In the Matter of:

WINDMILL FARMS,
Employer.

Certifying Officer: Chicago National Processing Center

Appearance: Robert Coene
For the Employer

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER AFFIRMING CERTIFYING OFFICER’S DENIAL


On August 10, 2021, the Office of Administrative Law Judge received a letter from Windmill Farms (“Employer”) requesting administrative review of the Certifying Officer’s (“CO”) denial Employer’s H-2A temporary labor certification application. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on August 18, 2021. By Order dated August 18, 2021, the parties were granted leave to file briefs on or before 12:00 P.M. (EDT) on August 23, 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 August 3, 2021, the Employer filed an H-2A Application for Temporary Employment Certification on ETA Form 9142A, (AF 23-41). The Employer’s Application requested a waiver of the usual time period and certification for thirty-two (32) farmworkers under the SOC occupation title of Farmworkers and Laborers, Crop, Nursery, and Greenhouse for the period
beginning September 6, 2021, and ending November 10, 2021. (AF 29-31). Employer submitted the following statement with its request for the waiver of the usual filing period:

I am asking for approval for the emergency application that I am placing. I am asking for 32 workers on September 6, 2021 for our apple harvest. Do [sic] to changes in our office with staff we thought this application had been taken care of and clearly it had not. We have been getting workers for our apple season for the past several years and would not be able to get our apples harvested without them. We are so very sorry for this inconvenience and truly appreciate your approval for this contract.

(AF 44).

By letter dated August 10, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”), finding Employer’s application deficient for its failure to provide a good and substantial cause warranting a waiver of the required time period. (AF 5). The CO noted that Employer failed to timely file ETA Form 790A with the New York State Department of Labor (“New York SWA”) and ETA Form 9142A with Chicago NPC. The CO stated that Employer's August 3, 2021 filing of ETA Form 790A and ETA Form 9142A was 34 days before Employer’s date of need and did not comply with the time period requirement. The CO explained that the filing must have been no more than 75 calendar days and no fewer than 60 days before Employer's date of need, pursuant to 20 C.F.R. § 655.121(a)(1). (AF 11).

The CO stated that Employer had not demonstrated a good and substantial cause for a waiver of the time period requirement, citing 20 C.F.R. § 655.134(b), which defines a good and substantial cause, which “… may include, but not limited to, the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.” 20 C.F.R. § 655.134(b). (AF 12). Furthermore, the CO acknowledged that the list contained in 20 C.F.R. § 655.134(b) is not intended to be exhaustive. (AF 5, 12). The CO, however, insisted that the examples described in the statute “share the traits of being both unforeseen and widespread in impact.” Id. The CO denied Employer’s emergency request explaining that it could not be viewed as good and substantial cause because Employer’s failure to timely file with the New York SWA and Chicago NPC was an administrative oversight within its control. (AF 6).

In addition, the CO informed Employer that it could adjust its date of need to 60 days from the date of the filing to be in compliance with 20 C.F.R. § 655.121(a)(1) and 20 C.F.R. § 655.130(b). (AF 5). The CO noted that the adjusted date of need could be no earlier than October 2, 2021. Id. The CO stated Employer could otherwise appeal the NOD. Id.

On August 10, 2021, Employer sought an appeal before the Board of Alien Labor Certification Appeals (“BALCA”) and a reversal of CO’s denial of its H-2A application. (AF 3). In its response, Employer asserted that it believed that it submitted an application on time, but on August 3, 2021, it became aware that it had not done so. Employer explained that this mistake resulted from employee turnover and lack of office workers, a hardship created by COVID-19.
Employer also asserted that it stands to lose hundreds of thousands of dollars if it is unable to get the workers for its harvest season. *Id.*

Pursuant to the August 18, 2021 Order, the Employer and CO were to submit briefs no later than 12:00 P.M. (EDT) on August 23, 2021. Employer submitted its brief in support of its appeal on August 19, 2021, reiterating the position that its harvest begins on September 6, 2021. The CO did not submit a brief.

**ISSUE**

Whether Employer has met its burden of establishing good and substantial cause for waiving the time period requirement for filing *H-2A Application for Temporary Employment Certification* as defined by the applicable regulation at 20 C.F.R. § 655.134(b)?

**SCOPE OF REVIEW**

This case arises from the Employer’s request for administrative review regarding the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program.

Pursuant to 20 C.F.R. § 655.171(a), upon a request for an administrative review, “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.” The presiding administrative law judge “must uphold the CO’s decision unless shown by the employer to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.” See, e.g., *J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016); see also, *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016)(“BALCA reviews decisions under an arbitrary and capricious standard.”). Thus, Employer may not refer to evidence not part of the record before the CO when appealing the CO’s determination, even if such evidence is in the appeal file, request for review, or legal briefs. See *Goldenview Dairy, Inc.*, 2020-TLC-00049 (April 7, 2020).

**APPLICABLE LAW**

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

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1 This is a duplicate submission of Employer’s August 13, 2021 submission.
2 In accordance with 20 C.F.R. § 655.171(a), Employer’s brief contained additional factual information that will not be considered since the information was not presented before the CO.
(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.

Prior to filing an Application for Temporary Employment Certification, an employer must submit a job order, Form ETA-790, to the SWA no more than 75 calendar days, and no fewer than 60 days, before the date of need. 20 C.F.R. § 655.121(a)(1). Likewise, an employer must file an application with the designated NPC “not less than 45 calendar days before the employer’s date of need.” 20 C.F.R. § 655.130(b). If the Employer fails to file no more than 75 calendar days, and no fewer than 60 days prior to the start date:

[t]he CO may waive the time period for filing for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by §655.100.

20 C.F.R. § 655.134(a). Furthermore, the regulations explain that “[g]ood and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.” 20 C.F.R. § 655.134(b).

DISCUSSION

Employer bears the burden to establish eligibility for temporary labor certification. See 20 C.F.R. § 655.161(a); Altendorf Transport, Inc., 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); see also Shemin Nurseries, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015). The applicant bears the burden of proving compliance with all applicable regulatory requirements in order to achieve certification. 8 U.S.C. § 1361 (2006).

The time requirement is important to protect domestic workers, and the CO may grant a waiver of the time requirement in unforeseen events or emergency situations. See Belle Chase Farm d/b/a Ken Slyziuk Ranch, 2010-TLC-00039 (June 17, 2010). In denying the Employer’s application, the CO relied on Employer’s failure to provide good and substantial cause, rather than the lack of sufficient time to test the domestic labor market on an expedited basis. Employer attested that COVID-19 caused employee turnover and worker shortages resulting in the untimely filing of its temporary labor certification. Employer averred that without the workers, the harvest could potentially be lost and result in a substantial financial loss.

After a careful review of the record, it appears that Employer failed to meet the filing requirement due to administrative oversight. Employer does not dispute that it filed its application outside the statutory time frame. Employer did not provide any employee records to substantiate its employee turnover or worker shortage. The record indicates that Employer successfully and timely filed for the H-2A program on July 3, 2020, also during COVID-19. Employer also did not
provide any evidence to differentiate why Employer’s prior year's filing was unaffected by employee turnover or worker shortage since both filings were during a pandemic. Accordingly, it appears that Employer’s untimely filing was not caused by an unforeseen event or emergency, but rather, administrative oversight. Thus, Employer has not provided any evidence of good and substantial cause for its untimely filing.

Based upon the record, Employer has failed to meet its burden of proving good and substantial cause exists for warranting a waiver of the required time period for filing an Application for Temporary Employment Certification. Accordingly, the CO did not act arbitrarily or capriciously in denying Employer's application.

**CONCLUSION**

Employer has not established good and substantial cause, as defined by 20 C.F.R. § 655.134(b). Therefore, the basis for the CO’s August 10, 2021 Notice of Deficiency is affirmed.

**ORDER**

Employer has failed to establish that waiver of the time period for temporary labor certification is warranted, as Employer has failed to establish a good and substantial cause pursuant to 20 C.F.R. § 655.134(b). Accordingly, it is hereby **ORDERED** that the Certifying Officer’s Denial is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

**SEAN M. RAMALEY**  
Administrative Law Judge