

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 September 2012

OALJ Case No.: 2012-TLC-00097

ETA Case No.: C-12215-35415

In the Matter of:

DESOTO FRUIT AND HARVESTING, INC.,

Employer.

Certifying Officer: William L. Carlson
Chicago Processing Center

**ORDER
TO SET-ASIDE THE SEPTEMBER 26, 2012 DECISION AND ORDER - REVERSING
CERTIFYING OFFICER'S DENIAL OF TEMPORARY LABOR CERTIFICATION;
TO DISMISS THE REQUEST FOR ADMINISTRATIVE REVIEW; AND
TO REMAND THE ADMINISTRATIVE FILE**

The above captioned case involves the labor certification for temporary and seasonal agricultural employment of nonimmigrant foreign workers (H-2A workers) under the Immigration and Nationality Act (INA), as amended, 8 USC 1101, et seq., and its implementing regulations at 20 CFR Part 655, Subpart B. The Employer filed a timely request for an expedited administrative review of the Certifying Officer's August 28, 2012, denial of its application for temporary labor certification issued pursuant to 20 CFR §655.164. Following a telephonic conference held on September 14, 2012, schedule dates were set for the Parties to file additional material for consideration as well as a date to file a written position statement with supporting brief. On September 17, 2012, the Employer filed notice that it "elects not to have a de novo hearing" on the issues involved. No other material was filed for consideration. On September 26, 2012, this Administrative Law Judge issued a Decision and Order - Reversing the Certifying Officer's Denial of Temporary Labor Certification upon administrative review of the appeals file.

At the close of business hours on September 26, 2012, the Certifying Officer's counsel filed a "Motion to Vacate the Decision and Order Reversing the Certifying Officer's Denial" and filed a "Motion to Reconsider the Decision and Order Reversing the Certifying Officer's Denial."

Attached were a copy of the September 20 and 26, 2012 filings with the Court by the Employer as well as e-mail correspondence exchanged by the Parties, and a copy of a September 24, 2012 e-mail sent to the Court's previous attorney-advisor who had been a point of contact within the Office of Administrative Law Judges.

Also on September 26, 2012, the Employer filed notice that it "resend [sic] the withdrawal notice to the Department of Labor (dated September 20, 2012) and to accept the decision of the Administrative Law Judge received on the 26th day of September, 2012..."

On September 27, 2012 a conference call was held with the Employer's representative and the Certifying Officer's counsel. The Parties indicated that they did not wish to submit additional material for consideration on the Motion to Vacate and that a decision could be made on the administrative file, including the documents filed by the Parties on September 26, 2012. The Parties represented that the Employer had filed two new applications with the Certifying Officer. The Employer indicated that the two new applications involved the same transportation of citrus for Sorrells Citrus, Inc., from the same citrus groves to the same processing plants but that the fixed-site citrus groves had been divided into two separate areas of intended employment and the position title was submitted as agricultural machine operator vice heavy equipment/tractor-trailer driver. The need for the individual driving the tractor-trailer transporting the citrus from the grove to the storage or market site being an employee of the farmer in order to be considered as being engaged in agricultural work off the farm, was addressed.

DISCUSSION

The Certifying Officer's counsel seeks to have the September 26, 2012 Decision and Order in this case vacated. He submits that the notice filed on September 20, 2012 by the Employer was a withdrawal of the pending case then before this Administrative Law Judge and "that DeSoto's action in seeking dismissal of its appeal left this Court with no jurisdiction to rule on DeSoto's appeal. While DeSoto has today rescinded the withdrawal of its application so that it may rely on this Court's decision ... it cannot do so. Once the Employer requested withdrawal of its appeal, the Court lost jurisdiction over the matter. DeSoto cannot reinstate that jurisdiction simply because it prefers the later outcome."

The provisions of 29 CFR Part 655, Subpart B sets forth the Federal implementing regulations of the labor certification process for temporary agricultural employment in the United States, that is employment of non-immigrant H-2A workers.¹ Actions which must be taken by the certifying officer upon denial of an Application for Temporary Employment Certification and how an employer may appeal the denial are set forth in 29 CFR §655.164. Actions required during an appeal of a denied Application for Temporary Employment Certification are set forth in 29 CFR §655.171. Permission for an employer to withdraw an Application for Temporary Employment Certification subsequent to the application being accepted by the National Processing Center, without further clarification, is provided by 29 CFR §655.172.²

¹ The latest version is set forth in the Federal Register at 75 FR 6884-6995 (Feb. 12, 2010).

² See also Department of Labor rule-making comments concerning 29 CFR §655.172 at 75 FR 6931 (Feb. 12, 2010).

Once an appeal by an employer of a denial of an Application for Temporary Employment Certification has been filed in a written request, by facsimile transmission or other means normally assuring next day delivery, with the Chief Administrative Law Judge (CALJ) of the Department of Labor, Office of Administrative Law Judges, the certifying officer must submit a copy of the Office of Foreign Labor Certification administrative file directly to the CALJ by means normally assuring next-day delivery. This is normally accomplished by submitting the administrative file in a physical CD format by mail or by submitting the administrative file electronically by placing the file in a designated electronic e-mail folder maintained at the Office of Administrative Law Judges for the sole purpose of accepting copies of such administrative files under 29 CFR §655.171. The CALJ then assigns the appeal to an Administrative Law Judge (ALJ). In an appeal where a request for administrative review applies, vice a de novo hearing, the presiding ALJ may affirm, reverse, or modify the underlying certifying officer's denial decision, or may remand the appeal back to the certifying officer for further action, 29 CFR §655.171(a). When a presiding ALJ has been notified by the contesting parties that an employer wishes to withdraw a pending appeal of a denial determination or wishes to withdraw the underlying Application for Temporary Employment Certification, the presiding ALJ reviews the written request to withdraw the application and normally issues an Order of Remand which ends the appeal process and returns the administrative file to the certifying officer for further actions as may be appropriate.

Neither the INA nor the Federal regulations at 29 CFR Part 655, Subpart B direct what steps must be taken to withdraw an Application for Temporary Employment Certification once the administrative file has been sent to the Office of Administrative Law Judges for an administrative review under 29 CFR §655.171(a) and jurisdiction over the application has passed to the Office of Administrative Law Judges.

The documents submitted for consideration indicate the following:

1. At 10:57 AM, Thursday, September 20, 2012 the Employer's designated agent sent an e-mail to "TLC Chicago – ETA SVC" to notify the Office of Foreign Labor Certification, Chicago National Processing Center that the H-2ALC Employer "has made the decision to withdraw the petition for 17 workers – Case Number 12215-35415. We therefore request to withdraw the petition ... [and request] that the Department of Labor return the bond that was sent to Chicago Office in connection with the petition."
2. Upon the September 21, 2012 inquiry by the Certifying Officer's counsel of record, the Employer's designated agent forwarded a copy of the September 20, 2012 e-mail to the Solicitor's counsel of record at 2:28PM, September 21, 2012 with the notation "I have attached a copy of the e-mail sent to DOL to withdraw our application and request the bond be sent back to DeSoto Fruit and Harvesting, Inc."
3. On September 21, 2012 the Certifying Officer issued a letter in Case Number 12215-35415 to the Employer's designated agent acknowledging receipt of her September 20, 2012 e-mail requesting withdrawal of the application and return of the surety bond and

stated “we are unable to grant your request to withdraw the application as it was issued a denial on August 28, 2012. Attached please find the surety bond as requested.”

4. At 9:17 AM, September 24, 2012 the Solicitor’s counsel of record sent an e-mail to A.M. Johnson – OALJ which attached the Employer’s September 20, 2012 e-mail requesting withdrawal and stated that “accordingly, the Certifying Officer requests that this case be dismissed as moot.”
5. On September 26, 2012, the Employer filed, by facsimile transmission, notice of the Employer’s decision to rescind the withdrawal notice to the Department of Labor dated September 20, 2012 and accept the decision of the Administrative Law Judge received on the 26th day of September 2012 for ... ETA Case #C-12215-35415.”

