In the Matter of:

INTERNATIONAL REAL GENERAL CONTRACTORS, LLC.

Employer

Before: Judge Francine L. Applewhite

DECISION AND ORDER AFFIRMING FINAL DETERMINATION

The above-captioned case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act (“INA”), 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 program (“H-2A”) permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the request for administrative review of the Certifying Officer’s (“CO”) Final Determination denying the H-2A temporary labor certification application filed by International Real General Contractors, LLC. (“Employer”).

Procedural History

On April 26, 2021, the Employment Training and Administration, Office of Foreign Labor Certification (“OFLC”) received the Employer’s Application for Temporary Employment Certification (“Application”). (AF1 57-84). The application requested approval for one (1) Laborer, Occupational Title Farmworker and Laborer, Crop, Nursery, and Greenhouse under the H-2A labor certification program. (Id. at 65).

On May 3, 2021, the CO issued a Notice of Deficiency (“NOD”). (Id. at 41-51). Thereafter, on May 4, 2021, the Employer responded to the Notice of Deficiency with exhibits including the property’s purchase agreement, photos, and a statement regarding agricultural labor and services. (Id. at 14-40).

1 As used herein, “AF” refers to the OFLC’s Administrative File in the above-captioned matter.
On May 13, 2021, the CO issued a Final Determination denying the Employer’s Application. (Id. at 58-64). Subsequently, the Employer filed an “Appeal of H-2A Application for Temporary Employment Denial.” (Id. at 1-4).

H-2A Application

In its application, the Employer requested one laborer. (Id. at 65). The Employer listed the job duties of this position as “preparation for planting shrubs and other plants; transplanting and bedding plants; field work, hand-hoeing, weeding, spraying for pests.” (Id.). In addition, the Employer specified the place of employment as 14094 Blazey Road in Strongsville, Ohio. (Id. at 66).

Notice of Deficiency

The May 3, 2021 NOD cited the following deficiencies: (1) Emergency Situation (20 C.F.R. § 655.134(a)); (2) H-2A Labor Contractor (20 C.F.R. § 655.103(b), 20 C.F.R. § 655.132(a), 20 C.F.R. § 655.132(b)); (3) Agricultural Labor or Services (20 C.F.R. § 655.103(c)); (4) H-2A Labor Contractor (20 C.F.R. § 655.103(b), 20 C.F.R. § 655.132(a), 20 C.F.R. § 655.132(b)); (5) Notice of Deficiency (20 C.F.R. § 655.141(a)). (Id. at 44-51).

Regarding the first deficiency, the CO noted that pursuant to 20 C.F.R. § 655.134(a), the CO may waive the time period for filing for employers who did not utilize the temporary worker program in the prior year or who show other good cause. Despite filing within 45 days of the intended start date, the Employer did not request a waiver of the filing time period. As a result, the CO instructed the Employer to modify its application by either appealing the Notice of Deficiency or requesting an amended start date.

In reference to the second deficiency, the CO stated that 20 C.F.R. § 655.103(b) defines a fixed-site employer as “[a]ny person engaged in agriculture who meets the definition of an employer…who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location…” (Id. at 44). The CO noted that the Employer listed itself as an individual employer, but due to the Employer’s business name, it is “unclear if the employer is a fixed-site employer, or is an H-2A Labor Contractor.” (Id.). Thus, the CO required the Employer to clarify whether or not it is an individual employer or an H-2A Labor Contractor. (Id. at 44). The CO also requested that “if the employer is operating as a fixed-site grower, it must provide evidence that it owns or operates the worksites listed in the application.” (Id.).

