U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 November 2021

BALCA Case No.: 2022-TLC-00027

ETA Case No.: H-300-21279-628094

In the Matter of:

WORLDWIDE HARVESTING CO, LLC,
Employer,

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(1)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (Department). 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A). A Certifying Officer (CO) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges (OALJ). 20 C.F.R. §§ 655.103 & 655.171.

STATEMENT OF THE CASE

On August 21, 2021, Worldwide Harvesting Co, LLC (Employer) filed the following documents with the CO: (1) Form ETA 9142A, H-2A *Application for Temporary Employment Certification* (Application); (2) Appendix A to Form ETA 9142A; (3) ETA Form 790, *Agricultural Clearance Order*; and (4) Attachments to Form 790. (AF 51-83).[1] Employer is an H-2A Labor Contractor (H-2ALC)[2] that provides agricultural labor service to fixed-site employers.[3] (AF 67-68, 76). Employer's Application sought certification for thirty farmworkers

[1] "AF" is an abbreviation for the Administrative File.

[2] An H-2ALC is "[a]ny person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart." 20 C.F.R. § 655.103(b).

[3] The regulations define a fixed-site employer as "[a]ny person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart, who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or

and laborers for greenhouse nursery operations, from December 5, 2021 until April 22, 2022, based on an alleged seasonal need during that period. (AF 51, 59).

On October 25, 2021, the CO issued a Notice of Deficiency (NOD), identifying two deficiencies, including the following:

> **1. H-2A Labor Contractor-FLC Certificate 20 CFR 655.132(b)(2) Deficiency:**
>
> In accordance with Departmental regulations at CFR sec. 655.132(b)(2), an H-2A Labor Contractor must provide a "copy of the Migrant and Seasonal Agricultural Worker Protection Act (MPSA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. sec. 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC."
>
> The employer is an H-2A Labor Contractor and provided a Farm Labor Contractor (FLC) Certificate of Registration with its application indicating the employer is authorized to transport and house workers. However, the authorized vehicles expire October 25, 2021.
>
> It is unclear how the employer plans to transport the 30 requested workers without current, authorized vehicles.

(AF 40).

The CO required the Employer to "provide a[n] FLC certificate that contains sufficient authorized vehicles to transport the requested workers." (AF 40). In addition, the CO noted that Employer could "submit evidence of an application submitted to WHD [Wage and Hour Division] that extends the prior registration's validity while pending." (*Id.*).

On October 27, 2021, Employer submitted a Letter of Assurance, which provided:

> Finally, please be advised that the updated insurance for WWH [Worldwide Harvesting] has been sent to WHD California office, along with an application for amendment to update the authorized vehicles to 12/31/2021 as reflected on the current insurance policy. Once said policy has been renewed, a copy of the certificate will be emailed to the appropriate departments.

(AF 30).

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this subpart as incident to or in conjunction with the owner's or operator's own agricultural operation." 20 C.F.R. § 655.103(b).

A Notice of Required Modifications was issued by the CO on October 29, 2021.[4] (AF 32). The Notice reiterated the deficiency reported in the NOD and again requested Employer file the requested documents, stating:

> As it was unclear how the employer plans to transport the 30 requested workers without authorized vehicles, the employer was asked to submit a[n] FLC certificate with sufficient, authorized vehicles to transport the requested workers. Additionally, the employer could submit evidence of an application submitted to WHD that extends the prior registration's validity while pending. Alternatively, the employer could provide an explanation of how it plans to transport workers when it does not have authorized vehicles.
>
> In response to the NOD, the employer stated, "Finally, please be advised that the updated insurance for WWH has been sent to WHD California office, along with an application for amendment to update the authorized vehicles to 12/31/2021 as reflected on the current insurance policy. Once said policy has been renewed, a copy of the certificate will be emailed to the appropriate departments."
>
> However, the employer did not provide documentation from WHD extending the employer's prior registration's validity while pending.
>
> **Modification Required:**
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> In order to further process your application, the employer must submit a[n] FLC Certificate of Registration with sufficient, authorized vehicles to transport the requested workers. Additionally[,] the H-2ALC may submit evidence of an application submitted to WHD that extends the prior registration's validity while pending.
>
> Alternatively, the employer may provide an explanation of how it plans to transport workers when it does not have authorized vehicles.

(AF 32-35).

On November 3, 2021, Employer re-submitted its October 27 Letter of Assurance in response to the CO's Notice of Required Modifications:

> Finally, please be advised that the updated insurance for WWH has been sent to WHD California office, along with an application for amendment to update the authorized vehicles to 12/31/2021 as reflected on the current insurance policy. Once said policy has been renewed, a copy of the certificate will be emailed to the appropriate departments.

[4] The Notice included a warning: "If the modifications required of the application and/or job order are received within three business days from the date you receive this letter and in the manner specified by the CO, the CO will make a determination as expeditiously as possible. Failure to respond within the time prescribed making all necessary modifications will result in a denial of certification." (AF 32).

(AF 22).

> On November 8, 2021, the CO issued a Final Determination, stating that:
>
> [T]he employer provided an amendment application to WHD. However, the employer failed to provide the evidence that WHD has received the application. Therefore, the employer has failed to provide any evidence that it can transport its workers from housing to the worksite.
>
> The employer failed to provide a valid FLC certificate of registration with sufficient, authorized vehicles to transport workers; or evidence of an application submitted to WHD that extends the prior registration's validity while pending.

(AF 22). Accordingly, the CO denied Employer's Application for thirty (30) farmworkers and laborers.

DISCUSSION AND APPLICABLE LAW

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 the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action." 20 C.F.R. § 655.171(a). Accordingly, an employer may not present an argument or refer to any evidence that was not part of the record when the case was pending before the CO.[5]

Deficiency regarding 20 C.F.R. § 655.132(B)(2): FLC Certificates of Registration

In accordance with Departmental regulations at 20 C.F.R. § 655.132(b)(2), an H-2ALC must provide in or with its Application a "copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. sec. 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC."

Employer did not provide a valid FLC Certificate of Registration showing it is authorized to transport workers or provide evidence that an amended application had been received by WHD *while the case was pending before the CO*. Although Employer's request for review may have included evidence that WHD received the amended application for Certificate of Registration as required under § 655.132(b)(2); Employer was prohibited from presenting or

[5] The Employer and CO were permitted to file a brief no later than November 29, 2021, but neither did.

referring to any evidence that was not part of the record while the case was pending before the CO, pursuant to § 655.171.[6]

In a request for administrative review, the ALJ may only render a decision based on "the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved." 20 C.F.R. § 655.171(a). Based on the written record and evidence before me, I find that Employer has not established it is eligible for the H-2A program for temporary labor certification pursuant to the regulations at 20 C.F.R. Part 655, Subpart B.

Accordingly, Employer does not meet the criteria for certification.

ORDER

Based on the foregoing, the denial of Employer's H-2A Application for temporary labor certification is **AFFIRMED**.

SO ORDERED.

For the Board:

Digitally signed by Dan C. Panagiotis
DN: CN=Dan C. Panagiotis, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

DAN C. PANAGIOTIS
ADMINISTRATIVE LAW JUDGE

[6] *See Paloma Harvesting, Inc.*, 2016-TLC-00051, slip op. at 2-3 (June 13, 2016) ("[A]n employer may not refer to any evidence that was not part of the record as it appeared before the CO.") *See also Rodriguez Produce*, 2016-TLC-00013, slip op. at 3 (Feb. 4, 2016) (evidence may not be considered that was not before the CO); *Paintbrush Adventures*, 2015-TLC-00006, slip op. at 3 (Nov. 24, 2014) (same).