**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 26 January 2021**

BALCA Case No.: 2021-TLC-00062
ETA Case No.: H-300-20338-937168

*In the Matter of:*

**K AND T OLSON SWINE, LLC,**
*Employer.*

**ORDER DISMISSING APPEAL**

The matter before me arises under the temporary agricultural guest worker provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184 and 1188 and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B.

On January 15, 2021, this case was assigned to me. The day prior to my assignment, the Certifying Officer ("CO") filed a *Motion to Dismiss* ("Motion") requesting I "dismiss employer's appeal for lack of jurisdiction." Mot. at 3. In the Motion, the CO avers a Notice of Deficiency ("NOD") was issued on December 16, 2020, citing several failures to abide by Department of Labor regulations. *Id.* at 1-2.

Pursuant to 20 C.F.R. §§ 655.141(b)(2) and 655.142, the employer has five business days from the date it receives the NOD to submit a modified application. If the employer fails to submit a modified job application within 12 calendar days after the issuance of the NOD, the application will be deemed abandoned. 20 C.F.R. § 655.142(a). Alternatively, the employer can refuse to modify the application and request an expedited administrative review or *de novo* hearing before an administrative law judge. *Id.* § 655.141(b)(4)(c). Any appeal must be filed within five business days of receipt of the NOD. *Id.*

Here, the NOD was issued on December 16, 2020, and therefore Employer had until December 28, 2020, to submit a modified application, or until December 23, 2020, to file an appeal. No such modified application was received by the CO. On January 8, 2021, Employer submitted its appeal via facsimile.

On January 21, 2021, based on the facts as presented, I issued an *Order to Show Cause*, granting Employer three business days to show cause why the appeal should not be dismissed. On January 22, 2021, Employer submitted its Response. Employer stated, in pertinent part,

> [W]e replied with GOOD INTENT on December 17th, unknowingly to the incorrect email address. There was no further communication from the DOL until we received the DENIAL letter. We could not respond or resend information if we did not know we made the error initial email (sic) or we absolutely would have corrected it!

Resp. at 1 (emphasis in original).

Employer acknowledged the procedural defect in this case, but "respectfully ask that [I] do not dismiss this appeal and please remand this case to the DOL CO to grant a notice of acceptance for this case so that we may continue with the process of bringing desperately needed labor to the employer." *Id.*

Although Employer has shown its failure to timely submit its response to the NOD or appeal was the result of an honest mistake, it has not alleged any facts that would give rise to equitable tolling or any equitable basis to remand this claim.[1]

In light of the foregoing, this case is **DISMISSED**.

**SO ORDERED**.

**TIMOTHY J. McGRATH**
Administrative Law Judge

Boston, Massachusetts

[1] I note Employer is not barred from refiling.