The CO identified Agricultural Labor or Services as the third deficiency. (Id. at 45). Specifically, that in accordance with 20 C.F.R. § 655.103(c), the job opportunity must “consist of agricultural labor or services.” (Id.). The CO elaborated that pursuant to 20 C.F.R. § 655.103(c) agricultural labor is as defined and applied in relevant part at 29 U.S.C. § 3121(g) of the Internal Revenue Code (“IRC”) as well as 29 U.S.C. § 203(f) of the Fair Labor Standards Act (“FLSA”). (Id.). Moreover, primary agriculture is the growing and harvesting of a horticultural commodities whereas preparation for market may constitute secondary agriculture only when the
activities are performed by a farmer or a farm. (Id. at 46). As the Employer listed a residential worksite, the CO stated that the job opportunity did not appear to fit the FLSA definition of agricultural labor. (Id. at 47). In addition, the CO explained that the IRC defines agricultural labor as “on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity.” (Id.). The CO noted that the employer did not establish that its workers will be on a farm. To remedy this issue, the CO required a written statement “describing how its application should properly be considered as agricultural labor or services...accompanied by evidence that the worksite meets the regulatory definition of “farm.” (Id.).

Concerning the fourth deficiency, the CO noted again that it was unclear whether the Employer constituted a fixed-site grower or was acting as an H-2A Labor Contractor. (Id. at 49-50). The CO requested that the Employer clarify which type of employer it is and if the Employer is applying as a fixed-site grower, that the Employer provide evidence that it owns or controls the worksites listed in the application. (Id.).

The CO divided the fifth deficiency into two separate components, A and B. (Id. at 50). Regarding Deficiency A, the CO stated that the Form ETA 790A, Conditions of Employment and Assurances for H-2A Agricultural Clearance Orders, must be signed by the employer to show “knowledge and compliance” of applicable law and regulations. (Id.). However, the Employer’s attorney signed the signature page rather than the Employer. (Id.). As a result, the CO requested a new signature page declaring that the Employer read and reviewed the clearance order. (Id.). Regarding Deficiency B, the CO noted ETA Form 9142A, Section C and ETA Form 790, Section II list the Employer’s business address as a location in Olmsted Falls, Ohio. The CO also noted that ETA Form 9142, Section B indicates the business address for the employer is a location in Strongsville, Ohio. (Id. at 51). The CO instructed the Employer to clarify its business address. (Id.).

Employer’s Response to Notice of Deficiency

On May 4, 2021, the Employer replied to the NOD. (Id. at 14-40). Addressing the first deficiency, the Employer attached the Emergency Time Waiver Request and in the alternative, requested that the CO accept an amendment to the start date listed in the application to June 10, 2021. (Id. at 16-19). In reference to the second deficiency, the Employer stated that it was a fixed-site employer and attached the Purchase Agreement of the Strongsville, Ohio job site. (Id. 16-26).

As to the third deficiency, the Employer stated that “the job opportunity here contemplates all labor required for the employer to produce the horticultural commodity.” (Id.at 16). Further, the Employer stated that it is involved in agricultural labor and services because agricultural labor under 20 C.P.R. § 655.103(c)(1)(a) and 29 U.S.C. § 203(f), includes “‘cultivation, growing, and harvesting of any agricultural or horticultural commodities ... performed... on a farm.’” (Id. at 17). To support its position, the Employer attached the Employer’s Statement Regarding Agricultural Labor and a document entitled “Farm Evidence,” consisting of several aerial photos of the job site. (Id. at 20-31). In its Statement Regarding

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2 I shall refer to these as Deficiency A and Deficiency B throughout this decision.
Agricultural Labor, the Employer asserted that “the nature of my business is to prepare for planting shrubs and other plants, as well as transplanting and bedding of plants; field work, hand-hoeing, weeding, and spraying for pests...[t]he job opportunity is temporary and contemplates all labor required for the employer to produce the horticultural commodity.” (Id. at 28).

To remedy the fourth deficiency, the Employer reiterated that it is applying as a fixed-site, individual employer. (Id. at 17). The Employer highlighted the attached Purchase Agreement as evidence of the Employer owning or controlling the worksite. (Id. at 20-26).

Lastly, the Employer addressed the two-part fifth deficiency. Concerning Deficiency A, the Employer provided an executed Form ETA 790A with the Employer’s signature. (Id. at 32-40). Regarding Deficiency B, the Employer clarified that it provided the Employer’s residential address in Form ETA 790A, rather than the business address, which is located in Strongsville, Ohio. (Id. at 17).

CO’s Final Determination

On May 13, 2021, the CO issued a final determination denying the Employer’s Application. (Id. at 5-13). Specifically, the CO found that the Employer failed to show how the job opportunity constituted agricultural labor or services. (Id. at 8).

The CO reiterated that a job opportunity must fall under agricultural services or labor as defined by 20 C.F.R. § 655.103(c). (Id.). The CO noted that the Employer responded to the NOD with the statement that “the nature of my business is to prepare for planting shrubs and other plants, as well as transplanting and bedding of plants; field work, hand hoeing, weeding, and spraying for pests.” (Id. at 10). However, the CO determined that this text “suggests [an operation] that may temporarily hold already grown plants in advance of their subsequent planting at a client site.” (Id. at 11). Moreover, the CO concluded that “‘preparing’ and ‘transplanting’ plants is not the same as growing and cultivating…but instead more akin to what a landscape contractor would do.” (Id.). Regarding the photos provided, the CO stated that it was difficult to discern what activities are taking place on the property. (Id.). Concerning eligibility under the FSLA, 29 U.S.C. § 203(f), the CO stated that there is no indication that the employer is a grower itself. (Id. at 12-13). Similarly, the CO determined that the Employer’s operation would not qualify as a farm under Section 3121(g) of the Internal Revenue Code.

Standard of Review

The scope of an administrative review in H-2A cases is limited to consideration of the written record and any written submissions from the parties, which may not include new evidence. 20 C.F.R. § 655.171(a). The decision on administrative review must specify the reasons for the actions taken and must affirm, reverse, or modify the decision of the CO, or remand to the CO for further action. (Id.) The governing regulation mandates that the presiding Administrative Law Judge “must uphold the CO’s decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” Id.; See also J and V Farms, LLC, 2016-TLC-00022, at 3 (March 4, 2016) (H-2A); Brook Ledge, Inc., 2016-TLN-00033, at 5 (May 10, 2016) (“BALCA reviews decisions under an arbitrary and
capricious standard.”) (H-2B). Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Moreover, the Administrative Law Judge may not consider evidence not before the CO at the time of the CO’s determination, even if such evidence is in the Appeal File, request for review, or legal briefs.

Discussion

Pursuant to 20 C.F.R. § 655.103(c), agricultural labor and services is defined in part as services performed “[o]n a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity.” 20 C.F.R. § 655.103(c)(1)(i)(A). The term “farm” includes “stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.” 20 C.F.R. § 655.103(c)(1)(ii). Similarly, under the FSLA, farming includes the cultivation and tillage of the soil, as well as “the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities.” 20 C.F.R. § 655.103(c)(2).

The CO denied this matter on the basis that the Employer failed to establish that the job opportunity properly constituted agricultural labor services under 20 C.F.R. § 655.103(c). (AF at 8-13). The Employer asserted that the job opportunity “contemplates all labor required for the Employer to produce the commodity.” (Id. at 16-17). However, the record does not include any evidence demonstrating that the job site is a nursery, greenhouse, orchard, or any other structure used primarily for the raising of agricultural or horticultural commodities. In addition, the record contains no documents to support whether structures or land on the property are used primarily for raising of agricultural commodities as required by 20 C.F.R. § 655.103(c). Although the Employer included a list of specific commodities in their Appeal, I may not consider any information that was not before the CO at the time of the final determination. See 20 C.F.R. § 655.171(a).

Moreover, the identified jobsite, 14094 Blazey Road, Strongsville, Ohio, appears to be located in a residential zone. (See AF 20-26; AF-3). In its response to the NOD, the Employer acknowledged that this location is a residential property, but asserted that it may be used for other purposes. (Id. at 3). There is no information in the record to demonstrate that it may be used for such purposes as cultivating horticultural commodities. Without evidence to demonstrate how the property is used as a location to primarily grow or cultivate a horticultural commodity, the Employer cannot meet its burden.

Accordingly, the Employer has failed to show that the CO’s decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The CO did not err in denying certification. Therefore, the denial is AFFIRMED.
ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is AFFIRMED.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge