OALJ Case No.: 2021-TLC-00135
ETA Case No.: H-300-21021-024536

In the Matter of:

MARTINEZ FARMING,
Employer.

Appearance: Mario Martinez
Self-represented
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: NATALIE A. APPETTA
Administrative Law Judge

DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DENIAL OF TEMPORARY LABOR CERTIFICATION

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 H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On April 8, 2021, Martinez Farming (“Employer”), requested administrative review under 20 C.F.R. § 655.171(a) of the Certifying Officer’s April 2, 2021 Final Determination Denial in the above-captioned H-2A temporary labor certification matter. I received the Administrative File (AF) on April 15, 2021.

Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five business days of the receipt of the Administrative File.
BACKGROUND

On February 8, 2021, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A, with additional documentation including ETA Form 790. (“Application”). AF 87-151. The Employer’s Application requested certification for 18 strawberry AG workers, pickers under the SOC occupation title of Farmworkers and Laborers, Crop, for the period beginning 03/25/2021 and ending 12/15/2021. AF 95.

The CO issued a Notice of Acceptance (NOA) on February 19, 2021, notifying the Employer that its application for temporary employment certification under the H-2A temporary agricultural labor certification program had been reviewed and accepted for processing. AF 69-74. The NOA informed the Employer that it must comply with additional requirements as listed in the Notice of Acceptance including the specified “positive recruitment steps” which must be performed between the date the NOA was issued and the expected date on which any foreign workers will depart for the place of employment, or three days prior to the expected start date of employment, whichever occurs first. In compliance with the regulatory requirements of 20 C.F.R. § 655.135(c) Employer was directed to do the following:

*Contact Former U.S. Employees (20 CFR § 655.153):* During the period of time that the job order is being circulated to the SWA for interstate clearance, establish contact, by mail or other effective means, with former employees who were employed by you in the occupation at the place of employment during the previous year and solicit their return to the job this year. You are not required to contact former employees who were dismissed by you for cause or abandoned the worksite.

**Important Notes:** You must maintain in your file, copies of correspondence signed and dated by you. If other means of contact are used, you must maintain dated logs demonstrating that each former employee was contacted and be prepared to submit such documentation if requested. You must also list in the recruitment report any former employees you contacted who did not return because they were either unable or unwilling to return to the job or did not respond to your request. If any documentation was provided to you by former employees showing evidence of their inability, unwillingness, or non-responsiveness, please also maintain such documentation in your file. (emphasis in the original).

AF 71.

The CO also notified the Employer that based on its initial recruitment efforts it must provide a recruitment report as noted below:

*You must submit a written recruitment report containing your signature and dated to our office seven calendar days from issuance of this notice. In order to assist with the timely processing of the application, you are encouraged to submit all required documentation no later than 3:00 pm Central Time.* Please remember that you must interview all U.S. workers who apply (or on whose behalf
an application is made), including those **who apply directly to you**, for your job opportunity. Any U.S. worker who applies to you, but whom you reject for other than a lawful, job-related reason or fail to provide with a lawful, job-related reason for rejection, will be considered available for work by our office. (emphasis in the original).

AF 72.

In addition the CO notified the Employer that the recruitment report must be submitted on the date specified and contain the following information:

(1) identify the name of each recruitment source;
(2) state the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report and the disposition of each worker;
(3) confirm that former U.S. employees were contacted and by what means; and
(4) if applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring each U.S. worker. You must continue to maintain the recruitment report throughout the recruitment period including the 50 percent period. The updated report is not to be automatically submitted to the Department, but must be made available if requested

*Id.*

The NOA also notified Employer of the requirement that it submit proof of its workers’ compensation coverage. AF 72.

On February 23, 2021, the Chicago NPC sent a minor deficiency notice to the Employer. AF 68. The notice acknowledged that Employer’s start date of need is March 25, 2021, but noted that as of February 23, 2021 it had not received the Employer’s signed and dated recruitment report and approved housing from the state SWA (State Workforce Agency). Employer was told that the recruitment report must contain the following information:

1. Name recruitment sources (job order and all newspapers as required)
2. State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker,
3. Confirm that former U.S. employees were contacted and by what means; and
4. If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

Employer responded on February 24, 2021 by letter dated February 23, 2021. AF 65-67. In its response letter, Employer stated that it would continue to cooperate with the state workforce agency serving the area of intended employment. Employer asserted that it would continue positive recruitment steps between then and the expected date that the workers would depart for the employment or three days prior to the expected start date of employment, whichever is earlier and
that positive recruitment would be conducted in a manner consistent with the Department regulations at 20 C.F.R. 655.135(c). In its response letter Employer stated “recruitment report,” apparently indicating that the report was being submitted. Employer also confirmed that it would provide the required housing to the workers and also stated that it would maintain and renew workers’ compensation coverage as required. Employer attached a certificate of workers’ compensation insurance. AF 66. It also attached a list of 19 individuals with no explanation as to the significance or purpose of the list of names submitted. AF 67.

