

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, DC

Issue Date: 09 May 2023

BALCA Case No.: 2023-TLC-00039
ETA Case No.: H-300-23031-738051

In the Matter of:

HOSMAR ARICEL LOPEZ RUIZ,
Employer.

Certifying Officer: Chicago National Processing Center

Before: Paul R. Almanza
Administrative Law Judge

DECISION AND ORDER OF DISMISSAL

This matter arises under the temporary agricultural labor or service provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1011(a)(15)(H)(ii)(a), 1188, (the “Act”), and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien 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 April 14, 2023, Hosmar Aricel Lopez Ruiz (“Employer”) requested administrative review of the Certifying Officer’s (“CO”) April 10, 2023 denial of Employer’s H-2A application. AF 2.¹ This case was docketed that same day. A decision upon administrative review must be issued “within 7 business days of the submission of the CO’s brief or 10 business days after receipt of the OFLC administrative file, whichever is later.” 20 C.F.R. § 655.171(d)(4). The Board of Alien Certification Appeals (“BALCA”) received the Administrative File (“AF”) in this matter on April 19, 2023. Neither Employer nor the CO filed an appellate brief. This case was assigned to me on May 5, 2023. On May 8, 2023, I issued a Notice of Docketing, stating that as this case was assigned to me after the deadline to issue a decision had passed, a decision would be issued with 10 business days of my receipt of the AF on May 5, 2023.

¹ References to the Administrative File are abbreviated as “AF.”

BACKGROUND

On March 19, 2023, Employer filed an *H-2A Application for Temporary Employment Certification* (“Application”) and supporting documentation for 120 workers in Georgia. AF 32–61.

On March 24, 2023, the CO issued a Notice of Deficiency (“NOD”) to Employer. The NOD stated that Employer’s Application failed to meet the criteria for acceptance and provided Employer five business days from the date of receipt of the NOD to submit a modified application. *Id.* at 8. The NOD further provided that the Application would be deemed abandoned if Employer did not submit a modified application or job order within 12 calendar days of the NOD, and if the modified application did not cure the cited deficiencies in the NOD, the CO would deny the Application under 20 C.F.R. § 655.164. *Id.* at 8–9.

The NOD listed ten deficiencies. First, the NOD stated that Employer failed to file its Application at least 45 calendar days before its first date of need in accordance with 20 C.F.R. § 655.130(b) or request a waiver under 20 C.F.R. § 655.134(a)–(b). *Id.* at 10.

Next, the NOD alleged that Employer’s Application improperly covers more than one area of employment. *Id.* at 11–14. The regulations provide that all places of employment on an Application must be within a single area of intended employment unless multiple places are necessary to perform the job duties and the worker can reasonably return to their residence within the same workday. *Id.* at 11 (citing 20 C.F.R. §§ 655.103(b), 655.130(e)(1)). If a place of intended employment is within a Metropolitan Statistical Area (“MSA”), any place within that MSA is deemed to be within normal commuting distance of that place of intended employment. 20 C.F.R. § 655.103(b). Thus, the CO computed the longest commute time within the Albany MSA to use as an upper-limit commute time in this case. AF 12. The CO concluded that this upper limit was one hour and three minutes, and therefore, the commute time of one hour and 27 minutes between the two worksites listed on Employer’s Application “cannot be considered normal.” *Id.* The CO opined that the commute between worksites would require overnight stay, and a “worksite which requires overnight stay is not a site within a normal commuting distance,” and Employer provided no evidence to the contrary. *Id.* at 13–14. The NOD instructed Employer to remove the worksite in Poulan, Georgia from its Application or submit documentation establishing that the commute in the proposed Application is normal. *Id.* at 14.

Additionally, the NOD noted that Employer’s dates of need changed from May 16, 2022, through July 15, 2022, to March 31, 2023, to July 15, 2023, without explanation. *Id.* The NOD instructed Employer to explain how its job opportunity is seasonal, specifically addressing the change in its season of need. *Id.* at 15. Next, the NOD stated that Employer’s daily transportation subsistence as listed on its Application is lower than the minimum allowable amount and directed Employer to amend its Application accordingly. *Id.* at 16–17. Relatedly, the NOD stated that the Application failed to state whether Employer would provide transportation, identify the modes of transportation and transportation plan, and provide proof of a valid Farm Labor Contractor (“FLC”) Certificate of Registration showing it has transportation authorization or explain how it will provide transportation without it. *Id.* at 17–21. Further, the NOD alleged that Employer listed the incorrect SOC Occupation Code and failed to “provide a complete, executed Form ETA-9142A – Appendix

B, with valid documentation of power of attorney attached, in the bond amount required.” *Id.* at 22–23. Lastly, the NOD noted that Employer failed to provide a wet signature on the ETA Form 790A. *Id.* at 24.

On the morning of April 10, 2023, Employer’s agent emailed TLC.Chicago@dol.gov stating, “I will have a NOD Response by tomorrow if not sooner. Sorry for the delay.” *Id.* at 3. That same day, the CO issued a Final Determination denying Employer’s Application. *Id.* at 5–6. The Final Determination stated that the “basis for the CO’s decision is the abandonment of the application” because Employer did not submit a modified application within 12 calendar days after the NOD was issued. *Id.* at 5.

Employer subsequently filed a Letter of Appeal, stating that when the NOD was sent, Employer’s agent “was having trouble with [his] email and didn’t realize [he] was not receiving emails.” AF 3.

DISCUSSION

The Employer bears the burden to establish that it is eligible for temporary labor certification. *See e.g. Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *see also Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015). When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding administrative law judge (“ALJ”) may only render a decision on the basis of documents in the AF that were before the CO at the time of their decision and any written submissions from the parties that do not contain new evidence.

In this case, the CO denied Employer’s Application because Employer failed to submit a modified Application or otherwise timely responded to the NOD. The applicable regulations give an employer five business days from the date of receipt of the NOD to submit a modified Application. 20 C.F.R. §§ 655.141(b), 655.142(a). Moreover, 20 C.F.R. § 655.142(a) provides that an employer’s Application “will be deemed abandoned” if it does not submit a modified Application “within 12 calendar days after” the CO issues the NOD. If the employer fails to comply with the requirements of 20 C.F.R. § 655.142, the CO will deny the Application. 20 C.F.R. § 655.141(b)(4).

The CO issued the NOD in this case on March 24, 2023. Employer did not submit a modified Application within 12 days of the NOD. Though Employer’s agent stated that he was having trouble accessing his email during that time, he does not provide supporting evidence or otherwise justify Employer’s untimely response. Thus, I find that Employer did not respond to the NOD in accordance with the regulations and abandoned its Application, and the CO notified Employer of the consequences of failing to file a modified Application.

ORDER

Based on the foregoing, it is hereby ordered that this case is **DISMISSED**.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge