In the Matter of:

TERRA BELLA NURSERY, INC.,
Employer.

DECISION AND ORDER AFFIRMING 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 its 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, if the Secretary of Labor first certifies (a) there are not sufficient domestic workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services in question; and (b) the employment of foreign workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. section 1188, subsection (a).

In this case, Terra Bella Nursery, Inc. (“Employer”), requests administrative review, under 20 C.F.R. § 655.171, subsection (a), of the Certifying Officer’s (“CO”) denial of an alien agricultural labor certification (“H-2A”) application. Employer seeks authority to hire twelve H-2A laborers to work from September 13, 2021, through July 1, 2022.

Under 20 C.F.R. section 655.171, subsection (a), I decide this appeal “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 amicus curiae” (emphasis added). I may affirm, reverse, or modify the CO’s decision, or I may remand the matter to the CO for further action.
In this case, I received the administrative record on November 30, 2021. There were no other submissions from either party. This decision and order is based on the administrative file.

Furthermore, this decision and order is issued within five business days after receipt of the ETA administrative file as required under 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On July 27, 2021, Employer applied for certification to employ H-2A Farmworkers and Laborers, Crop, Nursery, and Greenhouse from September 1, 2021, until July 1, 2022 (AF, pp. 106, 89) at worksites in the San Diego, California, area (AF, p. 107). On July 29, Employer e-mailed ETA to amend the application to change the location where the H-2A workers would be housed (AF, p. 86). The CO allowed Employer to amend the application 1) to change the number of workers requested to twelve; and 2) to change the housing address as requested (AF, pp. 71). The CO sent an updated application reflecting those changes to Employer for review (AF, pp. 72-85).

The CO issued a Notice of Deficiency on August 2, 2021 (AF, pp. 64-70), citing three issues. First, the Employer had submitted the application less than 45 days before its start date of need. Second, one of the worksite locations was apparently not an agricultural site, but rather a fire station; and the CO questioned why a fire station would require agricultural workers. Third, the application preparer’s federal employer identification number, business name, and e-mail address were missing. On that same day, Employer e-mailed to ask if it could respond to the Notice of Deficiency by e-mail (AF, p. 62). The next day, Employer provided the requested information and authorized the CO to amend the start date on the application to September 13, 2021 (AF, p. 60). On August 5, the CO once again sent an updated application reflecting those changes to Employer for review (AF, pp. 44-58).

On August 6, 2021, the CO notified Employer she had accepted the application for processing. The CO reminded Employer, inter alia, to submit a recruitment report and provide proof of workers’ compensation coverage (AF, pp. 39-43).

On August 12, 2021, the CO notified Employer she had not received the signed Recruitment Report and proof of Workers’ Compensation. She reminded Employer those steps were necessary “[t]o receive a positive determination” (AF, p. 36). She sent this same message again on August 17 (AF, p. 35) and August 31 (AF, p. 34). On August 31, Employer e-mailed a letter dated August 26, 2021, describing seven “recruitment sources” and listing seventeen job applicants (AF, p. 32) and a “Certificate of Liability Insurance” which referred to workers’ compensation coverage (AF, p. 33).
On September 1, 2021, the CO advised Employer that its identification of “recruitment sources” was not an acceptable recruitment report under 20 C.F.R. section 655.156, subsection (a)(1). The CO outlined the regulatory requirements for a recruitment report (AF, p. 29). Employer responded only with a revised version of its August 26, 2021, letter (AF, pp. 27-28).

On September 2, 2021, the CO advised Employer that the revised August 26, 2021, letter, likewise did not conform to 20 C.F.R. section 655.156, in that it still did not identify the SWA as a recruitment source, did not indicated the SWA job number order, and did not confirm that Employer had contacted former U.S. employees, and by what means (AF, p. 25). On September 10, 2021, the CO sent the same message a second time (AF, p. 24). On September 13, 2021, Employer e-mailed ETA:

Good morning.

I have questions on the email below. Is there a phone number where I can reach you? Patricia who was working on this is no longer with the company and I am taking over. I sent a few emails back but don’t seem to be sending the correct information requested. Can I get someone to explain please.

Thank you,

Rose Yoshinaga

(AF, p. 22.)

On September 20, 2021, the CO again e-mailed Employer, once again outlining the requirements for a recruitment report and noting Employer’s failure to identify SWA as a recruitment source; indicate the SWA job order number on the application; and to confirm it had contacted former U.S. employers, identifying the means of contact (AF, p. 21).

On October 5, 2021, the CO denied the application (AF, pp. 16-20).

This appeal followed. On October 12, 2021, Ms. Yoshinaga wrote the Chief Administrative Law Judge:

We received an email dated 10/5/21 stating that temporary labor certification under the H-2A temporary agricultural program had been denied. On October 6, 2021 I sent a letter requesting an extension to finish gathering the needed information, this was what was in the letter:
(On September 13, 2001 [sic] I sent an email requesting to speak to someone since information that was being submitted, was not the correct information. Patricia Urbina who no longer works here started the process and was more aware of how the program works. I do apologize but I am new to all of this and still confused on what is being asked for us to submit. At this time, we are requesting an extension to finish gathering the needed information. We had also requested a start date of September 13, 2021 and we would also need to move that starting date please)

We want to file an appeal, and I thought I was doing so by writing the previous letter. Can you please help me with instructions on how to file for an appeal.

(AF, p. 11 (emphasis in original).)

Discussion

The burden of proof in alien labor certification matters is on the employer. See, e.g., Altendorf Transport, Inc., 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); Garber Farms, 2001-TLC-6 (ALJ May 31, 2001). The employer wishing to hire H-2A workers must demonstrate the proposed hiring conforms to applicable laws and regulations.

Here, the CO ultimately denied the application because Employer did not support it with the recruitment report required under 20 C.F.R. section 655.156. After twice allowing Employer to amend its application with respect to the number of H-2A workers, the job locations, and the start date, and to supply missing information about the Employer itself, the CO notified Employer of the recruitment report requirement, by my count, seven times: on August 6; on August 12; on August 17; on September 1; on September 2; on September 10; and on September 20. By October 5, Employer still had not provided the recruitment report in conformance with the applicable regulation.

I well know how frustrating it can be for a private citizen to deal with a government agency. But the record before me shows this CO went out of her way to give the Employer every opportunity to correct deficiencies in its application. The regulations do not require a CO to allow two amendments to an H-2A application, nor repeatedly to outline the essential elements of a recruitment report. The CO in this case did all of those things, and received in return only requests for even more help. When all is said and done, the CO's responsibility is to evaluate applications for certification, and not to represent applicants seeking certification. The distinction is not absolute, of course: no one wants to see legitimate applications denied over a good-faith, easily-correctable mistake. But in this case, the CO did nothing of
the sort. An applicant for certification cannot reasonably expect indefinite suspension of the certification process any time the applicant raises a question. If, after seven reminders, an applicant is unsure what to do, it may be time for that applicant to seek professional counsel, rather than expect an eighth opportunity.

Thus, in this case, the CO’s denial of certification is reasonable under all the circumstances. The denial of certification is affirmed.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge