U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 August 2013

BALCA Case Nos.: 2013-TLC-00048, 2013-TLC-00049
ETA Case Nos.: H-300-13212-221867, H-300-13212-286362

In the matter of:
LEVIN SAVOY FARM,
Employer

And

WOOD TRUCKING, LLC,
Employer

Certifying Officer: Chicago National Processing Center

ORDER OF REMAND

This proceeding 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), and the associated regulations promulgated by the United States Department of Labor ("the Department") at 20 C.F.R. Part 655.

The H–2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the Department. 8 U.S.C. 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

On July 15, 2013, Cajun Visa Company, Inc. ("Cajun") submitted H-2A applications on behalf of Wood Trucking, LLC and Levin Savoy Farm. On August 5, 2013, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD") in accordance with 20 C.F.R. § 655.141 stating that the CO had reason to believe that Cajun, the agent for these two employers, is the alter ego of Linda White and Associates (LWA), a corporation that has been debarred from participation in the H-2A program. AF 81-86. The CO stated that Cajun could submit a modified application, and explained that in order to rebut the evidence suggesting that Cajun is an alter ego of Linda White and Associates, Cajun must provide answers to fifteen questions listed in the NOD. Id.

In a written response to the NOD, dated August 5, 2013, Cajun requested an expedited administrative review of the NOD or a de novo hearing before an Administrative Law Judge. Attached to Cajun's letter are responses, titled "Modification Responses," with answers to each

of the questions listed in the NOD as well as documentation. These "Modification Responses" appear to be Cajun's modified application as requested by the CO.

According to the Office of the Solicitor, Cajun's appeal has been treated as a request for administrative review. The Office of the Solicitor argues that Cajun's NOD responses and documentation are new evidence; therefore, should not be considered as the regulations state that where an appeal is filed for review based upon the record, the ALJ's review is limited to the appeal file, the legal briefs submitted by the parties, and the request for review itself, which may not include new evidence. See SOL Brief at 1; 20 C.F.R. § 655.171.

I note that Cajun is pro se. It may have been unclear to Cajun that the NOD laid out two different options: submit a modified application to the CO *or* request an expedited administrative review of the NOD or a de novo hearing of the NOD before an administrative law judge. Cajun submitted a modified application but also requested administrative review or a de novo hearing before the CO had a chance to review the modified application.

Therefore, Cajun's Modification Responses and accompanying documentation shall be treated as a modification application pursuant to § 655.142, and shall be reviewed by the CO. If the CO issues a denial of the modified application, Cajun may request an administrative review or a de novo hearing before an administrative law judge of the CO's decision in accordance with § 655.171.

IT IS RECOMMENDED THAT CAJUN OBTAIN A LAWYER.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for consideration of Cajun's modified application.

Digitally signed by Daniel Solomon
DN: CN=Daniel Solomon, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE