

UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, DC

Issue Date: 13 April 2023

BALCA Case No.: 2023-TLC-00033
ETA Case No.: H-300-22363-664908

In the Matter of:

CENTRAL FRUIT HARVESTING, LLC,
Employer.

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

Procedural History

This matter 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), 1188, and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On March 9, 2023, Central Fruit Harvesting, LLC (“Employer”) requested administrative review of the March 6, 2022 denial of its H-2A temporary labor certification application by a Certifying Officer (“CO”) within the Department of Labor’s Employment and Training Administration (“ETA”). *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188; 20 C.F.R. § 655.171(b). The Board of Alien Labor Certification Appeals (“BALCA”) docketed this case on March 31, 2023, the date that it received a copy of the Administrative File (“AF”) directly from the CO, and it was assigned to me on April 3, 2023. The AF included a copy of Employer’s request for administrative review. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and issued within ten calendar days of the receipt of the AF.¹

¹ In my April 3, 2023 *Notice of Docketing and Order Setting Briefing Schedule*, I erroneously stated that the tribunal’s decision must be issued “within 5 business days” of receipt of the administrative file and also mistakenly granted the Employer the opportunity to file a brief. On April 4, 2023, counsel for the CO filed *Motion to Amend Docketing Order* requesting that I issue an amended order to reflect the correct briefing schedule and timeframes in the current regulation, which became effective on November 14, 2022. *See Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660* (Oct. 12, 2022). Rather than issue an amended order, I directed a member of my staff to notify the parties that Employer is not authorized to file a brief, as it was required to do so with its request for review, and that the deadline for the CO to file a brief was April 11, 2023. *See* 20 C.F.R. § 655.171(d). The CO waived its right to file a brief.

Background

On January 17, 2023, Employer submitted a Form ETA-9142A, *Application for Temporary Employment Certification* (“Form 9142” or “Application”) for one hundred (100) Farmworkers and Laborers, Crop, Nursery, and Greenhouse for the period March 3, 2023 through June 30, 2023.

The Chicago National Processing Center (“CNPC”) issued a Notice of Deficiency (“NOD”) on January 24, 2023 and Employer responded on February 3, 2023.² On February 9, 2023, the CNPC issued a second NOD identifying the following deficiencies:

1. Employer failed to establish that the requested job opportunity satisfies the definition of agricultural labor or services in 20 C.F.R. § 655.103(c);
2. Employer failed to provide a transportation plan that accommodates the number of workers requested;
3. Employer failed to include the worksite in its ETA Form 790A and failed to consistently state the first date of need through the ETA Form 790A;
4. Employer failed to provide a signed and dated surety bond with valid documentation of power of attorney;
5. Employer failed to provide the proper work contracts associated with each of the fixed-site entities listed in the ETA Form 790A;
6. Employer failed to include the estimated hourly rate for all piece rates listed in the application; and
7. Employer failed to provide and updated signed and dated Appendix A form.

(AF at 69-83). Employer filed a response on February 20, 2023, which was incomplete, and resulted in a Minor Deficiency Email to Employer on February 23, 2023. (*Id.* at 60, 41). On February 27, 2023, CPNC received Employer’s response, but concluded that Employer had not sufficiently addressed each deficiency. (*Id.* at 34).

On March 6, 2023, the CO issued a Final Determination denying Employer’s Application for Temporary Labor Certification. (*Id.* at 20). In the denial, the CO explained that Employer “did not establish the requested job opportunity meets the definitions of agricultural labor or

² The first NOD listed the following six deficiencies: (1) Employer failed to file its Application no less than 45 days before the first date of need, as required by 20 C.F.R. § 655.130(b); (2) Employer failed to include information regarding housing accommodations in the Form ETA 790A, as required by 20 C.F.R. § 655.122(d)(1)(ii); (3) Employer failed to describe in the Form ETA 790A how it would provide employees with transportation to and from the worksite, as required by 20 C.F.R. § 655.122(h)(1), (2); (4) Employer failed to describe its daily transportation plan for workers residing in Employer’s housing, as required by 20 C.F.R. § 655.122(h)(3), (4); (5) Employer failed to submit a surety bond with its Application, as required by 20 C.F.R. § 655.132(c); (6) Employer failed to provide an estimated hourly rate, as required by 20 C.F.R. § 655.135(e); and (7) Employer provided an expired copy of the Appendix A to the ETA Form 9142A. (AF at 195-207).

