DECISION AND ORDER REVERSING 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 the 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. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

20 C.F.R. § 655.171(a). The Administrative Files were received on February 25, 2022, and Employer submitted a brief the same day. No submission was received on behalf of the Certifying Officer.

Employer submits that it is a Kentucky-based business that provides services to various farms in or near the Lexington, Kentucky metropolitan area that breed and train thoroughbred and Standardbred horses. In recent years, Employer has operated as a duly-licensed Farm Labor Contractor (“FLC”), furnishing workers and providing farm maintenance and support services to local horse farms in connection with their farming operations. Employer’s Brief at 1.

A. Relevant Procedural History and Facts

H-2A Applications

For the 2022 season, Employer filed the following two H-2A applications: (1) one First-Line Supervisor (SOC 45-1011) beginning March 14, 2022 and ending November 18, 2022, and (2) seventy-seven Farmworkers (SOC 45-2093) for the same period of employment. AF-1 at 213-491; AF-2 at 184-406.

On January 19, 2022, Employer filed H-2A applications with the Chicago National Processing Center (“CNPC”) in both matters, after the Kentucky State Workforce Agency accepted both cases for processing the previous week. Id.


Due to processing backlogs with the Wage & Hour Division (“WHD”) in San Francisco, the Employer was unable to amend its transportation authorizations on its Farm Labor Contractor (“FLC”)/Farm Labor Contractor Employee (“FLCE”) Certificates of Registration in time to receive updated Certificates for its H-2A filing process. Employer thus attested that it had secured a common carrier for transportation needs (“to transport the requested H-2A workers from the employer-provided housing to the worksite, and for any incidental transportation between worksites”). AF-1 at 362; AF-2 at 273. Employer noted that common carriers are exempt from Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”), and that vehicles used by common carriers are not required to be on the FLC Certificate, nor must they register as FLCEs. Id. Employer submitted that “paid common carrier services will be utilized until the pending vehicle amendments are processed by the San Francisco Wage & Hour Division.” Id. Employer also provided proof that it had timely submitted its FLC and FLCE renewals to San Francisco. AF-1 at 362-64; AF-2 at 274-76.

Notices of Deficiency

On January 26, 2022, each case received a Notice of Deficiency (“NOD”) from CNPC, identifying a single issue of concern: that Employer was “responsible for providing FLC or FLCE

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1 The Administrative File for H-300-22013-828891 is referred to herein as “AF-1” and the File for H-300-22013-828936 is referred to as “AF-2.”
Certificate(s) of Registration for itself, its vehicles used to transport the H-2A workers and for drivers it intends to hire to drive the vehicles” but that the Employer’s vehicle authorization on its FLC certificate expired as of June 1, 2021, and also three FLCE’s that were submitted had driving authorizations set to expire on January 31, 2022 and February 20, 2022. The NOD also noted deficiencies with the maximum available capacity of 36 available seats (total of 3 combined vehicles) per Employer’s expired FLC certificate, while Employer’s H-2A applications requested a total of 78 workers. AF-1 at 191-96; AF-2 at 165-70.

The NODs addressed Employer’s stated use of common carriers to satisfy transportation requirements, asserting that Employer misunderstood its obligations as an H-2A Labor Contractor under 20 C.F.R. § 500.1(c) and that the regulations require FLCs to comply with all regulatory requirements of H-2A Labor Contractors (“H-2ALCs”). The NODs cited MSPA provisions requiring FLCs to comply with various program requirements under MSPA when recruiting, soliciting, hiring, employing, furnishing, transporting, or housing covered workers.

According to the NODs, Employer misunderstood the intent of regulatory language under 20 C.F.R. § 500.30 regarding MSPA exemptions for common carriers. The NODs noted that if a common carrier is utilized to transport migrant or seasonal workers, the carrier (not the H-2A Labor Contractor) is exempt from MSPA. The NODs stated that transportation authorization requirements remained applicable to Employer and thus it must hold a valid certificate of authorization for such purposes from an appropriate local, State, or Federal agency. The NODs also noted that Employer was prevented from using a common carrier as a “stopgap” measure while its renewal or amendment application is pending or pending its receipt of valid FLC and FLCE Certificates of Registration.

