



Issue Date: 29 November 2012

OALJ Case No: 2013-TLC-00009
ETA Case No: C-12283-35732

In the Matter of:

LORENZO GABRIEL MARQUEZ,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

**DECISION AND ORDER -- AFFIRMING CERTIFYING
OFFICER'S DENIAL OF TEMPORARY LABOR CERTIFICATION**

The above-captioned case involves the labor certification of nonimmigrant foreign workers (H-2A workers) for temporary and seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101, *et seq.*, and its implementing regulations at 20 C.F.R. Part 655, Subpart B.

In this case, Lorenzo Gabriel Marquez (“the Employer”) has filed a timely request for expedited administrative review of the Certifying Officer’s November 9, 2012 denial of temporary labor certification. In expedited administrative review cases, the administrative law judge has five working days after receiving the Administrative File to issue a decision on the basis of the written record after due consideration of any written submissions not including new evidence. 20 C.F.R. § 655.171(a) (2010). The Administrative File for this case was received on November 26, 2013. The parties were given until November 28 to file appeal briefs. The Department of Labor Office of the Solicitor filed a brief on behalf of the CO on November 28, 2013. No brief was received from the Employer.

STATEMENT OF THE CASE

On October 9, 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 workers to perform “General Farm Labor.” AF¹ at 38

On October 15, 2012, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) finding that the Employer’s application failed to meet the criteria for acceptance for six reasons. AF at 21-27. One of the issues the CO noted was that it was unclear whether the Employer was

¹ Citations to the Administrative File in this case will be abbreviated “AF” followed by the page number(s).

a fixed-site employer, as indicated in its filings, or was actually an H-2A labor contractor (“H-2ALC”) such as would be compelled to satisfy additional filing requirements pursuant to 20 C.F.R. § 655.132. AF at 24-25. Specifically, the CO observed that the Employer had listed its address as 1223 Santa Catalina Street, Deming, New Mexico on the application for temporary labor certification (ETA Form 9142), but this address did not match the worksite location described on the application – “Take Highway 11, 5 miles South then 2 miles West.” AF at 39, 41. In view of this discrepancy, the CO instructed the Employer either to comply with the filing requirements for an H-2A labor contractor or to verify its status as a fixed-site employer by providing a written statement on both its application and its Agricultural and Food Processing Clearance Order (ETA Form 790) indicating that it owned or operated all the listed worksite locations. AF at 25.

On October 22, 2012, the Employer submitted a response to the NOD that cured five of the stated deficiencies. AF at 16-19. With respect to the H-2ALC issue, the Employer noted that the laborers requested through the H-2A program would work only for the Employer’s company and that there was “no agreement with third parties as labor contractors.” AF at 17. The Employer characterized itself as a small company “that handles sprinklers and irrigation for farm fields” in the area of Deming, New Mexico, and noted that it controls its own worksite but does not own the field where the requested H-2A laborers would be working. AF at 17. In a further correspondence with the CO transmitted October 25, 2012, the Employer stated that it operates completely independently from the owner of the real estate and takes full charge of the direction of its daily operations and workers. AF at 13.

On November 9, 2012, the CO denied temporary labor certification on grounds that the Employer had not adequately verified its purported status as a fixed-site employer. AF at 5-9. The CO explained in the denial letter that despite being given several opportunities to do so, the Employer had not disclosed who owns the agricultural worksite listed on the application for temporary labor certification, nor had the Employer provided a detailed explanation of the extent to which it operates or controls the agricultural worksite. AF at 8-9. Without this information, the Employer could not meet the requirements to be considered a fixed-site employer and thus the CO characterized it as an H-2ALC. AF at 7. Because the Employer had not satisfied the additional filing requirements imposed upon H-2ALCs pursuant to 20 C.F.R. § 655.132, the CO denied the application. AF at 7-9.

On November 16, 2012, the Employer appealed the denial. AF at 2-3. The Employer noted it has an oral agreement with the owner of the agricultural worksite, and reiterated its previous representations that it controls the worksite because it operates completely independently from the real estate owner and takes full charge of directing its own daily operations and workers. AF at 2. The Employer also stated it has already explained its mode of operation to the Department of Labor in prior successful applications for temporary labor certification. AF at 3.

DISCUSSION

I. The Employer does not meet the requirements to be considered a fixed-site employer.

Under the federal regulations applicable to the temporary employment of non-immigrant agricultural workers (H-2A workers), a “fixed-site employer” is an individual or legal entity engaged in agriculture who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, employs, solicits, hires, houses or transports H-2A workers as incident to or in conjunction with its own agricultural operation. 20 C.F.R. § 655.103(b) (2010); *Scott Aviation, Inc.*, 2011-TLC-00409 (June 7, 2011). An H-2A labor contractor (“H-2ALC”) is any individual or a legal entity who is not a fixed-site employer or employee or an agricultural association or employee, but who recruits, solicits, hires, employs, furnishes, houses, or transports H-2A workers. 20 C.F.R. § 655.103(b). The definition of an H-2ALC “broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer.” Employment and Training Administration, U. S. Department of Labor, comments to Final Rule implementing 20 C.F.R. Part 655, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6886 (Feb. 12, 2010). For example, in *Scott Aviation*, the judge held that an employer who “does not operate a farm or other fixed-site location, but rather operates a crop dusting business to service other farms in the area” does not meet the regulatory definition of fixed-site employer and therefore must be categorized as an H-2A labor contractor. See *Scott Aviation, supra*, slip op. at 2-3.

In this case, the Employer does not satisfy the definition of a fixed-site employer under 20 C.F.R. § 655.103(b). The Employer states that the worksite listed on its H-2A application is a field owned by someone else, but does not identify the owner. AF at 17. Nor does the Employer provide a lease contract or any other evidence that could demonstrate the extent and nature of the Employer’s control over the worksite, aside from a bare assertion that the Employer directs and controls its own employees and worksite independently of the worksite owner. AF at 13, 17. Based on the Employer’s description of its agricultural work as “hand[ling] sprinklers and irrigation for farm fields,” AF at 17, it appears that the Employer does not operate a farm, or the field listed on the H-2A application, or any other fixed-site location, but merely provides services to fixed-site farmers. Because no evidence exists on the record to show the employer owns or operates a fixed-site location, the Employer does not meet the requirements to be considered a fixed-site employer and thus is properly classified as an H-2A labor contractor. See *Scott Aviation, supra*.

II. The Employer has not satisfied the filing requirements for H-2A labor contractors.

On top of the general filing requirements that the federal regulations impose upon all applicants for temporary labor certification under the H-2A program, employers classified as H-2ALCs must satisfy additional requirements set forth at 20 C.F.R. § 655.132. Under this provision, the H-2ALC must include with its application the name and location of the fixed-site agricultural business to which the H-2ALC expects to provide workers; the expected beginning and ending dates it will provide the workers; a description of the crops and activities the workers are expected to perform at the agricultural worksite; copies of fully-executed work contracts with the fixed-site business; and, where the fixed-site business will be providing housing or transportation to workers, proof that such housing or transportation complies with applicable standards. 20 C.F.R. § 655.132(b)(1), (4), (5) (2010). Additionally, the H-2ALC must furnish a copy of its

Farm Labor Contractor Certification of Registration, if required under the Migrant and Seasonal Agricultural Worker Protection Act, and an original surety bond ensuring its ability to discharge financial obligations under the H-2A program. *Id.* § 655.132(b)(2), (3). The applicant bears the burden of proving compliance with all applicable regulatory requirements in order to achieve certification. 8 U.S.C. § 1361 (2006).

In this case, the Employer has not satisfied the additional filing requirements imposed on H-2ALCs under 20 C.F.R. § 655.132. The Employer has indicated the requested H-2A workers would be providing irrigation services at a field owned by another entity. However, the Employer has not provided the name and location of the fixed-site agricultural business that owns the worksite, copies of work contracts with the fixed-site business, or any other information at all about the worksite owner, despite requests from the CO to provide more information. The Employer also has failed to include with its application proof of a surety bond as required by 20 C.F.R. § 655.132(b)(3) or of FLC certification as required by § 655.132(b)(2). Thus, the Employer did not meet its burden of proving compliance with all applicable regulatory requirements for certification under the H-2A program.

After consideration of all the evidence of record, I find that the CO's denial of the Employer's application for temporary labor certification was proper.

ORDER

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

ALAN L. BERGSTROM
Administrative Law Judge

ALB/ENK/jcb
Newport News, Virginia