services per 20 C.F.R. 655.103(c) and did not provide the proper work contract documentation per 20 C.F.R. 655.132(d). (*Id.* at 23). The CO stated that Employer’s response did not clarify if the “duties related to packing, preparing, and distributing the commodity for market would be done on a farm,” if the Employer operates farms, or the percentage of product produced by the fixed-site growers. (*Id.* at 27). Further, while the Employer did explain the relationship between it and each of the fixed-site entities, Employer did not provide the proper work contracts for those entities.³ (*Id.* at 32-33)

On March 9, 2023, Employer requested administrative review, stating “H&A has packing houses but this particular FLC Central Fruit Harvesting, LLC will not be packing anything” and “gives written permission to amend Fixed Site grower to solely (sic) H&A Farms as H&A Farms is the fixed site grower and Central Fruit Harvesting, LLC is the Farm Labor Contractor.” (*Id.* at 1).

Scope and Standard of Review

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *See Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011). The presiding ALJ can either affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. 20 C.F.R. § 655.171(a). Further, the ALJ “must uphold the CO’s decision unless shown by the Employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 20 C.F.R. § 655.171(d).

Discussion

The regulations require H-2A labor contractors to submit certain information with its Application for Temporary Employment Certification, to include the name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers and fully-executed work contracts with each fixed-site agricultural business. 20 C.F.R. § 655.132(a), (d). A CO can deny the Application if they determine the response to a Notice of Deficiency is unacceptable. 20 C.F.R. § 655.142(b).

³ Employer explained that it is the H-2A labor contractor (“H-2ALC”), H&A Farms, LLC is the fixed-site grower, and H&A Packing LLC has a blueberry farm management company - Total Ag Care LLC. (AF at 32). Total Ag Care LLC manages operations at a variety of blueberry farms, some of which were included in the ETA 790A form. (*Id.* at 31). In a letter sent to the CO, Employer stated that it attached packing agreements between H&A Packing LLC and the various blueberry farms, but did not provide evidence of direct connection between itself and the fixed-site entities. With respect to the relationship between Employer and the fixed-site entities, the CO stated:

[Employer] appears to be acting as a subcontractor under the packaging and farm management entities H&A Packing LLC and Total Ag Care LLC. These entities have agreements with the fixed-site growers listed in the letter However, the [E]mployer did not provide agreements between itself and the fixed-site entities allowing the [E]mployer access to their land. The [E]mployer claims that H&A Packaging is the fixed-site business. However, H&A Packaging is not the producer of the commodity and thus does not fully represent the fixed-site agriculture business entity in which the H-2ALC is [to] provide work contracts with as described by the regulations. . . . As such, the [E]mployer has failed to provide copies of fully-executed work contracts with each fixed-site agricultural business identified.

(*Id.* at 33).

A review of the record in this case compels the conclusion that Employer failed to provide the proper work contracts with each of the fixed-site agricultural businesses listed in its Application. Though Employer explained its relationship with the various entities listed in its Application, Employer failed to actually submit proper work contracts with each of those fixed-site entities, as requested by the CO.

As such, based on a review of the entire record, I find that the CO properly considered the relevant evidence and rationally concluded that Employer failed to satisfy the requirements of 20 C.F.R. 655.132(d).⁴ Therefore, I find the CO's denial of the application for temporary labor certification in this case was not arbitrary or capricious.

ORDER

Accordingly, it is hereby ORDERED that the Certifying Officer's determination is AFFIRMED.

For the Board:

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁴ Because I find that Employer failed to submit the proper work contracts for each of the fixed-site agricultural businesses listed in its Application, it is not necessary to address whether Employer also failed to establish that the requested job opportunity satisfied the definition of agricultural labor or services in 20 C.F.R. § 655.103(c).