

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

Issue Date: 19 October 2023

OALJ No.: 2024-TLC-00002
ETA Case No. H-300-23213-230434

In the Matter of:

JUAN VEGA,

Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. 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 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. Employer applied under the H-2A program seeking temporary labor certification for thirty-six agricultural workers. The application was denied. Employer now seeks administrative review of the denial.

2. Procedural History and Findings of Fact.

a. On August 9, 2023, Employer submitted an Employment and Training Administration (ETA) Form 9142A application to the Chicago National Processing Center (CNPC).¹ Employer requested authorization for thirty-six “Farmworkers and Laborers, Crop, Nursery and Greenhouse” to perform “seasonal” work.² The listed period of need was from October 10, 2023 to July 30, 2024.³

b. Also on August 9, 2023, the Georgia Department of Labor (GDOL) took two actions in furtherance of Employer’s application. First, GDOL sent correspondence to Employer advising that Employer’s H-2A application had been accepted “subject to the review and acceptance of the Chicago National Processing Center.”⁴ Second, GDOL notified Employer that its “housing inspectors will reach out to you as soon as possible to schedule a [h]ousing inspection date.”⁵

¹ See AF 75-100. For the date of submission, see AF 78. All references to the Appeal File are denoted by the abbreviation AF followed by the relevant page number(s).

² AF 76.

³ AF 82.

⁴ See AF 34-36.

⁵ AF 22-23.

c. On August 10, 2023, the Certifying Officer (CO) issued a Notice of Deficiency (NOD).⁶ The NOD listed two deficiencies: (i) failure to adequately establish employer-provided transportation;⁷ and (ii) failure to provide an adequate surety bond.⁸ The NOD required Employer to resolve the first deficiency by providing the CNPC “written permission to amend Section F. Item 1 [of the application] to include a description of the employer’s daily transportation plan that addresses the information listed in the Form ETA-790A instructions.”⁹ The NOD required Employer to resolve the second deficiency by providing an “original bond” with an accompanying power of attorney.¹⁰

d. On August 23, 2023, Employer responded to the NOD.

As to the first deficiency, Employer stated that he “grant[ed] permission to the [CNPC] to amend . . . Section F. Item 1 [of the application] to include a description of the employer’s daily transportation plan. The grower is providing daily transportation to each worker at no cost to them to and from the housing location to the worksites and once a week for grocery and laundry needs. The grower will do this [by] providing a bus or vans and done in multiple trips.”¹¹

As to the second deficiency, Employer stated “I have purchased the bond. You should have a copy by the end of the week.”¹²

e. On August 24, 2023, Employer obtained the Power of Attorney required by the NOD.¹³ The evidence does not establish the date on which Employer provided the Power of Attorney to the CO.

f. On August 28, 2023, Employer signed the Surety Bond required by the NOD.¹⁴ The evidence does not establish the date on which Employer provided the Surety Bond to the CO.

g. Also on August 28, 2023, GDOL emailed Employer at 8:39 a.m.¹⁵ The email advised that a housing inspection had been scheduled for 2:00 p.m. the same day. The GDOL email stated that “[f]ailure to confirm/reply could cause a delay/denial of your job order.”¹⁶

h. At some point, GDOL’s “Agricultural Services” generated an undated message to an unidentified recipient stating that “Employer was called and e-mailed several times. Cell phone did not take a message and I was not contacted by the set deadline (date) for the needed housing inspections for this H2A job order. For this reason, the housing has been denied due to unable [sic]

⁶ AF 63-68.

⁷ AF 65-66.

⁸ AF 66-68.

⁹ AF 66.

¹⁰ See AF 68.

¹¹ AF 60.

¹² AF 60.

¹³ See AF 59.

¹⁴ See AF 58.

¹⁵ See AF 21-22.

¹⁶ See AF 21.

to perform needed inspections by the date needed.”¹⁷

i. On August 29, 2023, the CO issued a second NOD, addressing the same two deficiencies that were set forth in the August 10, 2023 NOD.

