ORDER DENYING THE CERTIFYING OFFICER’S (CO) MOTION TO DISMISS AND REMANDING TO CO TO TAKE PROPER ACTION

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 March 23, 2021, I received the Certifying Officer’s (“CO”) Motion to Dismiss (“Motion”) the above-captioned appeal. The administrative file was received on March 24, 2021. For the reasons that follow, the Motion is DENIED and the case REMANDED to the CO for proper action, consistent with this Order.

RELEVANT BACKGROUND


In the interim, on March 23, 2021, I received the Certifying Officer’s (“CO”) Motion to Dismiss (“Motion”) the Employer’s appeal.

I held the scheduled conference call among the parties on March 24, 2021. During the call, in clarifying the type of appeal sought, Employer stated it sought Administrative Review, pursuant to 20 CFR § 655.171(a). Counsel for the CO also indicated the Administrative File was ready and would likely be provided by the end of the day. Additionally, Employer responded to the CO’s Motion to Dismiss. I indicated I would consider the response and the CO’s Motion and provide a written decision.
THE PARTIES’ POSITIONS

As the basis for its Motion, the CO maintains that because the Employer failed to timely respond to the CO’s March 3, 2021 Notice of Deficiency (NOD), the CO’s denial is final and not subject to appeal or further consideration. 20 CFR §655.141(b)(5). As such, the CO requests that the appeal be dismissed for lack of jurisdiction.

The CO further contends that documents submitted by the Employer including its Agricultural Clearance Form (Form ETA-790) and H-2A application provided a business address of ajtuner@yahoo.com. The H-2A application also listed Employer’s agent as Todd Myrcik Miller with an email address of info@headhonchossa.com. The CO further asserts that the March 3, 2021 NOD was issued using both email addresses provided by Employer. Having not timely received either a modified application or request for administrative or de novo review by Employer in response to the NOD, the CO issued a final denial of the application on March 18, 2021. (Motion at 1-2).

During the conference call, Employer responded to the Motion to Dismiss indicating that it did not respond to the NOD because it did not receive the NOD which was sent to an incorrect email address. More specifically, the NOD was sent to ajtuner@yahoo.com, (listed as the Employer’s point of contact email address on the application), but the correct email address is ajtuner@yahoo.com. Employer however acknowledged that while the alternative email address for Mr. Miller (info@headhonchossa.com) was indeed correct, he does not check it or really monitor it because the email address of “ajtuner” is primarily used by the business and in fact was listed as the Employer’s contact on the application. It should be noted that the “ajtuner” email address was the only email address listed as the Employer’s point of contact. See AF 18. The email of info@headhonchossa.com was listed as the agent’s email address on the application. AF 19. Likewise, in its appeal, the Employer indicated it did not receive the NOD and could not therefore timely respond and asked for remand to be allowed to do so.

During the call, I asked Counsel for the CO if there were any safeguards in place to ensure parties are properly served via email and whether he knew if any of the emails sent to Employer’s incorrect email address were returned as “undeliverable.” At the time, he did not know the answer to either question. I asked the CO to look into these questions and he responded later the same afternoon, by letter dated March 24, 2021.1 In his response, the CO indicated that the Foreign Labor Application Gateway (FLAG) system through which Employer filed its H-2A application does not receive an “undeliverable” notice when the system issues an email to an incorrect address. However, the FLAG system does automatically generate a confirmation email confirming receipt of the application and here, because Employer’s address was incorrect she would not have received such confirmation. The CO also included a Q & A from the FLAG system’s webpage that states,

I submitted my application; however, I didn't receive an email confirmation with my assigned case number. What should I do?

1 I note that the March 24, 2021 letter provided by the CO, as well as Employer’s response indicate an incorrect case number (2021-TLC-00076 rather than 2021-TLC-00116). As it is clear that the error was inadvertent, both the CO’s supplemental letter and Employer’s response are considered.
The email confirmation is sent to the employer point of contact's email address and the agent/attorney's email address, if applicable, not the FLAG Account email address. If the employer point of contact or the agent/attorney did not receive a confirmation email, please reach out to the FLAG Technical Help Desk and include the Case Number.

Additionally, the CO notes in the supplemental letter, after the application is received, the CO is to notify the Employer within 7 days of receipt of the application of its acceptance (NOA) or of any deficiencies (NOD) in the application. 20 CFR §§ 655.141, 655.143. Thus, as with the initial confirmation, Counsel for the CO, Attorney Waldman, argues Employer here would not have received the NOA or NOD because of the incorrect address, which “she presumably has received within 7 days of filing in the many other cases in which she participated.” (March 24, 2021 letter to ALJ Appetta from DOL attorney, Edward Waldman, (“supplemental letter”).

The CO also included a copy of Employer’s ETA Form-790 and ETA Form 9142A, both of which show that Employer indeed provided an email address of ajtuner2016@yahoo.com as the point of contact/business email address for the Employer in both instances. The CO maintains that any blame on the CO should be rejected.

Shortly after receiving the supplemental letter from the CO, I received the Administrative File (AF) in the case. Review of the AF confirms the above. Additionally, it appears that the “Letter of Authorization” from Employer, authorized Mr. Todd Miller of Head Honchos, LLC to act as its agent, and if not available, Amanda Turner at: ajtuner2016@yahoo.com was also authorized to act. (AF at page 37).

On March 25, 2021, Employer submitted a response to the CO’s supplemental letter reiterating its position as stated at the hearing that it did not receive the NOD because it was sent to the incorrect email address. Employer also alleges, contrary to Attorney Waldman’s statement in his supplemental letter, that it is common for the CNPC to go many days beyond the 7 days after receipt of a temporary labor application, (as prescribed by the regulation) before providing an NOA or NOD to an Employer. Therefore Employer would not have been alerted to the fact that the NOD had been issued when she did not receive it by email, within 7 days from filing its application. Employer provided several letters submitted to the CNPC in other cases where status inquiries were filed when the CNPC had not issued an NOA or NOD as many as two months after the application was filed. See Employer’s Exhibits 3-5 attached to Employer’s letter responding the CO’s supplemental letter.

**DISCUSSION**

First, I do not excuse the carelessness of Employer here, where it provided a correct email address in its Authorization, but an incorrect email address in the requisite forms and application and another e-mail address that apparently is not monitored by the user, which in effect caused it to miss critical application processing deadlines here. Nor do I put fault on the CO for following its procedure, which clearly includes service of documents electronically through the FLAG system. However, in this case, significant questions have been raised as to whether the process followed by the DOL undermines due process and fairness when it does not
properly serve a party or provide safeguards to ensure that proper service is effectuated. More specifically, the applicable regulation, 20 CFR §655.140(b) Mailing and Postmark Requirements, provides in relevant part that “any notice or request sent by the certifying officer to an employer requiring a response will be sent using the provided address via traditional methods to assure next day delivery.”

Clearly the regulation, promulgated with notice and comment procedure, contemplates overnight/next-day mail and/or regular mail to assure next day delivery, which as discussed was not done here. Although the FLAG system apparently provides the agency and the user an easily accessible method to process the large volume of applications it receives in the temporary immigration system, it is not clear how the system addresses and reflects the above regulatory provision which emphasizes traditional service in order to assure next day delivery. (emphasis added).

As notice to a party, which is achieved through proper service, is a fundamental element of due process, it should not be taken lightly, especially when a party’s right to appeal an adverse determination would be barred, when actual service has not occurred.

In his March 24, 2021 letter, Attorney Waldman of the Solicitor’s office responded to my question, posed during the conference call, of whether the CO would have been notified of the incorrect undeliverable email sent to the “ajtuner” email. He states, the “electronic FLAG (Foreign Labor Application Gateway) system (www.flag.dol.gov), through which North Star Enterprises filed its H-2A application, does not receive an “undeliverable” notice when the system issues an e-mail to an incorrect or non-existent e-mail address.” This response, if true, confirms that important safeguards to “assure” next day service may not have been in place, in the system as utilized. Attorney Waldman also failed to articulate any safeguards in the system or in the CNPC’s procedures which would address how service is made when an incorrect undeliverable email is entered. In all fairness, I would note that if this were a traditional case, not subject to the expedited timeframe of the H-2A program, the parties would have been granted several days or more, to brief the issue of how the current FLAG system is safeguarding proper due process service. Under the expedited timeframe applicable to this case, that would not be practical. However, considerable doubt has been raised as to whether any safeguards are in place. The FAQ question and answer noted above, which was cited by Mr. Waldman, may provide helpful advice to system users and practitioners, but does not address my concerns.

