In the Matter of:

OVERLOOK HARVESTING MICHIGAN, LLC,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances:

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For the Employer

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For the Certifying Officer

Before: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER
AFFIRMING THE DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations presented 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. Overlook Harvesting Michigan, LLC (“the Employer”) timely filed a request for
expedited administrative review of the Certifying Officer’s denial of temporary labor certification. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration (“ETA”), and the written submissions of the parties.

STATEMENT OF THE CASE

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 through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

On, July 13, 2021, the DOL’s Employment and Training Administration (“ETA”) received the Employer’s Application for Temporary Employment Certification. (AF 68-107). In the application, the Employer requested temporary labor certification for 21 Farm Workers, Laborers, Crop, Nursery, and Greenhouse Workers from September 6, 2021 to June 25, 2022. (AF 68-107). The Employer is a farm laborer contractor who supplies workers to various farms. Id. The Employer is requesting workers for Florida in this application. Id.

On July 20, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) finding the Employer failed to establish that its job opportunity is seasonal or temporary pursuant to 20 C.F.R. §655.103(d). (AF 238-54). The CO based its findings on the prior filings of Overlook Harvesting Company (“OHC”), who the CO found is essentially the same company as the Employer, but acting under a different name. OHC has filed numerous prior requests spanning over 10 months of the year for similar workers and similar locations. The CO also found that as an H-2A Labor Contractor, the Employer must also provide evidence that it is authorized to transport workers with the proper Farm Labor Contractor Certificate (“FLC”) and Farm Labor Contractor Employee Certificates (“FLCE”).

The Employer responded to the NOD on July 26, 2021. (AF 31-37). The Employer submitted documentation alleging the Employer, Overlook Harvesting Michigan, and OHC are entirely two different entities and are not the same or similar for purposes of the regulations or this application. The Employer also submitted documentation regarding its drivers and vehicles with its response, but the transportation FLC/FLCEs show they expire in October 2021.

The CO issued a Final Determination denying the Employer’s request for certification on August 9, 2021. (AF 17-29). The CO determined that the Employer failed to show a seasonal or temporary need. Id. The CO also found that the Employer failed to establish it is authorized to transport workers per 20 C.F.R. § 655.132(b)(2), as the documentation submitted expires prior to the end of the requested time period. (AF 17-29).

The Employer requested a de novo hearing on August 12, 2021. (AF 1-16). On August 16, 2021, this case was assigned to me. I received the Appeal File on August 24, 2021. Thereafter, I held a telephone conference with the parties. In an Order dated August 24, 2021, I set a telephone

1 Citations to the Administrative File will be abbreviated “AF1” and “AF2” followed by the page number.
hearing date for September 7, 2021. I held a telephonic hearing on September 7, 2021. Both parties submitted evidence and hearing testimony. The CO and three of the Employer’s officers testified at the hearing. Thereafter, the parties submitted post hearing briefs. The record is now closed and the case is ready for decision.

The issues before me are whether the Employer established a temporary or seasonal need for the positions listed in its application, as defined by 20 C.F.R. § 655.103(d) and whether the Employer is authorized to transport workers as defined by 20 C.F.R. § 655.132(b)(2). This decision is based on the administrative file, the arguments of the parties, additional evidence submitted at hearing, and the applicable laws and regulations. This decision is issued within 10 calendar days after the hearing, as required by 20 C.F.R. § 655.171(b)(1)(iii).

Scope of Review

I held a de novo hearing in this matter pursuant to 20 C.F.R. § 655.171(b). Therefore, I will independently examine the evidence and testimony to determine the Employer’s eligibility for temporary labor certification. The burden remains with the Employer throughout the process. The burden is on the applicant to provide the documentation required by the regulation. In the event the Employer fails to meet its burden on one of the issues, there is no need to discuss the other issue.

The parties agree that the Employer is an H-2A Labor Contractor (“H-2ALC”). H-2ALCs may receive Temporary Employment Certifications, provided they meet the requirements for employers in 20 C.F.R. § 655.103(b) and comply with additional regulations laid out in 20 C.F.R. § 655.132. This includes the requirement that the H-2ALC provide a copy of its Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration (“MSPA FLCR”) “identifying the specific farm labor contracting activities the H-2ALC is authorized to perform.” Any employee of an H-2ALC who engages in farm labor contracting activities, including the transportation of temporary or seasonal agricultural workers, must obtain a FLCR authorizing such activity from the Administrator of the Wage and Hour Division of the Department of Labor’s Employment Standards Administration.

Employers are required to provide workers with transportation between living quarters and the worksite, and such transportation “must comply with all applicable Federal, State or local laws and regulations.” Accordingly, an H-2ALC’s failure to submit an FLCR authorizing the H-2ALC or its employees to drive workers, or to offer an explanation as to how the H-2ALC plans to transport workers without driving, is proper grounds for denial.

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2 David Stock, 2016-TLC-00040 (May 6, 2016).
4 See Valentino Lopez Gomez, 2015-TLC-00050, slip. op. at 12 (Jun. 17, 2015) (addressing deficiencies including the failure to submit a surety bond and finding “the burden is on the applicant to prove that he has satisfied the requirements of the regulation, not on the CO to go out and search for missing pieces.”)
5 20 C.F.R. § 655.132(b)(2).
6 Elgidio Jacobo Gonzalez, 2016-TLC-00030, slip op. at 4–5 (Apr. 1, 2016); See 29 C.F.R § 500.20(a), (i)-(m).
7 20 C.F.R. § 655.122(b)(3)-(4).
8 Elgidio Jacobo Gonzalez, slip op. at 5; Global AG Labor, Inc., 2010-TLC-00146, slip op. at 3 (Oct. 5, 2010).
The parties do not dispute that the Employer qualifies as an FLC, that the Employer must obtain certificates for all FLCEs or independent FLCs who will drive the workers to the jobsites, or that the Employer must obtain certificates for vehicles it intends to use. The CO determined that the Employer failed to identify or submit a valid certificate of registration covering the vehicles it intends to use for the covered period of time (September 6, 2021-June 25, 2022). In response to the Notice of Deficiency, the Employer submitted certificates showing the Employer has authorized drivers and vehicles, but only through October 2021. Therefore, these certificates all expire prior to the end of the requested period, ending in June 2022. Both the CO and the Employer’s representative testified at the hearing regarding this issue. (Tr. 66-67; 130)¹. The CO determined that while the Employer listed an authorized person, the Employer failed to provide a vehicle authorized for the extent of the requested time. (Tr. 66-67). The Employer provided the certificates at Employer’s Exhibit 8. (EX 8). All certificates filed with the CO expired prior to June 2022, and the Employer provided no proof of an extension to the CO. The purpose of the certificate is to ensure the vehicles are safe and to ensure they can transport the number of workers requested. (Tr. 64).

At the hearing and in its brief, the Employer asserted that it has since requested an extension of the vehicle certification from the wage and hour division. (Tr. 130; EX 8). However, the documentation shows that the Employer submitted a request for an extension of the certificate for a bus it intends to use to transport for the workers on September 3, 2021, after the dates of the CO’s notice of determination. (Id.). The Employer never conveyed this information to the CO. There is also no documentation or testimony in the record stating that an extension has actually been granted by the wage and hour division to use the vehicle through the requested time period. There is no valid certificate for the vehicle or any other vehicle for the extent of the requested time in the record.

Therefore, I find there is no valid certificate authorizing the Employer to drive workers, and Employer has, therefore, failed to establish it is in compliance with 20 C.F.R. § 655.132(b)(2). As I have found that Employer has not established entitlement to temporary labor certification, I need not consider the other issues in this claim, including the issue of whether Employer’s need was seasonal or temporary.

ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer’s decision is AFFIRMED.

JOSEPH E. KANE
Administrative Law Judge

¹ References to the hearing transcript are referred to as “Tr.”