



Issue Date: 18 November 2022

OALJ Case No.: 2023-TLC-00005

ETA Case No.: H-300-22271-500197

In the Matter of:

MALIGAYA DEVELOPMENT ECO-FARM LLC,
Employer.

Before: Monica Markley
Administrative Law Judge

ORDER OF DISMISSAL

On November 14, 2022, the Office of Administrative Law Judges docketed a case from Maligaya Development Eco-Farm LLC (“Employer”) requesting expedited administrative review of the Denial of Employer’s Application for temporary labor certification issued by the Certifying Officer in the above-captioned H-2A temporary alien labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188; 20 C.F.R. § 655.171(a). The Employer and counsel for the Certifying Officer were permitted to file briefs by 5:00 p.m. Eastern time on November 17, 2022. The CO filed a Motion to Dismiss; Employer did not file a brief.

STATEMENT OF THE CASE

On October 5, 2022, Employer filed an *Application for Temporary Employment Certification* (Form ETA-9142A) (“Application”), seeking certification to hire 10 Farmworkers to pick mushrooms to address a temporary, seasonal need for the period from November 28, 2022 through April 15, 2023. (AF¹ 66-110.) Modifications to the company name and a housing address were made in response to an email sent by Employer on October 6, 2022.

On October 12, 2022, the Certifying Officer (“CO”) issued a Notice of Deficiency. (AF 11-16.) The Notice stated that the Application did not meet the criteria for acceptance for two reasons: failure to establish a seasonal need (because Employer had also filed “overlapping applications with worksites in the same city ... for the past two years” with dates that included the “off-season”), and because Employer requested certification for 10 workers but the housing lease reflects a limit of 8 individuals. (AF 13-16.) The Notice listed the modifications and other

¹ The Administrative File is cited as “AF” followed by the page number.

requirements necessary to cure the deficiencies. Employer was directed to provide explanations and documentation to address these issues.

The Notice of Deficiency advised Employer that, “In accordance with Departmental regulations at 20 CFR § 655.142, you may submit a modified application within five (5) business days from the date you receive this letter.... Under Departmental regulations at 20 CFR § 655.142(a), the application will be deemed abandoned if the employer does not submit a modified application within 12 calendar days after the Notice of Deficiency was issued.” (AF 11.) Alternatively, the Notice also advised Employer that, “As provided by Departmental regulations at 20 CFR § 655.142(c), you have the opportunity to request an expedited administrative review of the Notice of Deficiency or a de novo hearing of the Notice of Deficiency before an Administrative Law Judge. To obtain this review or de novo hearing, you must file within five (5) business days from the date of receipt of this notice.” The Notice of Deficiency was sent to Employer by email on October 12, 2022. (AF 10.)

On October 20, 2022, the CO received a Wyoming State Workforce Agency (SWA) Housing Inspection form related to Employer, which showed that the housing unit was a four-bedroom house that can house 10 workers. (AF 8-9.)

On October 26, 2022, the CO issued a letter denying Employer’s Application. The letter noted that the Application had been filed on October 5, 2022, and a Notice of Deficiency had issued on October 12, 2022. The letter stated:

Your application is now being denied in accordance with Departmental regulations at 20 CFR § 655.142(a) and 20 CFR § 655.141(b)(5) because you have neither submitted a modified application within twelve (12) calendar days after the Notice of Deficiency was issued nor requested an expedited administrative appeal or a de novo hearing.

This denial is final, and the Department of Labor will not further consider the application.

(AF 7.) The denial letter was sent to Employer via email on October 26, 2022, at 9:29 a.m. EDT. (AF 6.)

Later on October 26, 2022, Employer submitted a five-page letter entitled “Appeal of Denial of Case H-300-22271-500197.” (AF 1-5.) Employer requested that DOL “reverse the denial of the subject labor certification for the reasons stated herein.” Employer contended that the two issues identified in the Notice of Deficiency “can be easily addressed by the employer,” and its delay in responding to the Notice of Deficiency “stemmed from a misunderstanding between the Wyoming SWA and the employer as to the status of a housing inspection, and the Wyoming SWA’s failure to upload the required documentation to FLAG.” (AF 1.) Employer noted that it had already re-filed its Application with a later start date, but would withdraw the new Application if DOL reversed the denial of the instant Application. Employer stated that at the time of the denial, it had drafted a response to the Notice of Deficiency, and it provided that response in its “Appeal” letter.

The CO prepared the Administrative File on November 4, 2022, and forwarded a copy to the Chief Administrative Law Judge of the Office of Administrative Law Judges as a request for administrative review.

The case was docketed on November 14, 2022, and assigned to the undersigned on November 15, 2022. I issued a *Notice of Docketing and Order Setting Briefing Schedule* on November 15, 2022. As noted above, the parties' briefs were due by 5:00 p.m. EST on November 17, 2022. The CO filed a Motion to Dismiss; neither party filed an additional brief.

DISCUSSION

The CO's *Motion to Dismiss* urges this Board to dismiss the employer's appeal for lack of jurisdiction. The CO noted that a Notice of Deficiency was issued on October 12, 2022, and Employer failed to respond to it, leading to the October 26, 2022 denial. The CO's denial letter cited 20 CFR §§ 655.141(b)(5) and 655.142(a), and informed Employer that the "denial is final, and the Department of Labor will not further consider the application." (Citing AF 7.) The motion argued:

Because the CO issued the NOD on October 12, 2022, Maligaya had until October 19, 2022, to request administrative review, and until October 24, 2022, to submit a modified application. Maligaya did neither....

Where, as here, the employer failed to respond to the CO's NOD, and the CO denies the employer's application on that basis, the Board lacks jurisdiction to further consider Maligaya's H-2A application and should therefore dismiss Maligaya's appeal. *E.g., Farmhouse Vineyard, LLC, 2021-TLC-00096* (March 12, 2021).

Thus, the issue presented in this matter is whether the regulations permit Employer's appeal of the CO's denial, where the denial was based on Employer's failure to respond in a timely manner to the Notice of Deficiency.

The federal regulation at 20 CFR § 655.141 (Notice of Deficiency) provides:

(a) Notification timeline. If the CO determines the Application for Temporary Employment Certification or job order are incomplete, contain errors or inaccuracies, or do not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the Application for Temporary Employment Certification. A copy of this notification will be sent to the SWA serving the area of intended employment.

(b) Notice content. The notice will:

(1) State the reason(s) why the Application for Temporary Employment Certification or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to *submit a modified Application for Temporary Employment Certification or job order within 5 business days* from date of receipt stating the modification that is needed for the CO to issue the Notice of Acceptance;

(3) Except as provided for under the expedited review or de novo administrative hearing provisions of this section, state that the CO's determination on whether to grant or deny the Application for Temporary Employment Certification will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the Application for Temporary Employment Certification within 5 business days and in a manner specified by the CO;

(4) Offer the employer an opportunity to *request an expedited administrative review or a de novo administrative hearing before an ALJ of the Notice of Deficiency*. The notice will state that in order to obtain such a review or hearing, the employer, *within 5 business days of the receipt of the notice*, must file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(5) State that if the employer does not comply with the requirements of § 655.142 or request an expedited administrative review or a de novo hearing before an ALJ within 5 business days the CO will deny the Application for Temporary Employment Certification. That denial is final cannot be appealed and the Department will not further consider that Application for Temporary Employment Certification.

(c) Appeal from Notice of Deficiency. The employer may timely request an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

(Emphases added.) While the regulation requires submission of either a request for administrative review or de novo hearing to OALJ, or submission of a modified Application to the CO, within 5 business days, the regulation at Section 655.142 provides for a grace period of “up to a maximum of 5 days.” 20 CFR § 655.142(a). Under 20 CFR § 655.142 (Submission of Modified Applications), “[t]he *Application for Temporary Employment Certification* will be deemed abandoned if the employer does not submit a modified *Application for Temporary Employment Certification* within 12 calendar days after the notice of deficiency was issued.” 20 CFR § 655.142(a).

Here, the Notice of Deficiency was issued via email on October 12, 2022. Employer had five business days to either request review by OALJ (expedited administrative review or a de novo hearing) or submit a modified Application to the CO under Section 655.141. That period

expired at the close of business on October 19, 2022. Employer did not make either filing in the allotted time. Further, Employer did not submit a modified Application within 12 calendar days after the Notice of Deficiency was issued, which expired on October 24, 2022; consequently, its Application was “deemed abandoned” under Section 655.142. Because Employer did not make a timely submission in response to the Notice of Deficiency, the CO’s denial “is final” and “cannot be appealed” pursuant to Section 655.141.

Based upon the foregoing, I conclude that Employer cannot appeal from the CO’s denial letter issued on October 26, 2022, and the CO’s Motion to Dismiss will be granted.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the Certifying Officer’s denial of Employer’s H-2A Application for Temporary Employment Certification was not in error and is not appealable. The CO’s *Motion to Dismiss* is **GRANTED** and this case is **DISMISSED**.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge