



Issue Date: 06 May 2016

BALCA Case No: 2016-TLC-00040
ETA Case No: A-16090-892683

In the Matter of:

DAVID STOCK,
Employer,

Certifying Officer: Chicago National Processing Center

Appearances: Christopher J. Schulte, Esquire
CJ Lake, LLC
For Employer

Louisa Reynolds, Esquire
Associate Solicitor
For the Certifying Officer

Before: **LARRY W. PRICE**
Administrative Law Judge

**DECISION AND ORDER REVERSING THE CERTIFYING OFFICER'S DENIAL OF
THE EMERGENCY FILING WAIVER UNDER 20 C.F.R. § 655.134**

This matter arises out of a request for de novo review of the Certifying Officer's denial of an emergency waiver of the timelines relating to an H-2A temporary labor certification application filed by David Stock. In support of their respective positions, the parties filed briefs on April 29, 2016. *See* Petitioner's Brief in Support of Reversal of Certifying Officer's Denial of Emergency Processing of H-2A Temporary Labor Certification (Emp.'s Br.) *and* Certifying Officer's Brief (CO's Br.).

I. STATEMENT OF THE CASE

David Stock (the Employer) is a long-time employer of temporary, seasonal, foreign workers. In late 2015, Employer discovered that his usual agent for filing H-2A applications had been debarred. *See Employment USA, LLC*, 2014-TAE-00003 (Sep. 1, 2015). Emp.'s Br., pp. 2-3. In accordance with his usual procedures, Employer contacted a new agent for the purpose of hiring sixteen H-2A workers for the upcoming season. Employer provided the new agent with an application identifying the need for sixteen workers, provided payment to the agent for sixteen workers, established housing for sixteen workers, and advertised for sixteen workers in all

recruitment documentation. Emp.'s Br., pp. 4-5. Employer also identified the dates of intended employment as March 15 to December 15, 2016.

On January 14, 2016, Employer, through his newly acquired agent, submitted an Agricultural and Food Process Clearing Order (ETA Form 790) for five agriculture equipment operators beginning on March 20, 2016. AF 89.¹ On January 24, 2016, the Certifying Officer (CO) received the Employer's Form ETA 9142 Application for Temporary Employment Certification for five workers, changing the occupation title and correcting the dates of intended employment. AF 81. On March 16, 2016, the CO approved the Employer's application for certification for the five requested workers. AF 86.

At some point within the following week, Employer discovered that his agent had only applied for five, rather than sixteen, workers, and Employer's agent sought to amend the certification to reflect the correct number of workers. Emp.'s Br., p. 5; AF 66. The CO rejected the amendment request and invited Employer's agent to file a new application for the additional workers. CO's Br., p. 2.

On March 30, 2016, two weeks after the initial certification application was approved, Employer, again through his agent, sought certification for eleven workers and requested a waiver of the usual 45-day filing period. Employer's agent identified Employer's health and recent cancer diagnosis as the basis for filing the emergency application. The request also stated that Employer would suffer financially without the additional eleven workers. AF 41-66. On April 5, 2016, the CO issued a Notice of Deficiency (NOD), which listed five deficiencies, including the failure to establish an emergency situation that would warrant waiver of the filing deadline. AF 22-30. Specifically, the CO stated, in pertinent part:

Departmental regulations at 20 CFR sec. 655. 134(b) provides a non-exhaustive list of items which qualify as good and substantial cause. While the events listed are varied, they share the common trait of being outside the control of the employer.... [The Employer's] reason for requesting emergency processing is that it made an error in requesting only five workers in its previous application. This action was entirely within the control of the employer, and does not fall within the above definition of good and substantial cause related to the loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

AF 25.

In response to the NOD, on April 11, 2016, the Employer, now through counsel, sought a de novo hearing, appealing the CO's denial of an emergency waiver under 20 C.F.R. § 655.134. AF 3-11. BALCA docketed the appeal on April 11, 2016, and this matter was assigned to me on April 14, 2016. At 1:00 p.m. CST on April 18, 2016, a conference call was held to discuss proceedings in this case. The parties agreed for this matter to be heard on the briefs, and the briefing deadline was set for Friday, April 29, 2016. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

¹ AF is an abbreviation for Administrative File or Appeal File.

II. DISCUSSION

It is the Employer's burden to show that certification is appropriate. 20 C.F.R. § 655.161(a). The applicant bears the burden of proving compliance with all applicable regulatory requirements in order to achieve certification. 8 U.S.C. § 1361 (2006).

An employer seeking temporary labor certification must file an application not less than 45 days before the requested date of need. 20 C.F.R. § 655.130(b). In some situations, the CO may waive the time period for filing temporary labor applications. 20 C.F.R. § 655.134 provides:

(a) Waiver of time period. The CO may waive the time period for filing for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100.

(b) Employer requirements. The employer requesting a waiver of the required time period must concurrently submit to the NPC and to the SWA serving the area of intended employment a completed Application for Temporary Employment Certification, a completed job order on the Form ETA-790, and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

(c) Processing of emergency applications. The CO will process emergency Applications for Temporary Employment Certification in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the Application for Temporary Employment Certification in accordance with §§ 655.160 through 655.167. The CO may advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or there is not sufficient time to test the availability of U.S. workers such that the CO can make a determination on the Application for Temporary Employment Certification in accordance with § 655.161. Such notification will so inform the employer using the procedures applicable to a denial of certification set forth in § 655.164.

20 C.F.R. § 655.134 (supplied).

Here, the CO denied the emergency waiver, finding that the Employer did not demonstrate good and substantial cause. The regulations give the discretion for approving waivers to the CO because he is in the unique position of being able to determine whether the shortened application period will allow him to test the domestic labor market in accordance with 20 C.F.R. § 655.100(b). However, because the Employer requested de novo review, the Administrative Law Judge must independently determine if the employer has established eligibility for temporary labor certification. Therefore, the standard of review in a de novo case cannot be for abuse of discretion on the part of the CO. Instead, the standard is whether the Employer has carried his burden of establishing by a preponderance of the evidence that he qualifies for an emergency waiver of the required time period. *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00096, *slip op.* at 2 (Aug. 15, 2014); *R. Hart Hudson Farms, Inc.*, 2015-TLC-00013, *slip op.* at 9 (Feb. 2, 2015).

The Employer has pointed to two cases in which BALCA, in dicta, has recognized non-weather-related and non-pandemic situations for which an employer may be able to file for an emergency waiver. *Tri-Turf Sod Farms, Inc.*, 2011-TLC-00170 *slip op.* at 3 n.2 (Feb. 3, 2011) (an employer may be able to file an emergency request if its domestic hires quit employment); *Carol Paul FLC*, 2007-TLC-00013 (Jul 5, 2007) (an employer is free to file an emergency application to avoid the potential loss of crops). Neither case held that the situations identified (loss of domestic workers or crops) would qualify for emergency waivers, only that the employers were able to file for emergency waiver. Nonetheless, the comments made in dicta provide further guidance as to what situation may qualify for emergency waiver.

At the heart, the primary reason the Employer requested waiver is because his agent requested certification for five, rather than sixteen, domestic workers. By the time the Employer knew of the error, it was well within the 45-day application period. Generally, an employer is bound by his agent's actions. However, in some situations where the balance of equity calls for exceptions, BALCA has excused an employer for his agent's actions. *Kaname Japanese Restaurant*, 2004-INA-00298, *slip op.* at 10 (Aug. 24, 2005) (the CO failed to notify the new attorney of the second notice of filing); *Nivek Painting, Inc.*, 2004-INA-00301, *slip op.* at 6 (Aug. 24, 2005) (forgiving the employer for failing to respond to the notice of filing where the CO did not notify the employer that its agent was debarred). Moreover, under the old PERM regulations, BALCA has excused an employer for its attorney's negligence where manifest injustice resulted. *Madeleine S. Bloom*, 1988-INA-152 (Oct. 13, 1989) (*en banc*). *Bloom* considered an employer's failure to file a timely rebuttal. The Board held that this regulatory deadline was non-jurisdictional and could be waived where the ends of justice would not be served by allowing an employer to suffer the consequences of its attorney's negligence. The Board found that grounds for waiver of the regulatory time period for submitting rebuttal were presented where the employer had given needed rebuttal evidence to its attorney, who then absconded, abandoning his law practice without the employer's knowledge. The needed evidence for rebuttal was a single piece of paper, a copy of the alien's driver's license. If the driver's license had been provided, labor certification would have been granted.

In *Park Woodworking, Inc.*, 1990-INA-93 (Jan. 29, 1992) (*en banc*), the Board held that the *Bloom* standard would be strictly construed, and equitable relief would not be mandated where there was no egregious factor in the case. The Board held that a finding of manifest injustice sufficient to require equitable relief would only occur upon a showing of some egregious conduct.

Although *Bloom* relates primarily to PERM cases, I find that it provides guidance here. Every step the Employer took in this case pertained to acquiring certification for sixteen workers. He paid for sixteen visas, paid for sixteen applications, advertised for sixteen workers, and established housing for sixteen workers. The Employer's agent, however, failed to apply for sixteen workers and failed to notify her client until time became too short to remedy the situation. The agent also initially noted the incorrect starting date of employment but corrected that error before it could cause irreparable harm. As a result, the Employer is left with a workforce of only one-third its usual and desired size, and is left with the prospect of losing millions of dollars. The CO granted certification in the earlier application only two weeks before the present application was filed, and very likely would have granted the earlier application had it been made for sixteen, rather than five, foreign workers. The domestic market has been adequately tested.

Under the particular facts of this case, I find that imputing the agent's errors to the Employer would work manifest injustice. Thus, I hold that the denial of an emergency waiver here is unreasonable and, therefore, should be reversed.

III. ORDER

In light of the foregoing, the Certifying Officer's decision denying an emergency waiver to the Employer is **REVERSED**, and this matter is **REMANDED** to the Certifying Officer for further proceedings in compliance with this Decision and Order.

SO ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge

Covington, LA