A second minor deficiency notice was issued by the Chicago NPC on February 24, 2021. AF 64. The notice acknowledged that the Employer submitted a recruitment report to the Chicago NPC on February 24, 2021 that failed to list the required information. The notice stated that although Employer submitted a page of names it was unclear if the Employer hired those workers or how the list of names related to the job order. The Employer was informed that all referrals of former workers should be listed on the employer’s recruitment report. Employer was again instructed that in order to receive a positive determination the Employer must provide a signed and dated recruitment report with a date that corresponds to the Employer’s signature. It also noted that all interim reports which did not include the following information would be deemed insufficient:

1. Name recruitment sources (job order and all newspapers as required)
2. State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker.
3. Confirm that former U.S. employees were contacted and by what means; and
4. If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

The minor deficiency notice also noted that the agency had not yet received confirmation that the Employer’s housing had passed inspection for the number of workers requested which is required prior to the issuance of a favorable determination in this matter. Id.

No response from Employer was submitted to this notice. A third minor deficiency notice was issued by the Chicago NPC on March 1, 2021. AF 63. Again the agency stated that the Employer failed to submit the required recruitment report or the confirmation that the Employer’s housing had passed inspection for the number of workers requested which is required prior to the issuance of a favorable determination in this matter. The Employer was informed again that the signed and dated recruitment report with the four items noted above must be received, as well as the housing confirmation from the SWA in order for Employer to receive a positive determination in this matter.

Employer responded to the third minor deficiency notice on March 3, 2021. AF 49-62. Employer submitted a brief letter dated March 2, 2021 stating that it included a revised recruitment report and also noting that it would continue to cooperate with the SWA regarding the employee housing inspection. Employer attached a thirteen page list of names but provided no explanation of the significance of the list of names or how it related to the Employer’s recruitment. It is not
clear whether the list refers to former employees, persons who were hired, or whether they were persons who had applied for the position.

The Chicago NPC issued a fourth minor deficiency notice to the Employer on March 9, 2021. AF 48. The notice acknowledged that the Employer submitted a recruitment report on March 3, 2021 but determined that the submitted report failed to list the required information. The notice stated that Employer had submitted a list of names and past hires but it was unclear whether the Employer hired the listed workers or what the relationship of the list to the job order was. Employer was again informed that it was required to submit a signed and dated recruitment report with the following information:

1. Name recruitment sources (job order and all newspapers as required)
2. State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker,
3. Confirm that former U.S. employees were contacted and by what means; and
4. If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

In addition, Employer was again informed that the agency had not received the required housing confirmation from the SWA.

Employer responded by email dated March 15, 2021 confirming that it understood that more detail on its recruitment report was needed and stating that it would update its recruitment report. AF 47. Employer asked whether it was required to advertise in the newspaper and if so where it was required to advertise.

A note in the record regarding the SWA review of the Employee housing in this case notes that deficiencies were found at the time of a housing inspection on March 12, 2021 and therefore the housing inspection would not be approved until the deficiencies were corrected. AF 46.

A fifth minor deficiency notice was issued on March 15, 2021. AF 45. The CNPC answered the Employer’s inquiry regarding whether newspaper advertising is required. The agency informed the Employer that the most recent regulations were issued by final rule on September 20, 2019 regarding modernizing the recruitment requirements. The CNPC provided Employer with the online citation for the final rule. The agency again notified Employer that it had failed to include the required information in its submitted recruitment report. Employer was again notified that the following required items must be included in a signed and dated recruitment report.

1. Name recruitment sources;
2. State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker,
3. Confirm that former U.S. employees were contacted and by what means; and
4. If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

In addition Employer was informed that the agency had not received the required housing confirmation from the SWA.

Employer responded to the notice of minor deficiency on March 18, 2021. AF 30-44. In its letter dated May 17, 2021, Employer stated that it would continue to cooperate with the SWA and also continue positive recruitment steps until the expected date of employment. In regard to its recruitment report Employer asserted that it had contacted and hired previous employees that are eligible for rehire. Employer also asserted that it would provide housing to its workers that met the required standards. AF 30. Employer attached a list of employees and the date they were originally hired but gives no further information.

A sixth minor deficiency was issued by the Chicago NPC on March 18, 2021. AF 29. The agency noted that the recruitment report submitted on March 18, 2021 was not signed and dated. In addition, the NPC stated that it was still unclear whether the Employer hired the list of former workers on the job order. Employer was directed to confirm whether or not the Employer had any referrals or hires. Employer was again notified that in order to receive a positive determination, it must submit a signed and dated recruitment report that includes the four items listed in all of the deficiency notices.

By email dated March 24, 2021, Employer stated that it was submitting a revised recruitment report which includes all information needed. AF 26-28. Employer attached a handwritten list of names but provided no explanation or information regarding the significance of the names. The last page of the list is signed by Employer and dated March 23, 2021.

The CO issued a Final Determination denial on April 2, 2021. AF 22-29. The CO determined that the Employer failed to submit a recruitment report that complied with 20 C.F.R. § 655.156. The CO noted that this regulation requires the submission of a recruitment report that complies with the following regulatory requirements:

(a) Requirements of a recruitment report. The employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted on a date specified by the CO in the Notice of Acceptance set forth in §655.141 and contain the following information:

(1) Identify the name of each recruitment source;

(2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker;

(3) Confirm that former U.S. employees were contacted and by what means;
(4) If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

(b) Duty to update recruitment report. The employer must continue to maintain the recruitment report throughout the recruitment period including the 50 percent period. The updated report is not to be automatically submitted to the Department, but must be made available in the event of a post-certification audit or upon request by authorized representatives of the Secretary.

AF 24-25 quoting 20 C.F.R. § 655.156.

The CO determined that as of the date of the Final Determination (April 2, 2021) Employer had failed to submit a recruitment report that complied with the regulatory requirements. Accordingly Employer’s application for eighteen Strawberry AG workers, picker job opportunities was denied. AF 25.

On April 2, 2021, Employer sent email correspondence to the CNPC alleging that it had received an email stating that its application was denied however it had not received a complete copy of the Final Determination with the basis for the denial. AF 18-20.

A copy of the Final Determination Denial was resent to the Employer on April 2, 2021. AF 13-17.

Employer submitted a letter signed on April 7, 2021 requesting that its case be reviewed. AF 1-12. Employer notes that it decided to do its application on its own this year and apologized for not clearly understanding how to present its recruitment report. Employer attached a copy of a revised recruitment report.

By Order dated April 16, 2021 a Notice of Docketing and Order Setting Briefing Deadline was issued by the undersigned providing that the parties may submit a brief no later than April 19, 2021. No brief was submitted by the Certifying Officer.

A one page letter was submitted by the Employer on April 19, 2021, which also attached a copy of the Administrative File. Employer stated that it is a small family owned farming business which is in need of eighteen H-2A workers. Employer explained that it decided to file its own H-2A petition this year and understands that the recruitment report was not initially completed correctly. It states that it had completed and included a correct recruitment report. As no recruitment report was included with the Employer’s April 18, 2020 letter, it is assumed that Employer is referring to the recruitment report that is contained in the Administrative File at AF 1-12 which was submitted with the Employer’s April 8, 2021 request for review and which was submitted after the April 2, 2021 Final Determination – Denial issued by the CO in this matter.
ISSUE

Whether the Certifying Officer properly denied the Employer’s H-2A temporary labor certification application due to Employer’s failure to submit a recruitment report in compliance with 20 C.F.R. § 655.156.

SCOPE OF REVIEW

The current case arises from the Employer’s request for administrative review in regard to the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program. “Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file 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 CO’s decision, or remand to the CO for further action.” 20 CFR §655.171(a). The ALJ’s decision “must specify the reasons for the action taken.” Id.

DISCUSSION

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. §1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

(1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and

(2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. §1188(a)(1); see also 20 C.F.R. §655.101.

Employer bears the burden of proof concerning its entitlement to temporary labor certification under the H-2A program. In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural labor or services. 20 C.F.R. §655.161. In addition the employer bears the burden of demonstrating that there are not sufficient U.S. workers that are able, willing, and qualified to perform the work in the area of intended employment. 20 C.F.R. §655.103(a). In this regard, the employer must cooperate with the SWA’s efforts to recruit U.S. workers for the available job for which it is requesting a temporary foreign worker, and also provide proof that Employer has performed other positive recruitment steps that it is required to make, in compliance with the regulations at 20 C.F.R. §655.135(c). As proof of these positive recruitment efforts, the Employer is required to file with the Certifying officer a “written recruitment report.” The Certifying Officer is required to consider as available for the position at issue, any U.S. worker who applies for the position, who is rejected by the employer for other than a lawful, job-related reason. See 20 C.F.R. § 655.161(b).
In this case the CO issued a Notice of Acceptance on February 19, 2021, notifying the Employer that its application for temporary labor certification was accepted for processing and also directing the Employer to proceed with the necessary regulatory recruitment. As noted above the Notice of Acceptance specifically listed the regulatory requirements including Employer’s obligation to submit a recruitment report containing specific information as noted in the applicable regulation, as well as in the Notice of Acceptance. Employer was directed to submit the recruitment report to the Chicago NPC seven calendar days from the issuance of the NOA and was informed that the recruitment report must contain the following information in compliance with the regulation at 20 C.F.R. §655.156:

1. identify the name of each recruitment source;
2. state the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report and the disposition of each worker;
3. confirm that former U.S. employees were contacted and by what means; and
4. if applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring each U.S. worker. You must continue to maintain the recruitment report throughout the recruitment period including the 50 percent period. The updated report is not to be automatically submitted to the Department, but must be made available if requested.

Although Employer submitted a list of names to the Chicago NPC, on several occasions, it never explained the significance of the list, nor did Employer address the four items listed above which must be included in a recruitment report that complies with the applicable regulation. See 20 C.F.R. § 655.156. The CO issued six minor deficiency notices to the Employer informing the Employer that its submissions did not comply with the regulation because they did not contain information addressing the four items noted above. Minor deficiency notices were issued on February 23, 2021, February 24, 2021, March 1, 2021, March 9, 2021, March 15, 2021 and March 18, 2021. Thus Employer was given multiple opportunities to correct its errors and provide the required information. Employer failed to do so. A Final Determination Denial was issued by the CO on April 2, 2021 on the basis that Employer had failed to submit a recruitment report that complied with the regulatory requirements at 20 C.F.R. § 655.156.

Subsequent to the issuance of the CO’s April 2, 2021 Final Determination Denial, Employer submitted another recruitment report with its request for review which was filed on April 8, 2021. In the case of an administrative review under 20 C.F.R. §171(a), BALCA may not review and consider a recruitment report that was submitted after the CO’s Final Determination as it would be considered new evidence that was not before the CO. See Zeller and Sons Farms, 2010-TLC-00031 (June 7, 2010) (Recruitment reports cannot be submitted to the Board unless the documentation was also before the CO) and Sunrise Orchards, Inc. 2010-TLC-00070 (July 27, 2010) (BALCA may not consider recruitment report submitted with its appeal as Board is limited to reviewing only the written record as it appeared before the CO). Accordingly, the recruitment report submitted with the request for review has not been considered by the undersigned.
The submission of a recruitment report is required by the regulations as noted by the CO in the Notice of Acceptance. See 20 C.F.R. §655.143(b)(2). Employer was notified that its application would not be certified until a recruitment report containing the information required by the regulation at 20 C.F.R. §655.156 was submitted. Employer was notified in six minor deficiency notices that its application was deficient due to its failure to submit a recruitment report that complied with the regulations. Employer failed to provide a recruitment report that was in compliance with the regulation at 20 C.F.R. §655.156, despite multiple opportunities to do so. BALCA cases have consistently affirmed the denial of certification where Employer failed to provide a recruitment report that included the information noted in the regulation at 20 C.F.R. §655.156. See e.g. Lohr’s Orchard 2016-TLC-00048 (May 25, 2016) (Denial affirmed where the Employer failed to identify the name of each recruitment source, provide the name and contact information of each U.S. worker who applied or was referred to the job opportunity, and confirm whether former U.S. workers applied but were not hired).

In this case the Employer submitted a list of names to the CO but failed to identify the name of each recruitment source, provide the name and contact information of each U.S. worker who applied or was referred to the job opportunity, and confirm whether former U.S. workers applied but were not hired, and if not hired, explain the lawful job related reason they were not hired, as required by the regulation at 20 C.F.R. §655.156. Therefore, the CO properly denied the Employer’s application for temporary labor certification due to its failure to provide a recruitment report that complied with the applicable regulation.

ORDER

The Certifying Officer properly denied the Employer’s application for eighteen H-2A workers due to Employer’s failure to submit a recruitment report that complied with the regulations. Therefore, the CO’s denial of temporary labor certification is AFFIRMED.

For the Board of Alien Labor Certification:

NATALIE A. APPETTA
Administrative Law Judge

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