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Issue Date: 16 June 2023

OALJ Case No.: 2023-TLC-00041
ETA Case No.: H-300-23032742372

In the Matter of:

COFFEE GIN COMPANY, LLC,
Employer.

Before:
Jonathan C. Calianos, Administrative Law Judge

Appearances:

For the Employer:
Jill Hughes, Self-Represented Litigant
Coffee Gin Company, LLC
Enterprise, Alabama

For the Certifying Officer:
Rebecca Nielsen, Esq. and Alice Catlin, Esq.
Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.

DECISION AND ORDER AFFIRMING DENIAL OF EMPLOYER'S H-2A APPLICATION

This matter involves an appeal arising under the provisions of the Immigration and Nationality Act governing temporary agricultural employment of non-immigrant workers (H-2A workers) and the corresponding regulations at 20 C.F.R. Part 655, Subpart B. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188. For the reasons set forth below, I affirm the Certifying Officer's denial of Employer's *H-2A Application for Temporary Employment Certification*.

STATEMENT OF THE CASE

On August 19, 2023, Coffee Gin Company, LLC ("Employer") filed an H-2A *Application for Temporary Employment Certification* ("Application") with the U.S. Department of Labor's

Employment and Training Administration, seeking certification for eight Cotton Ginner positions. (AF 31-51).[1]

On April 24, 2023, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD"), identifying 14 deficiencies with Employer's Application. (AF 6-23). The CO instructed Employer to submit a modified application within five business days and cautioned that if Employer failed to submit a modified application within 12 calendar days, the Application would be deemed abandoned. (AF 7). Employer did not file a modified application, and on May 10, 2023, the CO denied labor certification based on abandonment pursuant to 20 C.F.R. § 655.142(a). (AF 4-5).

On August 17, 2021, Employer requested an expedited administrative review before the Board of Alien Labor Certification Appeals ("BALCA"). (AF 2). Employer asserted that "[t]he individual that was preparing the application for us was in an accident and had serious burns and was unable to respond to the Notice of Deficiency in a Timely manner." (AF 2). Employer requested "additional time be allowed to correct any issues with the application." The matter was referred to BALCA and assigned to me. The CO subsequently filed an appellate brief on June 9, 2023, in accordance with 20 C.F.R. § 655.171(d)(1).[2]

DISCUSSION

On appeal, BALCA may only consider evidence that was before the CO at the time of the CO's final decision, along with any legal arguments contained in the written submissions on appeal. 20 C.F.R. § 655.171(d)(3). BALCA "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)(2). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

On April 24, 2023, the CO issued a NOD, identifying numerous deficiencies with Employer's Application and offering Employer an opportunity to submit a modified application within five business days in accordance with Section 655.141(b)(1) & (2). Pursuant to Section 655.142(a), an application "will be deemed abandoned if the employer does not submit a modified [application] or job order within 12 calendar days after the NOD was issued." In this case, Employer did not file a modified application within the time limitations set forth in the regulations,

[1] References to the appeal file will be abbreviated with an "AF" followed by the page number.

[2] Under the regulations, if an employer wishes to file a brief, it must do so as part of the request for review. 20 C.F.R. § 655.171(d)(1). In this matter, Employer chose not to file an appellate brief with its request for review.

and the CO ultimately denied the Application for abandonment 16 calendar days after the NOD was issued, consistent with Section 655.142(a).

In its request for administrative review, Employer did not contest that it failed to submit a timely modified application as required by the NOD and pertinent regulations, but instead appears to argue that its failure to do so should be excused. According to the Employer, "[t]he individual that was preparing the application for us was in an accident and had serious burns and was unable to respond to the Notice of Deficiency in a Timely manner." (AF 2). Employer did not provide any additional details surrounding its inability to submit a timely modified application and did not explain why only one person was available to respond the NOD or why Employer could not have, at the very least, requested an extension of time before the CO. Employer further fails to cite to any legal authority that would warrant an excusal of its failure to file a timely modified application under the regulations.

Based on the foregoing, I find that the Employer failed to respond to the NOD in accordance with Section 655.141 & 655.142(a), and the CO properly denied the Application as abandoned. At this junction, the only path forward for the Employer is the submission of a new application for consideration by the CO.

ORDER

Because Employer failed to file a modified application in accordance with 20 C.F.R. §§ 655.141 and 655.142, it is hereby **ORDERED** that the Certifying Officer's decision denying Employer's *H-2A Application for Temporary Employment Certification* is **AFFIRMED**.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge