In the Matter of:

FAMILY FRESH HARVESTING LLC,
Employer.

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises from a request by Family Fresh Harvesting, LLC’s (Employer) request for administrative review of the Certifying Officer’s (CO) decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B. For the reasons set forth below, the CO’s denial of certification is reversed and the case is remanded to the CO for further processing.

Statement of the Case


On September 27, 2021, the CO issued a Notice of Deficiency, identifying three deficiencies in Employer’s application. AF 85-91. First, Employer did not provide a copy of its surety bond. AF 88-89. Second, Employer did not provide a copy of its Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration. AF 89-91. Third, the period of need listed on the Application for Temporary Employment Certification was different from the period of need listed on Addendum B to the application. AF 91.

On September 29, 2021, Employer filed a response to the Notice of Deficiency. AF 66-84. In response to the first deficiency, Employer uploaded confirmation that the original surety bond was sent to the Wage and Hour Division. AF 66, 70. In response to the second deficiency, Employer stated it filed the renewal paperwork and uploaded the letters it received from the Wage and Hour Division’s National Farm Labor Certification Team acknowledging receipt of renewal applications filed
by Chief Financial Officer Rosemary Meza and Chief Executive Officer Guillermo Meza. AF 66, 67-69. The letters, dated September 1, 2021, state, in relevant part: “This letter serves as evidence that your previously approved FLC/E Certificate of Registration has been temporarily extended until such time as a determination is issued on your present application for renewal/amendment under 20 CFR part 500, subpart B, and provides evidence that you may continue to operate under your previously approved FLC/E Certificate of Registration.” AF 67-69 (emphasis in the original). In response to the third deficiency, Employer granted the Chicago National Processing Center express permission to modify Addendum B and submitted a corrected Addendum B “just in case.” AF 66, 74-84.

On October 8, 2021, the CO issued a Notice of Required Modifications. AF 61-65. The CO wrote:

The employer has self-identified as an H-2ALC [H-2A Labor Contractor] in Section A.2 of the ETA Form 9132A. The H-2ALC failed to provide:

1. A currently valid FLC Certificate of Registration
2. A valid FLC Certificate of Registration which expires 30 days prior to your date of need as indicated in Section A.3 of the ETA Form 790A
3. A FLC Certificate of Registration with expired authorizations which are required for the H-2ALC to perform its specific labor contracting activities.
4. Evidence of sufficient transportation authorization for the number of workers requested
5. Evidence of MSPA currently authorized drivers via a Certificate of Registration which may either be an FLC Employee or another FLC’s Certificate of Registration which may either be an FLC Employee or another FLC’s Certificate of Registration who will be working in conjunction with the employers of record.

The employer provided their Notice of Deficiency (NOD) response on September 29, 2021. In their NOD response, the employer provided letters from the Wage and Hour Division: United States Department of Labor (WHD) to prove that their renewal applications were submitted. However, these letters were only for the FLCEs. The employer failed to provide this documentation for the FLC Certificate.

**Modification Required:**
The H-2ALC must submit valid FLC documentation with valid vehicles. Additionally the H-2ALC may submit evidence of an application submitted to WHD that extends the prior registration’s validity while pending. See FAQs Round 15: H-2A Labor Contractor Filing Requirements.

Alternatively, the H-2ALC may provide an explanation of how it will transport its workers.

AF 64.

On October 11, 2021, Employer filed a response to the Notice of Required Modifications. AF 56-60. Employer wrote:

I certify that we have taken all necessary measures to ensure that our FLC license with transportation authorization has been filed in a timely manner and have
attached a copy of the paperwork [filed] with the MSPA W&H Division in San Francisco California. Also the letter we received from the FLC Processing Center was regarding our FLC license as well as all paperwork was filed together. I am contacting the MSPA FLC Processing center tomorrow to get a confirmation from them as well and once I receive a response I will be sure to forward it.

AF 56. In addition to the letter above, Employer submitted Ms. Meza’s FLC renewal application, dated June 1, 2021, requesting renewal for Prior Certificate Number C04705064H19I and attesting that Employer possessed five vehicles capable of transporting a maximum total of 190 employees. AF 57-60. On November 3, 2021, Employer sent a case status inquiry email to the Chicago National Processing Center. AF 54. Employer wrote: “I am looking to see if anything else is needed. My contract date is quickly approaching and I want to make sure that I will have enough time to get my workers here on time. I have been checking the status online everyday and it just shows as processing. If anything else is needed please let me know.” Id. Employer sent a second email on November 8, writing: “I have yet to receive any updated information on this case and I am a little concerned because my work start date is quickly approaching. Not being able to get people here on time to work will affect me greatly as my crops will get behind. Please contact me at your earliest convenience.” AF 53.

