In the Matter of:

MCVICKER FARMS, INC.,

Employer.

Before:       Jerry R. DeMaio
             Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF EMPLOYER’S H2A APPLICATION

This case arises from a request by McVicker Farms, Inc. ("Employer") for review under provisions of the Immigration and Nationality Act ("INA") concerning temporary employment of non-immigrant agricultural workers (H-2A workers). Employer is appealing the denial of its application for an H-2A temporary labor certification by a Certifying Officer ("CO") with the Employment and Training Administration ("ETA"). See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, & 1188; 20 C.F.R. Part 655, Subpart B. For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On April 12, 2021, McVicker Farms, Inc. filed an application for H-2A labor certification with the ETA. AF 65-103.1 The application sought authorization to hire six agricultural equipment operators from June 4, 2021, to December 31, 2021. AF 73. On April 19, 2021, the CO issued a Notice of Deficiency ("NOD") based on Employer’s failure to submit the required Migrant and Seasonal Agricultural Worker Protection Act Farm Labor Contractor Certificate of Registration ("FLC documentation"), pursuant to 20 C.F.R. § 655.132(b)(2) and a failure to show that the job opportunity consisted of agricultural labor or services, pursuant to 20 C.F.R. § 655.103(c), and a. AF 49-53. There was one other basis listed in the NOD that was not retained upon final determination. On April 26, 2021, Employer submitted a Notice of Deficiency Response Letter. AF 43-44.

On May 4, 2021, the CO issued a Notice of Required Modifications ("NRM"), which required that Employer provide additional information as to why the application should be considered as agricultural labor or services as defined at 20 C.F.R. § 655.103(c). AF 33-41. Specifically, the CO asked for clarification as to who is transporting the crops being transported,

1 Citations to the Appeal File are referred to herein as “AF” followed by the page number(s).
including locations or, alternatively, Employer could provide written permission to remove transportation duties from the application. AF 41. On May 7, 2021, Employer submitted its Notice of Required Modification Response Letter. AF 23-32. On May 25, 2021, the CO issued a Final Determination denying the application based upon Employer’s continued failure to show that the job opportunity consisted of agricultural labor or services and based on a continued failure to submit required FLC documentation. AF 11-19.

On May 28, 2021, Employer requested expedited administrative review. AF 1-10. The case was assigned to me and on June 7, 2021, a Notice of Docketing and Expedited Briefing Schedule was issued. The Appeal File was uploaded on June 4, 2021. The CO and Employer filed appellate briefs (“CO Brief” and “Emp. Brief,” respectively) on June 9, 2021. On June 10, 2021, Employer filed a Motion to Strike the CO’s Brief, or in the Alternative, for Leave to File Reply Brief. Employer’s motion is DENIED as both parties have had the opportunity to file simultaneous briefs in this matter.

DISCUSSION

An H-2A Labor Contractor (“H-2ALC”), is defined as follows:

Any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker.

20 C.F.R. § 655.103(b). H-2ALCs are subject to additional regulatory requirements listed at 20 C.F.R. § 655.132, which includes submitting a copy of the Migrant and Seasonal Agricultural Worker Protection Act Farm Labor Contractor Certificate of Registration, or FLC documentation.

Conversely, a fixed-site employer is defined as follows:

Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart, who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses or transports any worker… as incident to or in conjunction with the owner’s or operator’s own agricultural operation.

20 C.F.R. § 655.103(b).

Here, the first deficiency retained in the CO’s final determination hinges on whether or not McVicker Farms is a fixed-site employer or an H-2A Labor Contractor. Employer argues they are a fixed-site employer and, therefore, are not required to comply with the additional requirement of submitting a copy of the Migrant and Seasonal Agricultural Worker Protection Act Farm Labor Contractor documentation, pursuant to 20 C.F.R. § 655.132(b). Emp. Brief at
On appeal, the CO reiterates its position that Employer is in fact a H2-ALC. CO Brief at 3-5.

A review of the administrative review of the record shows that Employer here is a H2-A Labor Contractor. First, Employer filed its application as a H2-ALC. By checking “yes,” to the following question – “Is the employer operating as an H-2A Labor Contractor (H2-ALC), as defined by 20 CFR §655.13(b)?” – and signing and declaring under the penalty of perjury, Employer clearly filed its application as an H2-ALC. Employer’s defense to this, in its appellate brief, is to argue that it improperly filled out its application. AF 11.

Second, Employer’s application and responses to the CO contain various other references that demonstrate it is a H2-ALC. The application lists seven additional places of employment. AF 81. Employer explained it in its response to the NRM that it harvests for “seven (7) clients,” presumably those listed in the application. AF 28, 81. Additionally, in its response to the NOD, Employer stated that while it had a fixed site, it “has 7 additional farms that he harvests grain on provided by his work contracts.” AF 44. These work contracts were provided by Employer in its initial application. AF 87-96.

Employer had various opportunities before the CO, namely in its response to the NOD and in its response to the NRM, to establish itself as a fixed-site employer or to submit the required FLC documentation, but it did not. As an H2-ALC, Employer is subject to the additional requirements listed at 20 C.F.R. § 655.132(b), which includes submitting a copy of the Migrant and Seasonal Agricultural Worker Protection Act Farm Labor Contractor Certificate of Registration. Despite opportunities to submit this form, Employer failed to do so. The regulations are clear that an employer must establish that it is in full compliance with all of the requirements laid out in the regulations for certification to be granted. 20 C.F.R § 655.451(a); 84 Fed. Reg. 12380, 1240 (Apr. 1, 2019). As such, the CO correctly denied the application.

Because denial of certification is upheld based on Employer’s failure to submit the proper FLC documentation, pursuant to 20 C.F.R. § 655.132(b), the question of whether or not Employer additionally violated 20 C.F.R. § 655.103(c) need not be addressed.

ORDER

Because Employer failed to comply with the requirements of 20 C.F.R. § 655.132(b), it is hereby ORDERED that the Certifying Officer’s decision denying Employer’s H-2A Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts