In the Matter of:

MARK LORA

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding 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), and the associated regulations promulgated by the United States Department of Labor (“Department”) at 20 C.F.R. Part 655. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. §§ 1184(c)(1) and 1188.

Employers who seek to hire foreign workers under this program must first apply for and receive certification from the Department’s Employment and Training Administration (“ETA”) using a Form ETA-9142A (“application”). A Certifying Officer in the Office of Foreign Labor Certification (“CO”) then reviews the application. If the CO denies an application, the employer may request review by the Board of Alien Labor Certification Appeals (“the Board”). 20 C.F.R. § 655.171.

I. STATEMENT OF THE CASE

On February 24, 2021, Mark Lora ("Employer") submitted an application for temporary labor certification. (AF at 32-46.) Employer sought approval for two farmworkers for an alleged period of seasonal need of April 12, 2021 through December 20, 2021. (AF at 32, 38.) In its application, Employer listed its Federal Employer Identification Number (“FEIN”) and indicated the rate of pay and the amount of reimbursement available to prospective employees for daily meals. (AF at 32, 38, 40.) In addition, Employer also attached page one of three of Form ETA-9142A Appendix A (“Appendix A”) and a statement of temporary need. (AF at 35, 47.)

On March 2, 2021, the CO issued a Notice of Deficiency (“NOD”). (AF at 22-26.) The CO identified four deficiencies. First, the CO stated that it was “unable to complete business verification” using the FEIN provided in Employer’s application. (AF at 25.) Accordingly, the CO asked Employer to submit proof that it possesses the FEIN listed on the application. The CO

1 For the purposes of this decision, “AF” refers to the Appeal File.
explained that Employer could prove that it possesses the FEIN by submitting a “document from an official source, e.g. the State, or tax documents from the IRS” that associates Employer’s business with the FEIN. The CO also informed Employer that the Department had recently updated certain wage and meal reimbursement figures, and asked Employer to amend its application to reflect these updates. (AF at 25-26.) Finally, the CO directed to submit a complete copy of Appendix A, that is to say, all three pages. (AF at 26.)

Employer responded to the NOD on March 3, 2021.² (AF at 20-21.) Employer’s response included a copy of the NOD with a handwritten note. In this note, Employer asked the CO to amend its application to reflect the updated wage and reimbursement rates. (AF at 20.) Employer also submitted page two of three of Appendix A. (AF at 21.)

Because Employer’s response to the NOD did not sufficiently remedy the deficiencies, the CO issued a Notice of Required Modification (“NRM”) on March 12, 2021. (AF at 15-19.) The CO directed Employer to modify its application. Specifically, the CO again asked Employer to submit proof of that it possesses the FEIN listed in its application. (AF at 18.) With respect to the rates of pay and reimbursement, the CO directed Employer to amend and resubmit application. (AF at 18-19.) The CO also asked Employer to submit all three pages of Appendix A. (AF at 19.) The CO further explained that if Employer did not make the required modifications to its application within three business days, she would deny the application.

On March 15, 2021, Employer responded to the NRM. (AF at 8-14.) Employer’s response included handwritten notes on a copy of the NRM. In these notes, Employer wrote out the same FEIN number listed on its application and again requested that the CO amend its application to reflect the updated pay and reimbursement rates. (AF at 10-11.) Employer also submitted a complete copy of Appendix A. (AF at 12-14.)

On March 17, 2021, the CO issued its Final Determination denying Employer’s application. (AF at 3-7.) She based her denial wholly on one unresolved deficiency. The CO explained that she denied Employer’s application because it had not submitted proof that it possesses the FEIN listed on its application. (AF at 6-7.) The CO cited to the regulatory definition of “employer,” which requires a valid FEIN number.³ (AF at 7.)

Employer appealed the CO’s determination on March 17, 2021.⁴ (AF at 1-2.) The Board received the Appeal File on March 23, 2021. The undersigned received this matter for adjudication on March 24, 2021. This decision is issued within five business days of the receipt of the Appeal File, as required by 20 C.F.R. § 655.171(a).

² None of Employer’s responses to ETA are dated. The dates of Employer’s submissions listed in this decision come from the table of contents of the Appeal File.

³ The CO did not state whether Employer had adequately resolved the other three deficiencies.

⁴ On March 17, 2021, Employer submitted a copy of the Final Determination with the following handwritten note: “Please amend the employer to Mark Anthony Lora DBA Lora Farms FEIN [##].” (AF at 1.) The CO evidently considered this submission to be an appeal and request for an administrative review by the Board.
II. STANDARD OF REVIEW

When conducting an administrative review, the undersigned must “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). Although, the regulations do not specify a standard of review, the undersigned reviews the CO’s denial to determine whether it is arbitrary and capricious. J&V Farms, LLC, 2016-TLC-00022, slip op. at 3, n.2 (Mar. 4, 2016); Resendiz Pine Straw, LLC, 2019-TLC-00052 (June 14, 2019); Joshua Graham Farms, 2021-TLC-00076 (Mar. 1, 2021).

III. DISCUSSION

The CO based her denial of Employer’s application on Employer’s failure to provide proof that it possessed the FEIN listed on its application. (AF at 6-7.) In her NOD, the CO explained to Employer that her office was unable to complete its business verification using the FEIN provided. (AF at 25.) For this reason, the CO asked Employer to submit official documents linking its business with the FEIN so that the CO could complete the verification. The CO repeated her request in the NRM. (AF at 18.) In its response to the NRM and its appeal of the Final Determination, Employer only restated the same FEIN listed in its application. (AF at 1, 10.) Employer did not submitted any documentation associating its business with the FEIN provided in its application.

For purposes of foreign labor certification under the H-2A regulations, the definition of “employer” requires that the employer, among other things, possess a valid FEIN. See 20 C.F.R. § 655.103(b). Additionally, an employer must comply with all of the requirements set forth in the regulations. 20 C.F.R. § 655.161(a). Here, the CO clearly explained that she was unable to complete Employer’s business verification without additional documentation. Employer never provided this documentation to the CO.

The CO clearly explained her reason for denying Employer’s application. The CO’s based her decision on Employer’s failure to submit the documentation necessary to establish that it met the regulatory definition of “employer.” Her decision was in accordance with the applicable law and, based on a review of the record, entirely reasonable. The Board has consistently affirmed denials under the same or similar circumstances. See James W. McKenzie, 2016-TLC-00021 (Mar. 8, 2016) (affirming the CO’s denial of certification where employer failed to submit documentation associating its business with the FEIN listed in its application); Monte Kesey Farms, 2010-TLC-00049 (Jul. 12, 2010) (affirming the CO’s denial of certification where employer did not submit adequate proof of workers’ compensation insurance); see also Patout Equipment Co., 2015-TLC-00063 (Aug. 17, 2015) (affirming the CO’s denial of certification because the employer did not meet the regulatory definition of an employer).

Based on the foregoing, the undersigned concludes that the CO’s decision to deny Employer’s application was not arbitrary and capricious. As such, the undersigned affirms the CO’s decision.
IV. ORDER

Based on the foregoing, the undersigned **AFFIRMS** the CO’s decision denying certification.

**SO ORDERED.**

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*For the Board:
THeresa C. Timlin
Administrative Law Judge*

Cherry Hill, New Jersey