In the Matter of:

SYDNEY J. LAWLER,

Employer.

Appearances: KELCIE SUTTON
Farm Workers International, LLC
Memphis, TN
For the Employer

MATTHEW BERNT, Esq.
REBECCA NIELSEN, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer, Lynette Wills

Before: Christopher Larsen
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF 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, if the Secretary of Labor first certifies (a) there are not sufficient domestic workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services in question; and (b) the employment of foreign workers in such labor or services will
not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. section 1188, subsection (a).

In this case, Sydney J. Lawler ("Employer") requests administrative review, under 20 C.F.R. § 655.171, subsection (a), of the Certifying Officer’s ("CO") denial of an alien agricultural labor certification ("H-2A") applications. Employer seeks authority to hire one Farmworker and Laborer, Crop, to work in Bismarck, North Dakota, from April 1, 2021, to October 31, 2021 (AF, pp. 43-44).

Under 29 C.F.R. section 655.171, subsection (a), I decide this appeal "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 amicus curiae" (emphasis added). I received the administrative record on February 26, 2021. Thereafter, the CO moved for dismissal, as discussed below. There were no other submissions from either party. This decision and order is based on the administrative file.

Furthermore, this decision and order is issued within five business days after receipt of the ETA administrative file as required under 20 C.F.R. § 655.171(a).¹

**STATEMENT OF THE CASE**

Employer filed its application on or about December 10, 2020 (AF, pp. 38-76). The Certifying Officer issued a Notice of Deficiency on February 3, 2021, questioning whether the job opportunity was agricultural in nature, because it was located at what the CO believed to be a residential location. Additionally, the CO could not verify Employer's federal tax identification number (AF, pp. 26-29).

Employer responded to the Notice of Deficiency with this statement:

1. Agricultural Labor or Services: This employer, Sydney J Lawler is an agricultural, H-2A employer. Please amend the application so that it is for the H-2A visa. It is a temporary/seasonal position for farm work. It is for planting and harvesting of crops.

¹ Before the current regulations became effective on March 15, 2010, the regulatory standard of review was "legal sufficiency." 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted "legal sufficiency" to imply an “arbitrary and capricious” standard of review. See J and V Farms, LLC, 2015-TLC-00022, slip. op. at 3, n. 1 (Mar. 4, 2016) (citing Bolton Springs Farm, 2008-TLC-00028, slip op. at 6 (May 16, 2008)). But the earlier regulations did not define "legal sufficiency." See id.; 20 C.F.R. § 655.112(a) (2008). The current regulations omit the reference to “legal sufficiency” and do not address the deference, if any, BALCA should give to the Certifying Officer's decision. See 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations’ silence leaves the question open, and requires BALCA judges to determine an appropriate standard of review. In this case it makes no difference, since I would reach the same result even under an “arbitrary and capricious” standard.
Thank you.

(AF, p. 20). To address the taxpayer identification number, Employer attached a copy of an IRS Form 1096 bearing the number (AF, p. 21).

The CO was dissatisfied with this response for two reasons. First, Employer did not address whether the job location was at a residential site. Under the regulations, “agricultural labor,” as defined, must be performed “on a farm.” 20 C.F.R. section 655.103, subsection (c)(1)(i)(A) (AF, pp. 16-19). Second, the IRS Form 1096 had apparently been prepared by Employer itself. The CO “could not determine if the employer possesses the FEIN identified on the application” because the Form 1096 “was not provided by the IRS” (AF, p. 19). Consequently, on February 9, 2021, the CO denied the application (AF, pp. 14-15).

The next day, Employer’s representative e-mailed the National Processing Center in response to the denial of certification. She pointed out the “job description is the exact same as many other files that we have filed and had approved” and the Form 1096 was “the same form that in previous files was accepted also” (AF, p. 11). The National Processing Center replied with a statement of Employer’s right to appeal the decision (Id.).

**Motion to Dismiss**

On March 2, 2021, the CO moved to dismiss Employer’s appeal on the grounds it was not timely filed. The CO denied the application on February 9, 2021 (AF, pp. 14-15). On February 10, Employer’s representative e-mailed the National Processing Center at tlc.chicago@dol.gov, writing “We are going to appeal this but thought we would reach out to you first and just see if there was just an error made on this or what” (AF, p. 12). Within minutes, the CNPC Temporary Help Desk replied by e-mail:

A final determination has been issued for this case. Once an application has been denied the employer, if eligible, may file an appeal within seven calendar days of the date on the Final Determination letter. As part of the appeal process, the Administrative Law Judge (ALJ) will determine if the Certifying Officer’s decision should be affirmed, reversed, modified, or returned to the Chicago National Processing Center (CNPC) as a remand for further processing. Please refer to your final determination letter for information regarding appeal rights. Additional information regarding appeals may be found in the H-2A regulations at 20 CFR §655.171.

(AF, p. 12.)
The CO argues Employer’s “paper appeal request was not received by the CNPC until February 18, 2021, two days after the deadline for appeal. It is not evident from what was submitted to the CNPC when Employer sent its appeal request to BALCA, but the case was not docketed until February 25, 2021, nine calendar days after the February 16th deadline. Thus, the employer failed to timely submit its appeal within 7 calendar days and the CO’s denial is final” (Motion, p. 3). The CO acknowledges her denial letter “noted that correspondence could be sent directly to TLC.Chicago@dol.gov, an address to which the Employer had already sent communications” (Motion, p. 2). And in a footnote, the CO dismisses Employer’s February 10, 2021, e-mail, saying Employer “specifically states it is ‘going to’ appeal but that it was reaching out first, and that it would later decide to ‘go through the appeal process.’” AF 11-12 (emphasis added). Thus the email is not an appeal request” (Motion, p. 3, fn. 2).

I deny the Motion to Dismiss for two reasons.

First, I find the CO has not shown the appeal request in this case was untimely. Under 29 C.F.R. section 655.164, subsection (b), an applicant seeks administrative review of a denial by filing, “within 7 calendar days of the date of the notice . . . by facsimile (fax), or other means normally assuring next day delivery, a written request.” Nothing in this regulation suggests CNPC’s receipt of the written request determines its timeliness. The document which the CO recognizes as the request for administrative review (AF, p. 1) is undated, and there is no evidence in the appeal file to show how or when employer transmitted it. A stamped impression in the upper right corner indicates it was “received” on February 18, 2021, but there is no information in the record to show that affixing such a stamp is a regular procedure at CNPC, or even that this stamp was affixed in the ordinary course of CNPC’s business. What is more, even the CO admits “[i]t is not evident from what was submitted to the CNPC when Employer sent its appeal request to BALCA” (Motion, p. 3). Thus, the CO’s motion does not exclude the possibility that Employer’s filing of the document at AF, p. 1, was timely. Additionally, the CO does not allege the timing of Employer’s request for review has prejudiced her in any way.

Second, the CO’s careful parsing of the language of Employer’s February 10, 2021, e-mail (AF, pp. 11-12) is inappropriate in this context. To understand this e-mail as equivocal regarding Employer’s intention to appeal almost requires intentional misreading. The e-mail is not a statute subject to strict rules of construction, but rather a message in very conversational language from one person to another. The import of this message is that the CO’s decision is, in Employer’s view, unjustified, likely the result of an oversight, and requires immediate correction. 29 C.F.R.

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2 In the e-mail, Employer’s representative writes “Please advise if you will reverse this or if we will have to go through the appeal process” (AF, p. 12). Nowhere does Employer’s representative say it will later decide whether or not to “go through the appeals process.” Employer plainly states it intends to appeal the decision unless the CO acts to rescind the denial first. There is nothing uncertain about it.
sections 655.164 and 655.171 merely require a dissatisfied employer to “request” administrative review or a de novo hearing. It does not specify the form of such a request, nor require the request to comprise any particular terms or language. It is up to CNPC to decide how best to carry out its obligations under the regulations, but straining to interpret a communication from a member of the general public to his or her disadvantage is typically not the hallmark of public service of the highest quality.

**Discussion of the Merits**

The burden of proof in alien labor certification matters is on the employer. *See*, *e.g.*, *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *Garber Farms*, 2001-TLC-6 (ALJ May 31, 2001). The employer wishing to hire H-2A workers must demonstrate the proposed hiring conforms to applicable laws and regulations. Although an employer has the right to run its business however it may please, the employer cannot fairly expect the CO simply to defer to the employer’s own business judgment when it comes to hiring foreign workers.

In this case, the CO had two legitimate concerns, based on the application. First, it appeared to the CO the job opportunity might not be performed “on a farm” as the regulations require. Second, it could not verify Employer’s federal tax identification number. The CO outlined both of these concerns in the Notice of Deficiency. Employer did not specifically address the first concern at all, and with respect to the second, merely asserted again its taxpayer identification number was genuine. The CO appropriately could, and apparently did, conclude Employer had failed to meets its burden of proof.

I suspect clearer communication might have yielded a better result. Although the CO appears to have been concerned that the job location was apparently a residential address, she quoted multiple paragraphs of 20 C.F.R. section 655.103, subsection (c), in the Notice of Deficiency, setting forth the regulatory definition of “agricultural labor” at length. As a result, it takes more than cursory reading of the Notice to understand the CO is concerned about the location of the work rather than the character of the work. Employer’s response focuses on the nature of the work, rather than on its location. This may have been an entirely innocent mistake. Likewise, Employer may have failed to appreciate that the CO was asking for some verification of the taxpayer identification number from someone other than Employer itself.

But the question before me is not whether Employer’s failure to carry its burden of proof was accidental or blameworthy. However imperfect the inquiry, the CO gave Employer an opportunity to address these deficiencies, and the Employer did not do it.
I conclude the CO properly determined the application, and the denial of certification is affirmed.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge