U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 June 2019

BALCA Case No.: 2019-TLC-00056
ETA Case No.: H-300-19060-581813

In the Matter of:

BJORNSTAD HARVESTING, LLC
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Bjornstad Harvesting, LLC's ("Employer") request for review of the Certifying Officer's ("CO") decision to deny its application for temporary alien labor certification under the H-2A non-immigrant program. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1), 1188.

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142A, Application for Temporary Employment Certification ("Form 9142A"). A CO in the Office of Foreign Labor Certification of the Department of Labor's Employment and Training Administration ("ETA") reviews applications for temporary labor certification. Following the CO's denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a).

BACKGROUND

On March 1, 2019, the ETA received an application for temporary labor certification from Employer. Employer requested certification for six Agricultural Equipment Operators for an alleged period of seasonal need from April 17, 2019, through December 10, 2019. AF 54-63.[1] The CO issued a Notice of Deficiency ("NOD") on March 8, 2019. AF 44-48. After granting Employer's request for an extension and further communications between the CO and Employer, the CO issued a Notice of Acceptance ("NOA") on March 18, 2019. AF 17-22.

In the NOA, the CO informed Employer that its application had been "reviewed and accepted for processing"; however, issuance of a final determination was conditioned on, among other documentation, Employer providing "an original surety bond as required by 29 CFR 501.9." AF 17-21. Section 501.9(a) requires that the original surety bond be submitted with an application. Notwithstanding that requirement, the CO permitted Employer the opportunity to

[1] Citations to the Appeal File will be abbreviated with an "AF" followed by the page number.

cure this deficiency with a late submission. The NOA did not provide Employer with a deadline to submit its surety bond.

On April 30, 2019, apparently after submitting documentation to satisfy the outstanding requirements listed in the NOA, Employer contacted the CO via email to inquire on the status of its application.[2] AF 16. The CO responded to Employer via email on May 3, 2019. AF 13-14, 15.[3] The CO explained that ETA had not yet received Employer's surety bond, and that in order "to receive a favorable determination, [Employer] must provide the required documents outlined in the [NOA]." AF 13. The CO again failed to provide Employer with a deadline. In response, Employer stated that is surety bond had been mailed on May 2, 2019. AF 13.

On May 10, 2019, the CO informed Employer, via email, that ETA had still not received the surety bond. AF 10-11, 12.[4] The CO requested that Employer provide a tracking number. AF 10-11, 12. In an email response, Employer attached a PDF copy of the surety bond that it claimed to have mailed on May 2, 2019. AF 10.

On May 22, 2019, at 7:31 a.m., Employer's mailed original surety bond arrived at ETA. *See* AF 3, 85-87. Also on May 22, 2019, the CO issued a Notice of Denial Letter. AF 6-9. The CO explained that its denial was based on Employer's failure "to provide an **original** surety bond document" as required by 20 C.F.R. § 655.132(b)(3). AF 8-9.

Employer appealed the CO's denial on May 24, 2019, and requested an administrative review under 20 C.F.R. § 655.171(a). AF 2-5. Employer claimed that the original surety bond sent to the Department "got lost." AF 2. Employer then mailed a second surety bond to the Department through the United Parcel Service. AF 2. The UPS tracking information indicates that Employer mailed this surety bond on May 20, 2019; delivery was attempted but failed at 7:43 a.m. on May 21, 2019; and the surety bond was successfully delivered at 7:31 a.m. on May 22, 2019. AF 4-5.

On June 21, 2019, the CO uploaded the administrative file to the Office of Administrative Law Judges. This matter was assigned to the undersigned on June 25, 2019. This Tribunal issued a Notice of Assignment and Expedited Briefing Schedule that same day, giving the CO the opportunity to file a brief by June 26, 2019, 1:00 p.m.

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[2] The administrative file does not contain any records that show that Employer satisfied the other requirements listed in NOA. However, neither the CO nor Employer make any mention of any other missing documentation in the email correspondence include in the administrative file (AF 10-16), nor did the CO mention any other deficiencies in its Notice of Denial Letter. AF 6-9. Therefore, the Tribunal reasonably infers that Employer had satisfied all requirements listed in the NOA, except for the surety bond, before April 30, 2019.

[3] The CO's May 3, 2019, response to Employer's is included in the administrative file at AF 15. However, this record does not contain the full text of the CO's email. The full text, however, is included in the email chain attached to Employer's May 6, 2019, reply to the CO. AF 13-14.

[4] The record also contains an incomplete version of the CO's May 10, 2019, email. AF 12. However, once again, the full text is included as part of the email chain attached to Employer's response. AF 10-11.