Employer’s Response to the Notices

In its response to the NODs, Employer asserted:

- Nothing in the H-2A regulations requires submission of FLCE documents, but, rather, the regulations only reference FLC Certificates.
- Transportation authorizations are based on vehicle insurance validity dates and MSPA only requires coverage of vehicles while they are actually in use. There is no requirement to maintain coverage on vehicles not actively being used to transport migrant or seasonal agricultural workers.
- As H-2A workers are expressly exempt from MSPA, the CO’s comment regarding inadequate vehicle capacity for transportation of H-2A workers was not rational or consistent the statutory or regulatory requirements.
- An H-2ALC should not be conflated with an FLC, and MSPA does not reference H-2ALC requirements. The conflation of the terms H-2ALC and FLC led to the erroneous conclusion that MSPA mandates employer-provided transportation. While employer-provided transportation is a requirement of the H-2A program requirement, it is not a MSPA requirement. The MSPA transportation provisions apply to the employers who do, in fact, opt to engage in transportation activities, and, otherwise, the provisions do not apply to the employers.
Contrary to the NODs, the plain text of the regulation contemplates transportation being provided by third-parties. In fact, Form ETA-9142A asks if fixed-site growers will be providing transportation.

There is no regulatory requirement that Employer provide a letter from WHD confirming its authority to operate as an FLC. Instead, Employer noted that it validly operated as an FLC as a matter of law because of its previous, timely-submitted renewal applications, citing 29 C.F.R. § 1814(b)(1) and WHD’s own FAQ on the subject. Employer also provided proof that its renewals were timely submitted.

AF-1 at 54-58; AF-2 at 28-32. Common carrier information was attached, including proof of the limousine company’s authorization to operate in Kentucky. AF-1 at 60; AF-2 at 34.

**Notices of Required Modifications**

On February 10, 2022, the CO issued the Notices of Required Modifications (“NRMs”) at issue in these cases. AF-1 at 3-11; AF-2 at 14-23. The NRMs essentially reiterated the deficiencies noted in the NODs.

As for modifications required, the NRMs stated:

The employer must provide a FLC certificate with sufficient, authorized vehicles to transport the requested workers, and sufficient FLC or FLCE certificates for authorized drivers to transport the requested workers.

Additionally, the employer may submit an “Authority to Operate While Application for an Amendment is Pending or Authority to Operate While Application for a Renewal” letter issued to the employer and its individual employees that corresponds to the FLC or FLCE Certificate(s) of Registration the employer is using to demonstrate its authorization to perform the farm labor contracting activities required for certification. See FAQs Round 15: H-2A Labor Contractor Filing Requirements.

AF-1 at 11; AF-2 at 22.

**Employer’s Brief**

In its written submission that followed the request for administrative review under § 655.171(a), Employer has presented arguments that elaborate on its responses to the NODs. Employer argues that the CO’s rejection, or prohibition, of the common carrier arrangement presented by Employer is not supported by statute or regulation, and, further, that its arrangement with Gold Shield Transportation satisfies the regulatory requirement concerning transportation of workers. According to Employer, the NRM is deficient because it fails to address the validity of Employer’s transportation arrangements.
Employer further argues that it is not required or appropriate for the common carrier’s vehicles or maximum capacity of the vehicles to be listed on Employer’s FLC Certificate. Employer acknowledges that MSPA would require Employer to have valid transportation authorization if Employer is the entity transporting the workers, but the provision does not apply when an employer utilizes a common carrier for transportation. Also, common carriers are exempt from MSPA. 29 C.F.R. § 500.30(c).

Employer reiterates its position that since it timely renewed its FLC/FLCE Certificates, it is authorized by law to operate under MSPA and no letter confirming its authority is required.

Employer further reiterates its position that the H-2A regulations only require an H-2ALC to submit a copy of its FLC Certificate of Registration (if required under the MPSA), identifying the farm labor contracting activities that it is authorized to perform as an FLC, and that there is no requirement for submission of transportation authorization or FLCEs.