It is noted that the Parties were advised in the initial scheduling conference and in the September 14, 2012 Procedure and Schedule Order that the Parties could contact the Court’s Attorney-Advisor or Court Clerk if they needed assistance in filing documents exceeding 12 pages. The Court’s Attorney-Advisor at that time was A.M. Johnson, whose term of appointment expired prior to September 24, 2012. Neither Party was advised that Ms. Johnson had departed this office on September 21, 2012 and her Agency e-mail account had been closed.

After deliberation on the administrative file, this Administrative Law Judge finds that:

1. The Employer, DeSoto Fruit & Harvesting, Inc. filed a written Application for Temporary Labor Employment Certification in ETA Case #C-12215-35415 with the Chicago National Processing Center on August 2, 2012.
2. The Certifying Officer denied the Application for Temporary Labor Employment Certification on August 28, 2012.
3. The Employer filed a written appeal of the denial on September 4, 2012.
4. The Employer filed a written request with the Department of Labor to withdraw its Application for Temporary Labor Employment Certification and return its surety bond on September 20, 2012.
5. The Certifying Officer properly denied the request to withdraw the Application for Temporary Labor Employment Certification on September 21, 2012, since jurisdiction over the application was with the Office of Administrative Law Judges.
6. The Certifying Officer properly returned the Employer’s surety bond on September 21, 2012.

7. The Parties were in mutual agreement no later than September 21, 2012 when the surety bond was returned that the Employer had requested that the Application for Temporary Labor Employment Certification in ETA Case #C-12215-35415 was being withdrawn by the Employer.
8. Service of a written request to withdraw an Application for Temporary Labor Employment Certification filed with an office of the Department of Labor is an effective filing before the office with jurisdiction over the pending application at the time of filing the request to withdraw, even if it is filed in the incorrect office.
9. The Solicitor's counsel made a good faith effort to notify this Court of the Employer's filing of the written withdrawal in the wrong office.
10. Through no culpable negligence of either Party, this Administrative Law Judge was not informed that the Employer had filed a written request to withdraw the Application for Temporary Labor Employment Certification in ETA Case #C-122215-35415 and have the surety bond returned with the Chicago National Processing Center, and that the surety bond had been returned, prior to issuance of the September 26, 2012 Decision and Order.
11. Upon the filing of a proper written request to withdraw an Application for Temporary Labor Employment Certification pursuant to 29 CFR §655.172(b), the steps to effectuate the withdrawal are administrative in nature.
12. An error at law was made when the case pending before the Office of Administrative Law Judges was not promptly dismissed and remanded to the Certifying Officer following Employer's filing of the written request to withdraw the Application for Temporary Labor Employment Certification in ETA Case #C-122215-35415 pursuant to 29 CFR §655.172(b).
13. An error at law was made when a Decision and Order was issued on September 26, 2012 pursuant to 29 CFR §655.171(a) after a proper written request to withdraw the relevant and material the Application for Temporary Labor Employment Certification had been filed with the Department of Labor.
14. The September 26, 2012 effort by the Employer to "rescind" their September 20, 2012 withdrawal of the Application for Temporary Labor Employment Certification in ETA Case #C-122215-35415 after issuance of the August 26, 2012 Decision and Order is not a legal action and is of no consequence.

Accordingly, the Decision and Order issued on September 26, 2012 must be set-aside and the filed remanded to the Certifying Officer. In view of the requirement to set-aside the September 26, 2012 Decision and Order, the Motion for Reconsideration is moot.

ORDER

It is hereby **ORDERED** that:

1. The Decision and Order – Reversing Certifying Officer’s Denial of Temporary Labor Certification issued on September 26, 2012 is **SET-ASIDE**;
2. The request for administrative review of the Certifying Officer’s August 28, 2012 denial determination is **DISMISSED**; and,
3. The administrative file is **REMANDED** to the Certifying Officer for appropriate action.

ALAN L. BERGSTROM
Administrative Law Judge