U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 January 2023

BALCA CASE NO.: 2023-TLC-00012

ETA Case No.: H-300-22210-385956

In the Matter of:

AXL K TRUCKING, LLC,
Employer.

DECISION AND ORDER AFFIRMING THE DECISION OF THE CERTIFYING OFFICER

This matter arises under the labor certification program for temporary agricultural labor or services in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*., and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. This program, commonly referred to as the H-2A program, allows employers to hire foreign workers to perform agricultural labor in the United States on a temporary basis.

AXL K Trucking, LLC ("Employer" or "AXL") applied for authorization to hire four temporary workers under the H-2A program. The Certifying Officer in the Office of Foreign Labor Certification ("OFLC") denied the application on December 5, 2022. Employer appealed and requested "reconsideration" of the decision. Employer did not request a hearing. Accordingly, the undersigned has conducted an administrative review of this matter pursuant to 20 C.F.R. § 655.171(a).[1] Upon a review of the record and the relevant legal authority, the undersigned **AFFIRMS** the determination of the Certifying Officer.

I. Procedural and Factual Background

AXL is a Texas based company. (Administrative Record ("AF") at 38). On September 23, 2022, Employer submitted an application for four Agricultural Equipment Operators. (AF at 46.) The job duties for the workers were "Managing

[1] For applications filed after November 14, 2022, the new regulations apply. Employer filed its application on September 23, 2022. Thus, the prior regulations apply to this matter.

the rate of cotton coming into the gin, cotton harvesting, general maintenance, and quality of the cotton class. Service and repair of the cotton gin." (AF at 46.) The stated temporary need was seasonal, with a beginning date of September 27, 2022, and an end date of May 26, 2023. (AF at 38, 46.) The offered wage was $13.88 an hour. (AF at 46.) The job required no education, no experience, and no training. (AF at 47.) But the job did have a lifting requirement of fifty pounds, and it did require the ability to drive. (*Id.*)

OFLC issued a Notice of Deficiency on September 29, 2022. (AF at 28.) The Notice of Deficiency set forth two deficiencies. (AF at 30-31.) Deficiency One noted that the start date for the temporary need was four days after the application was submitted, which would not provide enough time for review, and OFLC cannot certify a past due start date of need. (AF at 30.) Accordingly, OFLC indicated that Employer would need to provide written permission to amend the start date. (*Id.*)

Deficiency Two noted that OFLC was unable to verify the Federal Employer Identification Number. (AF at 30-31.) The Notice of Deficiency stated that Employer must provide a valid number, which is specified on a document from an official source. (AF at 31.)

In response to the Notice of Deficiency, Employer submitted a written authorization to amend the application start date. (AF at 25.) In addition, Employer submitted a one-page document from the IRS noting that an Employer Identification Number had been assigned. (AF at 26.) A document from the IRS contained the specific number. (*Id.*)

OFLC then issued a Notice of Acceptance Letter on October 5, 2022. (AF at 20.) The Notice of Acceptance Letter required the submission of additional documents. (AF at 22.)

Employer subsequently submitted a recruitment report. (AF 14-18.) Then, on November 16, 2022, the OFLC issued a minor deficiency email noting that Employer had not provided the required documentation to the Texas SWA. (AF at 12.) The email noted that final determination was pending Employer's submission of its "TDHCA migrant licensing documentation to the Texas SWA." (*Id.*)

The Certifying Officer then denied the application on December 5, 2022. (AF 7-10.) The Denial Letter stated:

> On October 6, 2022, the Chicago National Processing Center (Chicago NPC) was informed by the Texas SWA that the employer failed to submit the required Texas Department of Housing and Community Affairs (TDHCA) migrant licensing documentation which is required in order for the it to approve the employer's housing. On October 12, 2022

> and October 28, 2022, the Chicago NPC contacted the SWA requesting the status of the employer's housing. On November 8, 2022, the Texas SWA responded to the Chicago NPC's request for an update stating, "To date, the SWA hasn't received any documentation pertaining to the TDHCA license from the employer. I checked the active license database on TDHCA's website and the employer's name isn't listed on it." On November 14, 2022, the Chicago NPC sent an email to the employer via the Foreign Labor Application Gateway (FLAG) system encouraging the employer to contact the Texas SWA for instructions as to how the required documentation should be submitted. Subsequently, a follow-up email was sent to the employer and the Texas SWA on November 16, 2022, via the TLC.Chicago@dol.gov SWA requesting the employer to submit the TDHCA required documentation or withdraw its application. On November 23, 2022, the Chicago NPC made a final inquiry to the SWA requesting the required information. To date, there has been no response from the SWA or the employer.

(AF at 9-10.) As a result of the failure to comply with the requirements of 20 C.F.R. § 655.122(d)(1) and Employer's failure to submit the TDHCA migrant licensing documentation to the Texas SWA, the Certifying Officer denied the application. (AF at 10.)

In response to the denial, Employer sought reconsideration of the decision by filing an appeal with BALCA. In its appeal, Employer submits an email from the Compliance Program Administrator at the Texas Department of Housing and Community Affairs, which states that as of November 30, 2022, no TDHCA license had been issued, because the application was still pending and incomplete. (AF at 3.)

II. Legal Standard

An employer may request an administrative review or a *de novo* hearing before an administrative law judge. 20 C.F.R. § 655.171. Regardless of the method of review sought by an employer, an administrative law judge is limited to affirming, reversing, or modifying the decision of the certifying officer, or remanding the matter to the certifying officer for further action. 20 C.F.R. §§ 655.171(a), (b)(2). The administrative law judge must specify the reasons for his or her determination in a written decision. *Id.* The regulations also require that when a matter is decided by administrative review, the administrative law judge must issue the decision within five business days of receipt of the administrative file. 20 C.F.R. § 655.171(a).

III. Analysis

The H-2A program allows an employer to temporarily bring nonimmigrant workers into the United States to perform "agricultural labor or services, as defined by the Secretary of Labor. . . . ." 8 U.S.C. § 1101(a)(15)(H); *see also Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 382 (D.C. Cir. 2018). One of the fundamental purposes of the H-2A program is to provide employers in the United States with temporary, foreign agricultural laborers where the employer can demonstrate that there are not sufficient U.S. workers able to perform the work needed. 20 C.F.R. § 655.103(a); *Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 980 (D.C. Cir. 2021); *Mendoza v. Perez*, 754 F.3d 1002, 1007 (D.C. Cir. 2014). To qualify for the H-2A program, the employer must show that bringing in the requested number of foreign workers to perform the work will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.103(a); *Overdevest Nurseries*, 2 F.4th at 980.

An employer seeking certification for workers under the H-2A program must establish that the need for agricultural labor or services is of a temporary or seasonal basis. 20 C.F.R. § 655.161(a); *Hispanic Affairs Project*, 901 F.3d at 382 ("By law, H-2A visas may issue only if the employer's need for the worker is temporary or seasonal."). The regulations define both temporary and seasonal. 20 C.F.R. § 655.103(d). Section 655.103(d) provides:

> Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

Id.

Here, the Certifying Officer denied the application not because if failed to meet the requirements of seasonal or temporary need but because Employer failed to submit the required licensing documentation to the Texas Department of Housing and Community Affairs. Pursuant to 20 C.F.R. § 122(d)(1), an employer is obligated to provide housing at no cost to an H-2A worker who is not able to return to his or her residence within the same day. The regulations provide requirements for Employer-provided housing and rental and public accommodations. 20 C.F.R. § 122(d)(1)(i)-(ii).

As Employer acknowledges in its appeal, it does not yet have its TDHCA migrant licensing documentation. (AF at 1.) From the correspondence submitted by Employer, the mobile home offered as housing on the application will have to receive a current inspection prior to acceptance of the application by Texas SWA.

(AF at 3, 47.) Thus, it is clear from the record before the undersigned that the Certifying Officer did not err in denying the application. OFLC informed Employer that "Final determination [was] pending submission of the employer's TDHCA migrant licensing documentation to the Texas SWA." (AF at 12.) Employer failed to timely submit the required documentation and complete it application. The Certifying Officer did not err in denying the application.

IV. Conclusion

The undersigned **AFFIRMS** the determination of the Certifying Officer.

SO ORDERED.

STEWART F. ALFORD
Administrative Law Judge