In this case there is really no dispute that Employer was not properly served due to the incorrect address on the application. Although there was a contact listed for the Employer’s representative, as noted above, the “ajtuner” email was listed as the business email and point of contact for the Employer. See AF 18. Employer admitted its error in this regard. However, the correct email was listed on the representative’s letter of authorization in the administrative file (AF 37) and a close review of the submitted information by the CNPC should have alerted them to the discrepancy, and acted as a red flag to the potential that service to the Employer may have been defective.

While it appears that the CO utilized the FLAG system for service of the related documents at issue here, including the NOD, there is no indication that service was properly
effectuated. To the contrary, when asked during the conference call whether the CO indeed served the NOD by next day or overnight mail delivery or complied with the regulation, he responded that with the COVID-19 Pandemic, he did not think it was provided by mail, given that all mail was being sent electronically. While I can certainly appreciate the agency’s need to adapt to the situations created by the unprecedented pandemic, I can find no new or amended regulation that relieves the DOL of its obligation to properly serve an employer such as North Star here. Likewise, while the Flag system Q & A may address a specific scenario, it is not a law or regulation by which the DOL or other parties are bound, but rather is simply advisory. Moreover it does not specifically provide a remedy for ineffective service, nor can it. This is especially true here, where Employer did not receive the NOD. By the time Employer received the Final Determination, it was too late to respond to the NOD, or otherwise modify its application, or in fact have any avenue for a review of the merits of this matter.

To the extent the CO cites the January 26, 2021 BALCA dismissal of an appeal apparently filed by Ms. Turner, for failing to respond to the CO’s NOD, it is noteworthy that the cited case was dismissed because the employer unknowingly submitted its response to the NOD to an incorrect address and therefore, it was not timely received by the DOL for consideration. (See K & T Olson Swine, LLC, 2021-TLC-00062 (Jan. 26, 2021)). It was not, because the DOL did not properly effectuate service of the NOD, in accordance with its prescribed regulations as in the instant case. Similarly, the other case relied upon by the CO is even less on point. That is in Pinecrest Tree Farms, LLC, 2021-TLC-00066 (Feb. 4, 2021), when faced with the CO’s Motion to Dismiss, Employer responded by voluntarily dismissing its appeal. Thus, neither case cited by the CO is on point here.

Regardless of the reasons given here, as significant doubt has been raised as to whether the CNPC properly effectuated service of the NOD on Employer, North Star Enterprises, Inc., and in the interest of assuring due process and fundamental fairness, the CO’s Motion to Dismiss the Employer’s appeal is denied. In the interest of judicial economy and in an effort to avoid further delay in the processing of this application, the case is remanded to the CO for further processing, including service of the Notice of Deficiency to the corrected email address, and thus providing the Employer an opportunity to respond to the Notice of Deficiency. Should the Employer fail to respond in the time provided by the CO, the CO may again deny the Employer’s application.

ORDER

For the reasons stated above, it is ORDERED that the Certifying Officer’s Motion to Dismiss the instant appeal is DENIED. It is FURTHER ORDERED that the case is REMANDED to the Certifying Officer to take proper action with respect to Employer’s H-2A

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2 The regulation at 20C.F.R § 655.171(a) provides in pertinent part that where an administrative review has been requested the administrative law judge may either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.
application, including properly serving the NOD to the Employer, noting the corrected email address, and allowing sufficient time for the Employer to respond. The CO may request an expedited response from the Employer in light of the circumstances presented in this case.

For the Board of Alien Labor Certification Appeals:

NATALIE A. APPETTA
Administrative Law Judge