U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 September 2012

OALJ Case No.: 2012-TLC-00095

ETA Case No.: C-12228-35463

In the Matter of

T.A.F. SHEARING CO./ALEJANDRO R. COLQUI,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On August 31, 2012, T.A.F. Shearing Company ("Employer") filed a request for review of the Certifying Officer's determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. On September 10, 2012, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer ("the CO"). In administrative review cases, the administrative law judge (ALJ) has five business days after receiving the file to issue a decision on the basis of the written record and the briefs submitted. 20 C.F.R. § 655.171(a).[1] The ALJ may not consider any new evidence on appeal if the employer has requested administrative review. The standard of review is whether the CO's denial was arbitrary and capricious.

[1] In this case, the Solicitor did not receive the Scheduling Order, which was faxed on September 10, 2012, until September 17, 2012, the date the Decision and Order was to be issued. However, the parties agreed that the Solicitor could submit his brief by the close of business September 18, 2012, and the decision would be issued on September 19, 2012.

STATEMENT OF THE CASE

On August 15, 2012, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification for eight "Farmworkers: Farm & Ranch Animals." AF 91-99.[2] Employer stated that it had a temporary seasonal need for the farm workers from October 1, 2012 to July 15, 2013. AF 91.

On August 21, 2012, the CO issued a Notice of Deficiency ("NOD"), finding that Employer failed to provide the necessary surety bond as required by 29 C.F.R. § 501.9.[3] AF 68-69. The CO noted that the surety bond the Employer provided for this application was the same one it had submitted with an earlier application, C-11262-30076. The CO asserted that according to the regulations, an original, notarized security bond must be submitted for each application for temporary labor certification submitted. AF 69.

On August 22, 2012, Employer responded to the NOD. AF 27-40. Employer argued that the surety bond it submitted with its application was active and unexpired, demonstrated its ability to discharge its financial obligations under the H-2A program, and met the requirements of 29 C.F.R. § 501.9 . AF 28.

On August 28, 2012, the CO issued his denial determination, finding that Employer failed to satisfy the regulatory requirements because it provided a continuation certificate of a surety bond originally submitted with an earlier application, and did not submit a unique bond with its present application. AF 8-23. The CO rejected Employer's argument that the duplicate original submitted satisfies the regulatory requirements, because the regulatory intent was to require a unique bond on a per-employer, rather than per-application basis. AF 12. The CO cited a February 2012 FAQ release by the Department of Labor Employment and Training Administration, which states that a new and separate bond is required for each application for temporary labor certification.[4] Moreover, the CO cited 29 C.F.R. § 501.9(b), arguing "that a

[2] Citations to the 140-page Administrative File will be abbreviated "AF" followed by the page number.
[3] The CO also found ten other deficiencies, which are not at issue on appeal.
[4] OFLC Frequently Asked Questions and Answers, H-2A Temporary Labor Certification Program, "H-2A Labor Contractors," February 29, 2012, available at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2alabor5; accessed Sept. 17, 2012. *See infra* pages 5-6 for full text of the FAQ.

bond provides benefits when there is a final decision finding a violation related to *the labor certification* the bond is intended to cover," rather than the per-employer coverage Employer urged (emphasis added). AF 12. "At no point is there even the implication that a single bond could be applied to more than one temporary labor certification," and

> the only way to ensure that adequate funds remain available throughout the validity period of each bond is to limit their applicability to a single labor certification. To associate a bond with multiple temporary labor certifications creates the possibility that the bond could be liquidated by claims associated with an initial temporary labor certification which would leave no recourse for workers employed pursuant to later temporary labor certifications.

AF 12-13.

On September 4, 2012, Employer appealed the CO's denial and requested administrative review. In its brief, the CO argues the denial was correct because Employer's "duplicate original" surety bond covered its previous application, C-11262-30076, which was certified for the dates of need 10/01/2011-6/30/2012, and is not an "original, notarized security bond" for the present application, C-12228-35463, as required by the regulations. The CO also argues Employer was on notice of the requirement for a separate security bond for each application, because of the ETA FAQ issued on February 29, 2012 which stated the same.

Employer argues that the answer to the February 2012 FAQ is contrary to the intent of the regulation and to a response given by the Assistant Secretary of the ETA to Senator John Barrasso in March, 2012. Employer also argues that the demands made on employers regarding bonds do not accomplish the stated intent of the regulations and create an impractical financial burden on employers. Employer quoted the relevant Notice of Proposed Rulemaking: "[t]he Final Rule requires that an H-2ALC submit the original surety bond (and any extensions thereof) to the Department with the Application. This change is not expected to place any additional burden on an H-2ALC applicant."[5] Employer's point is that requiring a separate surety bond for each application *is* significantly burdensome, and therefore must not be the intent of the regulations.[6]

[5] Employer's Brief at page 1.

[6] I note again that I because Employer requested Administrative Review, I was limited to consideration of the evidence that was before the CO when he made his determination. Employer's quote of the NPRM is merely illustrative of the crux of its argument, that the bond requirements are too onerous. As a reviewing authority, my determination is limited to deciding if the CO acted arbitrarily when making his decision.

Finally, Employer argues that the surety bond it submitted with application C-12228-35453 meets the regulatory requirements, that an additional bond would not accomplish the regulatory intent, and that the regulation be revisited.

DISCUSSION

The Immigration and Nationality Act (INA) and the H-2A program require that there be no U.S. workers able, willing, and qualified to perform the temporary agricultural jobs for which an employer desires to hire H-2A workers. It also requires that the employment of foreign workers not adversely affect the wages and working conditions of similarly-employed U.S. workers. 8 U.S.C. § 1188(a); 20 C.F.R. § 655.100. One of the regulatory requirements developed in furtherance of these goals is that the employer must provide proof of its ability to meet the financial obligations of the H-2A program. 20 C.F.R. § 655.132(b)(3). To do so, the employer must submit, along with its application,

> [p]roof of its ability to discharge financial obligations under the H-2A program by including with the Application for Temporary Employment Certification the original surety bond as required by 29 C.F.R. 501.9. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond (as calculated pursuant to 29 C.F.R. 501.9) and any identifying designation used by the surety for the bond.

20 C.F.R. § 655.132(b)(3). 29 C.F.R. Section 501.9 provides:

> (a) Every H–2ALC must obtain a surety bond demonstrating its ability to discharge financial obligations under the H–2A program. The original bond instrument issued by the surety must be submitted with the *Application for Temporary Employment Certification.* At a minimum, the bond instrument must identify the name, address, phone number, and contact person for the surety, and specify the amount of the bond (as required in paragraph (c) of this section), the date of issuance and expiration and any identifying designation used by the surety for the bond.
>
> (b) The bond must be payable to the Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue, NW., Room S–3502, Washington, DC 20210. The bond must obligate the surety to pay any sums to the WHD Administrator for wages and benefits owed to an H–2A worker or to a worker engaged in corresponding employment, or to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation or violations of this part or 20 CFR part 655, subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. **The bond must be written to cover liability incurred during the term of the period listed in the**

Application for Temporary Employment Certification for labor certification made by an H–2ALC, and shall be amended to cover any extensions of the labor certification requested by an H–2ALC.

(c) The bond must be in the amount of $5,000 for a labor certification for which an H–2ALC will employ fewer than 25 workers; $10,000 for a labor certification for which an H–2ALC will employ 25 to 49 workers; $20,000 for a labor certification for which an H–2ALC will employ 50 to 74 workers; $50,000 for a labor certification for which an H–2ALC will employ 75 to 99 workers; and $75,000 for a labor certification for which an H–2ALC will employ 100 or more workers. The WHD Administrator may require that an H–2ALC obtain a bond with a higher face value amount after notice and opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

(d) The bond must remain in force for a period of no less than 2 years from the date on which the labor certification expires. If the WHD has commenced any enforcement action under the regulations in this part against an H–2ALC employer or any successor in interest by that date, the bond shall remain in force until the conclusion of such action and any related appeal or related litigation. Surety bonds may not be canceled or terminated unless 45 days' notice is provided by the surety in writing to the WHD Administrator at the address set forth in paragraph (b) of this section.

29 C.F.R. § 501.9 (emphasis added). The requirement that the employer provide an original surety bond, rather than just a copy, is a new requirement that went into effect March 15, 2010. Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States,* 75 Fed. Reg. 6884, 6941 (Feb. 12, 2010).

The FAQ section of the Department of Labor Employment and Training Administration website provides the following guidance regarding surety bonds for H-2A employer applicants:

1. **May an H-2A Labor Contractor use the same surety bond to support *Applications for Temporary Employment Certification* in different years?**

No. A new, separate bond is required for each *Application for Temporary Employment Certification.*

The regulations governing the H-2A program require an H-2A Labor Contractor (H-2ALC) to submit an original surety bond, i.e. one with a raised seal or other indicator evidencing it is an original, for each *Application for Temporary Employment Certification* filed with the Department.

Submitting a copy of a surety bond or a surety bond without an original indicator is not sufficient to satisfy the regulations. Also, submitting a rider or evidence of a "continuous" bond, even if an original document, is not sufficient to satisfy the regulations. Such documents provide evidence of an existing bond rather than a new bond specific to the application. The requirement of a new original surety bond to support each *Application*

> *for Temporary Labor Certification* allows the Chicago National Processing Center (NPC) to ensure that the amount of the bond coverage appropriately corresponds to the number of workers requested on the employer's ETA Form 9142. Additionally, in the event of a violation, a separate bond for each application is critical to the effective enforcement of the H-2ALC's wage obligations against the surety that agreed to be legally responsible.
>
> Each surety bond must comply with all requirements outlined in the regulations. These requirements include the bond: (1) identifying the issuer, the name, address, phone number, and contact person for the surety; (2) specifying the amount of the bond, the date of issuance and expiration and any identifying designation used by the surety for the bond; (3) being payable to the Administrator, Wage and Hour Division, United States Department of Labor; and (4) remaining in force for a period of no less than 2 years from the date on which the labor certification expires. Additional information about surety bonds may be found in other Frequently Asked Questions (FAQs) posted here.
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> Important Reminder: The employer must submit the original surety bond to the Chicago NPC at the time of filing its *Application for Temporary Employment Certification.*[7]

In *In the Matter of C.N.A. Trucking, Inc.*, the Court affirmed the CO's denial of an employer's application when it sent in a copy of the surety bond it had submitted for a prior application. 2010-TLC-00135 (Sept. 13, 2010). "[T]he regulation is specific that an original bond must be submitted for the application for temporary employment certification. Applications are not processed as a batch, but rather individually, so the Employer cannot comply with the regulations by submitting a single document to cover multiple applications." *Id*. at p. 3. In this case, Employer did not submit an original bond with its application for temporary employment certification, and instead relied on a bond it had submitted with a prior application. Though the Employer may have valid questions about feasibility and risk to employers, those are properly raised at the rule making and legislative stages, rather than during the administrative adjudicatory process. There is ample evidence in the record to support the CO's denial determination.

[7] OFLC Frequently Asked Questions and Answers, H-2A Temporary Labor Certification Program, "H-2A Labor Contractors," February 29, 2012, available at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2alabor5; accessed Sept. 17, 2012.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED.**

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
Administrative Law Judge