Finally, Employer contends that enforcement of FLC authorizations is the exclusive domain of the WHD and that the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) does not have authority to enforce MSPA or its provisions, including authorizations for farm labor contracting activities under a particular FLC registration. Therefore, Employer submits that the CO lacked authority to insist that Employer maintain vehicle and driving authorizations when it was not engaging in transportation activities.

Employer also promotes application of a non-deferential standard of review but also argues that, since the CO erroneously interpreted and applied both MSPA and the H-2A regulations, the CO’s determinations also warrant reversal under the “arbitrary and capricious” standard of review.

B. Applicable Law

1. Standard of Review

When an employer requests administrative review under § 655.171(a), the administrative law judge (“ALJ”) may consider the written record and any written submissions from the parties, which may not contain new evidence. 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. Id.

Neither the Immigration and Nationality Act (“INA”) nor the H-2A regulations identify a standard of review to be applied to an employer’s request for administrative review. An “arbitrary and capricious” standard to review has often been applied, including by the undersigned in previous determinations. Under such standard, the CO’s decision will be upheld unless the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See ASKDK Enterprises, Inc., 2021-TLC-6, slip op. at 2-3 (Oct. 26, 2021).

This deferential standard of review is not, however, required by relevant statute or regulation. Accordingly, in keeping with other recent decisions, a de novo standard shall apply, which examines whether the CO’s determination is legally and factually sufficient in light of the
written record provided. See, e.g., MB Florida Ltd., 2022-TLN-00005 (Nov. 4, 2021)(rejecting arbitrary and capricious standard of review in labor certification cases); Best Solutions USA, LLC, 2018-TLN-00117 (May 22, 2018) (holding that BALCA should consider a denial of certification by determining whether the basis provided by the CO for her determination “is legally and factually sufficient in light of the written record provided” and declining to apply an arbitrary and capricious standard because such a deferential standard “is not appropriate for administrative review under Part 655”); Albert Einstein Medical Center et al., 2009-PER-00379-81, slip op. at 31-32 (Nov. 21, 2011) (en banc) (citing 5 U.S.C. § 577(b) rather than § 706(2)(A) and concluding that de novo review of CO decisions denying permanent labor certification is appropriate due to intra-agency nature of the adjudication).

2. Discussion

The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a labor certification from the U.S. Department of Labor. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

At issue is whether the CO’s NODs and subsequent NRMs meet the legal criteria under 20 C.F.R. § 655.141 (“Notice of Deficiency”), which provides that a CO may determine that an application for temporary labor certification fails to meet the criteria for acceptance if the application or job order is incomplete, contains errors or inaccuracies, or otherwise fails to meet regulatory requirements. The CO determined that Employer failed to meet the criteria for acceptance because Employer did not comply with Departmental regulations at 20 C.F.R. § 655.132(b)(2), which provides that an H-2A Labor Contractor must provide a “copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. sec. 1801 et seq., identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.”

The Department of Labor’s WHD oversees FLC and FLCE Certificate of Registration processes, including renewals, under MSPA. See 29 U.S.C. §§ 1811-1815; 29 C.F.R. Part 500. The WHD also oversees the legal requirements pertaining to transportation of migrant workers under MSPA. 29 U.S.C. §§ 1841-1842.


The CO correctly noted that Employer self-identified as an H-2ALC on its ETA Form 9412A but took issue with Employer’s failure to provide “FLC or FLCE Certificates of Registration for itself, its vehicles used to transport the H-2A workers and for the drivers it intends to hire to drive the vehicles.” AF-1 at 193; AF-2 at 167.

As an initial matter, Employer has correctly noted that the regulation references only the provision of a FLC Certificate of Registration, not FLCE Certificates. 20 C.F.R. § 655.132(b)(2).
Thus, the NODs reference to the submission of “FLC or FLCE Certificates” does not align with the express language of the regulation. AF-1 at 193; AF-2 at 167 (emphasis added). The undersigned thus considered whether Employer’s submission of its FLC Certificate of Registration met the H-2A regulatory requirements.