In the second NOD, however, the CO explained how Employer’s responses to the first NOD did not cure the two deficiencies that were noted in the first NOD.¹⁸

As to Deficiency 1, the CO asserted that Employer still needed to provide: the daily transportation schedule, the number of vehicles to be used, the type of vehicle and seating capacity for each vehicle and, if applicable, whether the same no-cost transportation would be available to workers not residing in employer-provided housing. Additionally, Employer “failed to provide a copy of its contract with the fixed site grower that establishes this daily transportation arrangement.”¹⁹

As to Deficiency 2, the CO asserted that Employer still had not provided the surety bond along with documentation of power of attorney.²⁰

j. Sometime between August 29, 2023 and September 5, 2023, the CO received Employer’s Surety Bond, Power of Attorney, and further explanation of the workers’ transportation arrangements.²¹ With regard to transportation arrangements, Employer provided a notarized statement from the grower. The statement said only that the grower would provide all workers with transportation to and from work and “once a week to buy groceries.” The statement further asserted the grower would “comply with all applicable Federal, State or local laws and regulations” including applicable driver license and insurance requirements.²²

k. On September 5, 2023, the CO sent a Minor Deficiency Email (MDE) to Employer noting that the most recent response failed to cure Deficiency 1 regarding transportation and subsistence.²³ The email reiterated that Employer must specify the daily transportation schedule, the number of vehicles to be used, the type of vehicle and seating capacity for each vehicle and, if applicable, whether the same no-cost transportation would be available to workers not residing in employer-provided housing. The CO’s email allowed Employer two business days to “upload its response directly....”²⁴

¹⁷ AF 20. Although it is unclear in the record and there is no date on the message, this message may be what the CO referred to in the denial letter when stating that GDOL denied Employer’s housing certification “on September 11, 2023.” *See* AF 15.

¹⁸ *See* AF 51 – 57.

¹⁹ *See* AF 54.

²⁰ AF 57.

²¹ *See* AF 47 – 49. The CO’s second NOD was issued August 29, 2023, and the MDE was sent September 5, 2023. The MDE implicitly acknowledges receipt of the surety bond and power of attorney, and directly addresses the remaining deficiency in Employer’s response to the transportation issue noted in the second NOD. Therefore, it is reasonable to conclude that the surety bond, power of attorney, and further explanation of transportation arrangements reached the CO between issuance of the second NOD and the September 5, 2023 MDE.

²² AF 47.

²³ *See* AF 46.

²⁴ *See* AF 46. This page of the record is cut off on the right side of the page. There is clearly more to the sentence; however, there is no direct evidence in the record regarding where Employer was required to “upload its response

l. Also on September 5, 2023, GDOL denied certification for Employer's housing on the grounds that they were "[u]nable to contact employer to conduct inspection therefore order is denied."²⁵

m. On September 7, 2023,²⁶ Employer sent an email to "tlc.chicago@dol.gov."²⁷ The email again granted the CNPC permission to amend Section F. Item 1 of the application, this time to include the grower's specified daily pick-up and drop-off times, a description of the one vehicle that would be used, the seating capacity of the vehicle, and the fact that "multiple trips" would be used to complete transportation to and from the grower's worksite.²⁸

n. On September 12, 2023, TLC, Chicago - ETA SVC received an email stating that "[a]n NRM was issued for H-300-23213-230434 Juan Vega on 09/05/23. To date, there is no response in FLAG."²⁹ Can you confirm that no response has been received?"³⁰

o. Also on September 12, 2023, TLC, Chicago - ETA SVC responded to the above email inquiry, stating that "[a]fter a full search of the TLC mailbox we found the attached response for Juan Vega H-300-23213-230434."³¹ The two-page attachment contained Employer's September 7, 2023 response to the CO's September 5, 2023 email regarding Deficiency 1 (transportation).³²

p. On September 15, 2023, the CO issued a determination denying Employer's application.³³ The deficiencies cited were "transportation," and "housing." The denial letter acknowledged Employer's responses to the first and second NODs but stated that "the employer did not cure all deficiencies."³⁴ The letter also stated that "[o]n September 5, 2023, the Chicago NPC issued email correspondence advising the employer of the outstanding deficiencies. The employer did not respond to the email correspondence. Therefore, this application is denied for 36 Farm Laborers and Workers job opportunities."³⁵

q. On September 18, 2023, Employer sent an email to GDOL's Agricultural Services

directly." There is a follow-up email in the record from an unidentified sender to "TLC, Chicago – ETA SVC" noting that "[a]n NRM was issued for H-300-23213-230434 Juan Vega on 09/05/23. To date, there is no response in FLAG." See AF 17. Thus, it is reasonable to conclude that Employer's response was supposed to be uploaded directly to the Foreign Labor Application Gateway (FLAG).

²⁵ AF 41. The CO's denial letter contends the housing certification was denied six days later on September 11, 2023; however, there is no evidence in the record supporting the later date. See AF 15.

²⁶ Employer's email was sent at 6:06 p.m. on September 7, 2023. See AF 5. Further, there is a second, nearly identical email in the record that was also sent by Employer to TLC Chicago on the same date, but at 5:07 p.m. It is questionable whether a response is timely when sent after normal business hours on the second day of a two-business-day extension. However, the CO did not file an opposition brief and did not object to the timeliness of the response; therefore, Employer's response has been deemed timely.

²⁷ See AF 5.

²⁸ See AF 5.

²⁹ FLAG is the Foreign Labor Application Gateway.

³⁰ See AF 17.

³¹ See AF 17.

³² See AF 18 – 19.

³³ AF 10-16.

³⁴ AF 12.

³⁵ AF 12 (emphasis added).

acknowledging the CO's denial and requesting "a housing inspection as soon as possible."³⁶ Agricultural Services responded the same day, stating that "[t]he Housing Inspector will be giving a call [sic] to schedule an [sic] Housing Inspection for Juan Vega."³⁷

r. On September 25, 2023, Employer filed its appeal to the Board of Alien Labor Certification Appeals (BALCA). Employer's appeal did not include any legal arguments.³⁸

s. Employer's appeal was docketed October 5, 2023. It was assigned to the undersigned ALJ on October 6, 2023.

t. Neither party submitted a brief urging BALCA to either affirm or reverse the CO's denial of Employer's ETA Form 9142A application.

3. Applicable Law.

a. *H-2A Program.* The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

b. *Transportation.* The employer must provide transportation at no cost to the worker between any employer-provided housing and the employer's place of employment. The job offer must include a description of the modes of transportation (e.g., type of vehicle) that will be used.³⁹

c. *Housing.* The employer must provide housing at no cost to the H-2A workers who are not reasonably able to return to their residence within the same day.⁴⁰ Employer-provided housing must meet the full set of applicable Occupational Safety and Health Administration (OSHA) standards.⁴¹ The State Workforce Authority (SWA) with jurisdiction over the location of the employer-provided housing must inspect and provide to the employer and CO documentation certifying that the employer-provided housing is sufficient to accommodate the number of workers requested and meets all applicable standards.⁴² The determination as to whether the housing provided to workers meets the applicable standards must be made not later than 30 calendar days before the first date of need identified in the application.⁴³

³⁶ AF 7-8.

³⁷ AF 7. This information (subparagraph (q)) was not before the CO when the denial letter was issued; therefore, it cannot be, and has not been, considered in the formulation of this *Decision and Order*. See 20 C.F.R. § 655.171(a)(7). The information was included in the Appeal File and is noted here solely to ensure a complete record. See 20 C.F.R. § 655.171(d)(3) (directing that "The ALJ may not consider evidence not before the CO at the time of the CO's decision, even if such evidence is in the administrative file").

³⁸ AF 1-4.

³⁹ 20 C.F.R. § 655.122(h)(3) & (4).

⁴⁰ 20 C.F.R. § 655.122(d)(1).

⁴¹ 20 C.F.R. § 655.122(d)(1)(i).

⁴² 20 C.F.R. § 655.122(d)(6)(ii).

⁴³ 20 C.F.R. § 655.122(d)(6)(i).

d. *Notice of Deficiency Requirement.* If the CO determines an employer’s application or job order is incomplete, contains errors or inaccuracies, or does 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. The notice must (1) state the reason(s) the application or job order fails to meet the criteria for acceptance; (2) offer the employer an opportunity to submit a modified application or job order within 5 business days from date of receipt stating the modification that is needed for the CO to issue the NOA; (3) state that the CO’s determination on whether to grant or deny the application will be made not later than 30 calendar days before the first date of need; and (4) state that if the employer does not comply with the requirements of § 655.142, the CO will deny the application.⁴⁴

e. *Burden of Proof.* Throughout the labor certification process, the burden of proof in alien certification remains with the employer.⁴⁵ Therefore, the employer must demonstrate that the CO’s determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or that they are based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible.⁴⁶ Consequently, a CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law.⁴⁷ The ALJ will affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.⁴⁸

4. Analysis

a. Deficiency 1: Transportation.

The CNPC issued Employer two NODs: one on August 10, 2023, and one on August 28, 2023.⁴⁹ Employer responded to each NOD, but the responses did not cure the “Transportation” deficiency because Employer failed to establish the workers’ daily transportation schedule, the number of vehicles to be used, and the type of vehicle and seating capacity for each vehicle. Pursuant to regulatory discretion,⁵⁰ on September 5, 2023, the CO sent Employer a “Minor Deficiency Email” (MDE) stating that Employer must provide this information “[n]o later than 2 business days from the date of [the MDE].”⁵¹

u. On September 7, 2023, Employer sent an email to “tlc.chicago@dol.gov.”⁵² The email again granted the CNPC permission to amend Section F. Item 1 of the application, but this time Employer included the grower’s specified daily pick-up and drop-off times, a description of the one vehicle to be used, the seating capacity of the vehicle, and the fact that “multiple trips” would be used to

⁴⁴ 20 C.F.R. § 655.141(a) & (b).

⁴⁵ 20 C.F.R. § 655.161(a); *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011).

⁴⁶ See *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014).

⁴⁷ 20 C.F.R. § 655.171(d)(2); *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

⁴⁸ 20 C.F.R. § 655.171(d)(3).

⁴⁹ AF 62-68; AF 51-57.

⁵⁰ See 20 C.F.R. § 655.142(a) (“The CO may issue one or more additional NODs before issuing a Final Determination”).

⁵¹ AF 46.

⁵² See AF 5.

complete transportation to and from the grower's worksite.⁵³ On September 12, 2023, TLC, Chicago - ETA SVC confirmed that Employer's email response had been received.⁵⁴ Nevertheless, the CO's September 15, 2023 denial letter asserted that "[a]s of the date of this notice, the employer has not responded to the email correspondence."⁵⁵

The CO's assertion that Employer never responded to the September 5, 2023 MDE is controverted by the record. Moreover, Employer's response satisfied all the remaining elements the CO required in the MDE. As such, denial of certification on this basis was arbitrary because it cannot be said that the CO "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."⁵⁶

b. Deficiency 2: Housing.

The applicable regulations required Employer to provide housing for the proposed thirty-six farmworkers.⁵⁷ Also per applicable regulation, the housing provided must have been inspected and certified as (i) sufficient to accommodate the number of workers requested and (ii) meeting all applicable standards.⁵⁸ Georgia's DOL scheduled Employer's housing inspection for the afternoon of August 28, 2023 and sent Employer notice of the inspection that same morning.⁵⁹

The inspection did not take place because GDOL was unable to contact Employer on that date; accordingly, GDOL denied certification for Employer's housing.⁶⁰ There is evidence in the record establishing that Employer was sent notice of the inspection. There is also evidence in the record asserting that the GDOL inspector made several unsuccessful attempts to contact Employer to accomplish the inspection. There is no evidence that Employer was unaware of the inspection date or that Employer was actually present at the housing site for a planned inspection on the scheduled date and time. Finally, there is no evidence that Employer attempted to reschedule the planned inspection.

Employer's housing must have been inspected no later than September 10, 2023.⁶¹ GDOL's denial of housing certification is dated September 5, 2023.⁶² The only evidence in the record of Employer's attempts to resolve the missed inspection is Employer's request on September 18, 2023 to schedule "a housing inspection as soon as possible."⁶³ This was three days after the CO issued the denial letter; therefore the request was not before the CO when the denial letter was issued, and Employer's late request cannot be considered.

⁵³ See AF 5.

⁵⁴ See AF 17.

⁵⁵ AF 15.

⁵⁶ See *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted).

⁵⁷ 20 C.F.R. § 655.122(d)(1).

⁵⁸ 20 C.F.R. § 655.122(d)(6)(ii).

⁵⁹ Notably, GDOL's first and only notice of inspection was sent to Employer by email at 8:39 a.m. on the same day as the scheduled 2:00 p.m. inspection. See AF 21. However, this *Decision and Order* makes no determination regarding whether five hours' notice is reasonable.

⁶⁰ See AF 41.

⁶¹ See 20 C.F.R. § 655.122(d)(6)(i).

⁶² See AF 41.

⁶³ AF 7-8.

c. Summary.

The evidence established that Employer resolved the “Surety Bond” deficiency and the “Transportation” deficiency before the CO issued the denial letter. However, the evidence further established that Employer did not resolve the “Housing” deficiency before the CO issued the denial letter. The regulations required Employer to ensure that the proposed workers’ housing was inspected no later than September 10, 2023. The CO’s denial letter was issued September 15, 2023, and Employer’s housing had not been inspected. Failure to obtain a housing inspection from the local SWA within the required timeframe is a valid basis for a deficiency determination under the Act.⁶⁴ Accordingly, the CO’s denial of Employer’s application was not arbitrary, capricious, or otherwise not in accordance with law.

5. Ruling. The Certifying Officer’s denial of Employer’s *Application for Temporary Employment Certification* is AFFIRMED.

SO ORDERED for the Board,

JOHN M. HERKE
Administrative Law Judge

⁶⁴ See 20 C.F.R. § 655.122(d)(6); see also *In Re C.R. Nelson Wholesale Plant Supply*, 2023-TLC-00032 (April 20, 2023).