UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, D.C.

Issue Date: 05 April 2023

In the Matter of:

FS LOYALTY MUTLI SERVICES II, INC., Employer.	CASE NO.: 2023-TLC-00027 ETA NO.: H-300-22362-663326 ANGELA F. DONALDSON Administrative Law Judge

Appearances:

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DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

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 February 28, 2023, Employer FS Loyalty Multi Services II, Inc., requested an expedited administrative review of the Certifying Officer's Final Determination (dated February 27, 2023) in the H-2A temporary labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188; 20 C.F.R. § 655.171(b). This appeal has been docketed with the Board of Alien Labor Certification Appeals and assigned to Administrative Law Judge Angela F. Donaldson on March 3, 2023, for expedited administrative review. The Administrative File ("AF") was received March 24, 2023. The Certifying Officer ("CO") waived the opportunity to file a brief on appeal.

I. STATEMENT OF THE CASE

On December 29, 2022, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A ("Form 9142A" or "Application"). (AF113-137). The Employer's Application requested certification for 69 Farmworkers & Laborers, Crops, for the period beginning 01/07/2023 and ending 07/31/2023. (AF121). Employer's associated ETA Form 790A (Agricultural Clearance Order) identifying housing information at a hotel located at 16305 NW 162nd Lane, Alachua, FL 32615. (AF122). The total number of housing units was 17, for a total occupancy of 17. (*Id*.).

On January 5, 2023, the CO issued a Notice of Deficiency ("NOD") identifying eight deficiencies in Employer's H-2A Application, including Deficiency 2, regarding Employer's ETA 790A, Section D, Housing Information, which states that the Employer will utilize a hotel located at 16305 NW 162nd Lane, Alachua, Florida 32615. (AF99-100). According to the NOD, Employer had not provided the required attestation for rental housing, i.e., the hotel. (AF100). The CO cited regulatory requirements that an employer must "document to the satisfaction of the CO that the housing complied with the local, State, or Federal housing standards." (AF99-100).

To remedy this deficiency, the CO directed Employer to respond to the NOD with information consistent with the Frequently Asked Questions published June 17, 2017, in that Employer must determine which standards govern its desired housing and take appropriate action. (*Id*.). Specifically, if the applicable rental housing or public accommodation required SWA inspection, or a local, State, or Federal authority other than the SWA, Employer was required to submit appropriate documentation. (*Id*.).

After the CO reviewed the Employer's responses to the NOD, the CO sent Employer a Minor Deficiency Email ("MDE") on January 10, 2023, as to failure to cure several deficiencies. (AF94). As it concerned housing, Employer had not provided a rental attestation. (*Id*.).

On January 10, 2023, Employer sent a copy of a one-page Commercial Lease Agreement, describing a seven-month lease (January 7, 2023–July 31, 2023) of 17 rooms for 69 workers (4 workers per room) at the Royal Inn Hotel, 16305 NW 162nd Lane, Alachua, Florida 32615. (AF93). The agreement stated that the "undersigned" parties agreed to the terms and referenced the parties as the Royal Inn Hotel (owner), Freedom 7 Labor Group, Inc. (contractor), and Saurel Fedweck (independent licensed farm contractor). The agreement did not include any signatures of the parties or any attestation regarding housing. (*Id*.). Employer further submitted an inspection report of the Florida Department of Health indicating it was "OK to license" 35 rooms at the Royal Inn to be occupied with 4 migrant workers per room; the inspection report noted the total occupancy was for 140 individuals. (AF91-92).

On February 7, 2023, the CO sent Employer a Notice of Acceptance ("NOA"), requiring the submission of a written recruitment report within seven calendar days from the issuance of the NOA. (AF30-34).

On February 7, 10, and 13, 2023, the CO sent Employer MDEs, noting that Employer's Form 790A still reflected a total occupancy of 17 workers and that a signed rental lease confirming total occupancy was still required. (AF25-27).

On February 15, 21, and 23, 2023, the CO sent Employer MDEs, noting that Employer's updated Form 790A (AF24) now identified a total housing occupancy of 43, without explanation. (AF 17-18, 22-23). The CO again noted that a signed rental lease for housing at the hotel, which confirmed total occupancy, was required. (*Id*.). Also, Employer had not yet provided its recruitment report. (*Id*.).

On February 27, 2023, the CO issued a Final Determination denying Employer's Application. (AF12-16). The CO determined that Employer failed to cure certain deficiencies identified in the NOD and subsequent correspondence with Employer. The CO identified two deficiencies with regard to housing and the recruitment report.

As for Deficiency 1 (housing), the CO cited 20 C.F.R. § 655.122(d)(1)(i) and noted that Employer failed to "resolve its housing occupancy discrepancy" because ETA Form 790A (Section D, Item 8) indicated that the specified housing can accommodate 17 workers, but the Employer's Application requested 69 workers. (AF12-14). For this reason, the CO noted Employer had "insufficient housing for the total number of workers requested." (AF15). Employer was also required to provide a signed rental lease with Royal Inn confirming the total occupancy, which the CO stated was not provided. (AF12-14).

As for Deficiency 2 (recruitment report), the CO cited 20 C.F.R. § 655.156 and noted that Employer failed to submit a recruitment report within seven calendar days of the NOA that issued February 7, 2023. (AF14-15). The CO thus concluded that Employer did not overcome these deficiencies and denied the application. (AF15).

On February 28, 2023, Employer submitted the instant request for expedited administrative review, arguing that it had attempted to respond to the NOD to the best of its ability but nonetheless had "failed to resolve all the flaws." (AF4). Employer admitted that it did not clarify the total housing occupancy, "because the hotel owner had relocated the housing plan to a different hotel." (AF5). Employer thus waited for the new hotel contract and new inspection from the State of Florida Department of Health before clarifying the total housing occupancy requested by the CO. (*Id*.). Employer states that it did "everything possible" to resolve the deficiency in a timely manner but was not able. (*Id*.). Employer provided new information regarding housing, stating that the "new hotel is Econo-Lodge University, at 2645 SW 13th Street, Gainesville, FL 32608." (*Id*.). Employer states it secured a lease agreement for 18 rooms, with 4 people per room, to accommodate 69 workers. (*Id*.).

As for the recruitment report, Employer asserts that its primary objective was to fill the job with 69 U.S. workers, but it was not able to meet this goal. (*Id*.). Employer states it received no calls or emails from any U.S. workers, and only foreign workers applied, "which is in the recruitment report." (*Id*.).

II. ANALYSIS

Legal Standard

Employer requested administrative review. Accordingly, the undersigned will consider Employer's arguments on appeal submitted with its request for review. 20 C.F.R. § 655.171(d)(1). I will 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." *Id*. § 655.171(d)(2). I will consider documents in the Administrative File ("AF") that were before the CO at the time of the CO's decision and any written submissions from the parties that do not contain new evidence. *Id*. § 655.171(d)(3). After due consideration, I will affirm, reverse, or modify the CO's decision, or remand to the CO for further action. *Id*. The instant Decision is issued in compliance with the regulations at § 655.171(d)(4).

Under the "arbitrary and capricious" standard, the reviewing judge or panel must determine whether the CO "examined 'the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *K.S. Datthyn Farms, LLC*, 2019-TLC-00086, at 5 (Oct. 7, 2019) (citing *Three Seasons Landscape Contracting Service, Inc.*, 2016-TLN-00045, at 19 (June 15, 2016), and *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (alteration in original)).

Employer bears the burden of establishing its eligibility. *See Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011).

Deficiency 1 - Housing

As for Deficiency 1, the CO cited 20 C.F.R. § 655.122(d)(1)(i) and noted discrepancies between the housing occupancy total indicated on ETA Form 790A (17 total workers) and the total number of workers requested in the application (69 total workers). The CO also noted that a signed rental lease agreement for housing was never provided. (AF14-15).

The regulations require that the employer provide housing at no cost to H-2A workers and workers in corresponding employment who are not reasonably able to return to their residence within the same day. 20 C.F.R. § 655.122(d)(1). The regulations further require,

> The employer must provide to the CO a written statement, signed and dated, that attests that the accommodations are compliant with the applicable standards under paragraph (d)(1)(ii) of this section [pertaining to health and safety standards] and are sufficient to accommodate the number of workers requested. This statement must include the number of bed(s) and room(s) that the employer will secure for the worker(s). If applicable local or State rental or public accommodation standards under paragraph (d)(1)(ii) of this section require an inspection, the employer also must submit to the CO a copy of the inspection report or other official documentation from the relevant authority. If the applicable standards do not require an inspection, the employer's written statement must confirm that no inspection is required.

Id. § 655.122(d)(6)(iii).

Employer did not identify any error, or arbitrariness, in the CO's conclusion that Employer failed to correct the discrepancies regarding housing occupancy and failed to provide the housing attestation required by the regulations. Employer, in fact, admitted that it failed to resolve the flaws identified by the CO. (AF4-5). Although Employer updated its ETA Form 790A and changed the total housing occupancy from 17 to 43, there remained a discrepancy between the total number of workers sought and total housing occupancy that Employer never explained. (AF24, 122). The record does not contain an attestation about housing, as required under § 655.122(d)(6)(iii), or a signed lease agreement, which the CO repeatedly notified the Employer was lacking. Employer also identified new information concerning housing, reflecting a change from the Royal Inn to the Econo-Lodge, which was not information submitted to the CO. Thus, it is new evidence that I am not able to consider.

I conclude that Employer did not demonstrate its application was arbitrarily or capriciously denied, or that CO committed an abuse of discretion or legal error requiring reversal or modification with regarding to this deficiency.

Deficiency 2 – Recruitment Report

As for Deficiency 2 (recruitment report), the CO cited 20 C.F.R. § 655.156 and noted that Employer failed to submit a recruitment report within seven calendar days of the NOA that issued February 7, 2023. (AF14-15).

Section 655.156 requires the employer to prepare, sign, and date a written recruitment report containing the information required by this regulation concerning Employer's efforts to recruit U.S. workers. 20 C.F.R. § 655.156. The report is due by the date specified by the CO in the NOA. *Id*. § 655.156(a); *see* 20 C.F.R. § 655.143(b).

The CO required the submission of the written recruitment report within 7 days of the issuance of the February 7, 2023, NOA. (AF30-34). In the days that followed, the CO notified Employer more than once of its obligation to submit the report. (AF17-18, 22-23). Despite Employer's indications on appeal that there is a recruitment report describing its unsuccessful efforts to recruit U.S. workers, (AF5), there is no record in the AF of Employer submitting the report to the CO, much less within the timeframe required by the NOA. There are repeated MDEs from the CO up through February 23, 2023, and the Final Determination on February 27, 2023, noting that Employer had not provided the recruitment report.

Employer again failed to show that the CO's determination regarding this deficiency was arbitrary, capricious, an abuse of discretion, or not in accordance with the law.

III. CONCLUSION AND ORDER

I conclude that the Certifying Officer's denial of Employer's application for temporary agricultural labor certification under the H-2A program was not arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with the law. The CO's determination is **AFFIRMED**.

SO ORDERED.

ANGELA F. DONALDSON
ADMINISTRATIVE LAW JUDGE