On November 9, 2021, without responding to Employer’s emails, the CO issued a Final Determination denying Employer’s application. AF 47-52. The CO explained:

At the time of filing, the employer submitted an FLC Certificate for Family Fresh Harvesting, LLC. However, the FLC Certificate has expired as of September 4, 2021 and the vehicles expired as of August 24, 2020 and August 24, 2021. The employer did not submit valid FLC certificate(s) of registration authorizing a sufficient number of vehicles necessary to transport the workers requested in this application.

On September 27, 2021, the Chicago NPC issued Notice of Deficiency (NOD) in which the employer was asked to provide FLC Certificates of Registration with valid vehicles; or provide an explanation on how the employer will transport its requested workers without authorized vehicles or drivers.

On September 29, 2021, the employer submitted a response to the NOD in which it provided letters from Wage and Hour Division (WHD) regarding the renewal applications for FLCE Certificates for Rosemary Meza, Guillermo Meza, and Guillermo Meza, Jr. The employer also provided a statement regarding the renewal of the MSPA Certification. However, while the employer stated that the response letter from WHD was provided, the employer failed to provide a letter detailing the renewal of the FLC Certificate for this application.

On October 8, 2021, the Chicago NPC issued a Notice of Required Modifications (NRM) in which the employer was asked to submit valid FLC Certificate of Registration with vehicles that cover the dates of need requested in the ETA form 790A. The employer was also afforded the opportunity to submit evidence of an application submitted to WHD that extends the prior registration’s validity while pending.
On October 11, 2021, the employer submitted a response to the NRM[.] The employer’s response neither provided a renewed FLC certificate for the vehicles nor provided proof of timely submission of the application to renew the FLC Certificate of Registration.

AF 50-51. The CO concluded, “as of the date of this letter’s issuance, the employer has failed provide proof of authorized means of transportation for its 169 workers requested that were to begin on November 29, 2021. Therefore, this application ... is denied.” AF 52.

On November 16, 2021, Employer filed a request for administrative review. AF 1-46. Employer wrote:

It is noted on the letter of denial that our application was denied for the following reasons: FLC Certificate Validation. However, as I have clearly explained in the emails and correspondence I have yet to receive our recertification due to delays at the San Francisco Office. Which is entirely out of my control, I filed paperwork in July and have tracking information to show it was received. I also supplied a letter received from the San Francisco Office stating that we can continue to do business as usual until they review the application and make a final determination. I have attempted to contact the San Francisco office several times and have been told the same thing. I feel as though the reason for denial was made unjustly as I have taken all measure to make sure that I renewed our FLC license in a timely manner and the delays are completely out of my control. Therefore, I am requesting that our application be granted expedited administrative review and the decision for denial be overturned as I have taken all the possible measures necessary to make sure that our applications be filed timely.

AF 1. Employer also submitted a copy of the Final Determination, email correspondence with the Chicago National Processing Center, the Notice of Required Modifications, a copy of the MSPA FLC/E Certification, a copy of the ETA Form 9142A, a copy of FLC documentation, copy of the surety bond, copy of the workers’ compensation insurance documentation, and mailing label. AF 2-46.

On November 22, 2021, the Board of Alien Labor Certification Appeals (BALCA) received the Administrative File from the CO. Counsel for the CO (the Solicitor) and Employer were invited to briefs. Neither party filed a brief, and the time for doing so has passed.

**Discussion**

When an employer requests administrative review of an unfavorable decision made by the CO, BALCA must affirm, reverse, modify the CO’s decision, or remand to the CO for further action, and specify the reasons for the action taken. 20 C.F.R. § 655.171(a). Neither the statute nor regulations supply a standard of review. Under BALCA precedent, the CO’s decision will be upheld unless that decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *ASKD Enterprises, Inc.*, 2021-TLC-00006, slip op. at 2-3 (Oct. 26, 2021) (citing J&V
Based on my review of the record, I find and conclude that the CO’s denial of Employer’s application was arbitrary, capricious, and an abuse of discretion. Contrary to the CO’s assertions, Employer submitted adequate documentation to prove it possesses a valid FLC Certificate of Registration. See AF 67-69. Accordingly, the CO’s denial is reversed and the case will be remanded for additional processing.

ORDER

Based on the foregoing, IT IS ORDERED that the Certifying Officer’s Final Determination denying Family Fresh Harvesting, LLC’s Application for Temporary Employment Certification is REVERSED and the case is REMANDED for further processing.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/PML/ksw
Newport News, Virginia