The regulation relied on by the CO, 20 C.F.R. § 655.132(b)(2), requires the submission of a copy of the FLC Certificate of Registration under the MSPA that identifies specific farm labor contracting activities the H-2ALC is authorized to perform. Employer supplied that documentation, along with proof that it had timely submitted its FLC (and FLCE) renewals, with vehicle- and transport-related amendments, to San Francisco WHD. AF-1 at 362-64; AF-2 at 274-76. Employer presented legal authority that, since it timely renewed its FLC/FLCE Certificates, it has been authorized by law to operate under MSPA. See 29 U.S.C. § 1814(b).

The CO went beyond the express language of § 655.132(b)(2) to evaluate whether Employer was, in fact, authorized to perform specific, transportation-related activities as an FLC; however, that determination is not part of the H-2A regulatory requirement at § 655.132(b)(2) under the ETA’s responsibility. See 20 C.F.R. § 655.132(b)(2); cf. 20 C.F.R. § 655.132(b)(5) (requiring certain proof when the fixed-site agricultural business will provide housing or transportation to workers). See also 75 FR 6884, 6918-6919 (noting that Section 655.132 filing requirements regarding proof of work contracts were intended to address commenters’ concerns over proper regulation of H-2ALCs to verify the existence of work contracts and increase the enforcement authority of WHD, and that no comments were received regarding the proposed “required information and submission” requirements of Section 655.132(b)).

Even if the CO has responsibility to inquire into Employer’s transportation-related activities and authorization for same, Employer also presented sufficient evidence to conclude that it was not engaging in transportation activities pending the processing of its renewals, but, rather, engaged the services of a duly-authorized common carrier to provide transportation for the requested workers. Employer relied on MSPA regulations providing that an FLC is required to obtain a Certificate of Registration and “in addition to registering, … must comply with all other application provisions of the [MPSA] when they recruit, solicit, hire, employ, furnish, or transport or, in the case of migrant agricultural workers, provide housing.” 29 C.F.R. § 500.1(c) (emphasis added). MSPA regulations further acknowledge that common carriers may be engaged to transport migrant or seasonal agricultural workers. 29 C.F.R. § 500.30(c). Such common carriers must possess a valid certificate of authorization for such purposes from an appropriate local, State, or Federal agency. Id. The carrier is exempt from MSPA. Id.

Accordingly, the CO’s requirement that Employer provide documentation that it is “currently authorized to transport and drive workers” is not legally sound, as it exceeds the requirements of the applicable H-2A regulation (Section 655.132(b)(2)) and also because Employer has engaged a common carrier such that a third party, not Employer, will transport and drive workers. In the NODs, the CO stated, “If the employer intends to transport and drive workers, it must provide sufficient documentation prior to final determination that it is authorized to do so.” Employer established, however, that this contingency did not apply.
The CO also did not cite authority for the statement that Employer was prohibited from using a common carrier as a “stopgap,” or interim measure, while its Certificate renewal was pending with WHD. Accordingly, to the extent that the CO intended to convey that, if Employer “intends to transport and drive workers” at any future time within the requested employment period (March 14, 2022 - November 18, 2022), after initially engaging a common carrier to provide the services, the CO did not reference any legal authority that would prevent Employer from doing so.

Accordingly, I find that the modification options proposed by the CO are not based on statutory or regulatory requirements. The first required modification per the NRM, that Employer “must provide” an FLC Certification showing its authorization to transport the requested workers, and FLC or FLCE Certificates for authorized drivers to transport the requested workers, is not found in the pertinent H-2A regulations. The second modification, that Employer “may submit” a letter from WHD regarding its authority to operate pending its renewal application, is not a legal requirement and is superfluous in light of the regulatory provision for extended authority to operate as an FLC, per the language of 29 U.S.C. § 1814(b).

3. Conclusion and Order

For the above reasons, I conclude that the NRM is not legally and factually sufficient under the de novo standard of review. Even applying the “arbitrary and capricious” standard of review, I also find that the denial of certification was arbitrary, capricious and not in accordance with the law.

Therefore, it is hereby ORDERED that the Certifying Officer’s determination is REVERSED. See 20 C.F.R. § 655.171(a). This matter is REMANDED to the Certifying Officer for further processing consistent with this decision.

ORDERED this 3rd day of March, 2022, at Covington, Louisiana.

ANGELA F. DONALDSON
Administrative Law Judge