, Employer argues that the CO ignored both the sworn statement by Employer that specifically asserts that it is a fixed-site employer and the representations made in response to the Notice of Deficiency that the Employer is operating the farm with full control of the worksite. Employer Brief at 7. Employer compares its application to the one submitted by the employer in Slater Run Vineyards, LLC, 2021-TLC-00060, slip op. at 6 (Jan. 22, 2021). In Slater Run, however, the administrative law judge reversed the Notice of Deficiency only after finding that the employer “submitted a substantial amount of evidence with its application.” Id. I agree with Employer that its statements are worthy of consideration. I do not agree, however, that its statements – which, like the Lease, are short on details – are sufficient to establish Employer as a fixed-site employer. This is especially so in light of Employer’s current certification as an H-2ALC at the same location and the lack of specificity provided in the Lease. Employer simply did not provide sufficient evidence to support why it should be classified as a fixed-site employer and thereby be permitted to forego compliance with the additional H-2ALC regulatory requirements.

Conclusion

For the reasons discussed herein, it is hereby ORDERED that the Certifying Officer’s decision denying the above-captioned H-2A temporary labor certification application is hereby AFFIRMED.

SO ORDERED.

JODEEN M. HOBBS
Administrative Law Judge