

U.S. Department of Labor

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Issue Date: 14 June 2013

OALJ CASE NO.: 2013-TLC-00036

In the Matter of:

RODRIGO GUTIERREZ-TAPIA,
Employer

Certifying Officer: Chicago Processing Center

Before: **LARRY W. PRICE**
Administrative Law Judge

ORDER DISMISSING APPEAL

Employer filed an application for a Temporary Labor Certification (TLC), which was fully certified on May 8, 2013. Thereafter, Employer sought to amend the certification to add an additional worksite. The CO rejected the request on the grounds that post-certification changes are not authorized. Employer appealed and requested a *de novo* hearing, stating the CO's decision was unreasonable, capricious, and not supported by existing H-2A regulations and case law. On June 10, 2011, the Solicitor filed a Motion to Dismiss this case, arguing that 1) the relief sought by Employer was not contemplated by the Regulations, and 2) that the regulations do not "contain a generic right for employers to appeal any action of the CO to the OALJ."

DISCUSSION

20 C.F.R. §655.171 provides for administrative review or *de novo* hearing before an ALJ "where authorized in this subpart." Employer sought what they described as a "post-certification modification" by adding an additional work site location. However, this type of modification does not fit into the existing regulations.

Section 655.142 sets out the requirements for submission of a modified application, and states that the "Application for Temporary Employment Certification will be deemed abandoned if the employer does not submit a modified Application for Temporary Employment Certification within 12 calendar days after the notice of deficiency was issued." §655.142(a). Thus, the regulation contemplates a modification will occur *after* a notice of deficiency has been issued. Here, no notice of deficiency was issued as the application was fully certified. The rules governing the submission of modified applications do not discuss any type of post-certification modification, only those modifications made after the original application was determined deficient. Accordingly, I find no authority in the regulations authorizing an Employer to file a post-certification modification, and no authority for the CO to grant such.

Likewise, Employer's request may not be authorized under §655.145, which governs amendments to applications and allows certain changes to be made. Subsection (a) allows an amendment to increase the number of workers requested before the certification determination. §655.145(a). This type of amendment to an application "may be amended at any time *before the CO's certification determination.*" Subsection (b) allows minor changes to the period of employment to be made, should an employer meet certain requirements, such as demonstrating "that the change to the period of employment could not have been foreseen." §655.145(b). Neither of these two allowable amendments contemplates adding an additional worksite, as Employer seeks to do, and the regulation does not discuss the right to appeal. Thus, Employer's appeal is not authorized under the regulations governing amendments to applications.

Section 655.170 allows an employer to apply for extensions of the period of employment. While this section provides for an appeal, it is not applicable to the facts of this case, as it is not what Employer is seeking.

While §655.171 procedurally governs appeals to the OALJ following the CO's determination, the regulations are very specific on which actions are appealable. For instance, an employer may appeal from the Notice of Deficiency, and may also appeal from a denial of the Modified Application for Temporary Employment Certification.¹ §§655.141-42. To the contrary, an appeal is not contemplated for amendments to applications for temporary employment certification, §655.145, or for the request for a short-term extension found in §655.170(a). However, an employer seeking a long-term extension is given the right to appeal a denial of a request for an extension by following the procedures found in §655.171. §655.170(b). In short, the regulations provide procedures for appealing determinations of the CO, and specifically will include in the regulation whether an action by the CO is appealable. I find that the type of post-certification modification Employer seeks is not found in the regulations. Without any mention of this type of a modification in the regulations, there is no right to appeal.

Employer argues that in its H-2A Certification Letter dated May 8, 2013, the certifying officer stated "employers may request to amend H-2A applications in writing [and the Chicago National Processing Center] must approve in advance changes you may need to the period of employment, number of workers requested, or other minor modifications contained in your application." Employer argues it is "disingenuous" for the CO to argue that the sought modification is not authorized by the H-2A regulations. "It is widely known that the Chicago National Processing Center routinely approves post-certification changes to H-2A job orders and labor applications." Even if true that the Chicago National Processing Center routinely approves post-certification changes, the regulations do not authorize an appeal from the denial of such a post-certification change.

¹ Remember, the right to appeal from this modified application is not post-certification, but after a notice of deficiency was issued, unlike what the Employer seeks to do in the case at hand.

Based on the foregoing, the Solicitor's Motion to Dismiss is **GRANTED**.

So ORDERED.

LARRY W. PRICE
Administrative Law Judge