On June 26, 2019, the CO submitted a brief, arguing that the denial of certification should be affirmed on two grounds. First, the CO asserted that Employer's surety bond constituted "new evidence" that was not before the CO when the denial decision was made. Since this Tribunal must base its decision only on evidence that Employer timely submitted to the CO, the CO asserts that the denial must be affirmed. Second, even if the Tribunal were to consider Employer's untimely submitted surety bond as "evidence" in this matter, the CO argues that denial was warranted. The CO notes that this bond appears to be an extension of a bond that Employer used in a prior application. And since a new, separate surety bond is required by ETA for each application, Employer's submitted surety bond does not satisfy the bonding requirement of § 655.132(b)(3).

STANDARD AND SCOPE OF REVIEW

Although neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review in H-2A appeals, the Board has adopted the arbitrary and capricious standard. *Employment and Training Administration v. Altman Specialty Plants, Inc.*, 2019-TLC-00008 (Dec. 20, 2018). *But See Crop Transport, LLC*, 2018-TLC-00027, slip op. at 3 n.4 (Oct. 19, 2018) (concluding that *de novo* review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a)). Thus, the CO's determinations will be upheld unless the Board finds that CO has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *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).

Employer bears the burden to show that certification is appropriate. *See* 20 C.F.R. § 655.161(a). In an administrative review of the CO's denial, the ALJ must base his decision on the written record and any written submissions by the parties. *See* § 655.171(a). The ALJ may not consider new evidence that was not submitted to the CO. *Id.*

DISCUSSION

In addition to the general filing requirements that the federal regulations impose upon all applicants for temporary labor certification under the H-2A program, employers classified as H-2A labor contractors must satisfy additional requirements set forth at 20 C.F.R. § 655.132. These requirements include a filing of:

> Proof of [the employer's] ability to discharge financial obligations under the H-2A program by including with the *Application for Temporary Employment Certification* the original surety bond as required by 29 CFR 501.9. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond (as calculated pursuant to 29 CFR 501.9) and any identifying designation used by the surety for the bond.

20 C.F.R. § 655.132(b)(3).[5]

Here, the record unambiguously demonstrates that Employer—an H-2A labor contractor (*see* AF 55)—did not submit a surety bond with its application. Notwithstanding this deficiency, the CO issued a Notice of Acceptance Letter conditioned upon, *inter alia*, Employer's submission of an original surety bond. AF 17-22. The CO did not provide Employer with a deadline to submit the surety bond. Employer mailed a surety bond on May 2, 2019 (AF 13), but it never arrived at ETA. AF 10-11. On May 10, 2019, the CO emailed Employer to inform it that ETA had still not received the surety bond, and Employer emailed a PDF copy of the surety bond that same day. AF 10. On May 22, 2019, at 7:31 a.m., Employer's mailed original surety bond arrived at ETA. *See* AF 3, 85-87. Additionally on May 22, 2019, the CO issued a Notice of Denial Letter. AF 6-9. The CO explained that its denial was based on Employer's failure "to provide an **original** surety bond document" as required by 20 C.F.R. § 655.132(b)(3). AF 8-9. The administrative record also contains a copy of the original surety bond that Employer mailed to the CO. AF 84-87.

Based on the record, the undersigned is unable to determine whether the CO had possession of Employer's original surety bond at the time the Notice of Denial issued. It seems that the CO was unaware on May 22 that Employer's original surety bond had been delivered to ETA, as the CO emphasizes that an "**original**" surety bond was required for certification. Since Employer had emailed a PDF version of the surety bond to the CO, such emphasis would seem to indicate that the CO only knew of the PDF version and found it deficient. However, the administrative record also contains the dated receipt of Employer's original surety bond by ETA, showing that it arrived on May 22, 2019. AF 84-87. And the tracking info submitted on appeal shows that the package containing the surety bond arrived at ETA at 7:31 a.m. AF 3. Thus, given that the CO did not provide Employer with a deadline for submission of the surety bond,[6] and that the surety bond arrived early in the morning on the same day the Notice of Deficiency issued, the undersigned cannot determine if the surety bond constitutes "new evidence" in this appeal.

However, resolution of this issue is unnecessary for adjudication of Employer's appeal. As the CO's brief correctly notes, ETA requires an employer to submit a new, separate surety bond for each application. *See T.A.F. Shearing Co./Alejandro R. Colqui*, 2012-TLC-00095, at 2, 6, 7 (Sept. 19, 2012) (citing OFLC FAQ) (affirming the CO's denial where the employer "provided a continuation certificate of a surety bond originally submitted with an earlier

[5] The preamble to the regulations specifically notes that this "requirement to provide the original bond is intended to ensure that the Department has legal recourse to make a claim to the surety against the bond following a final order finding violations." 75 Fed. Reg. 6,884, 6,942 (Feb. 12, 2010).

[6] The Notice of Acceptance Letter stated that the CO would "make a determination to grant or deny the application no later than 30 calendar days before the date of need, except as provided for under Departmental regulations at 20 CFR § 655.142 for modified applications." AF 21. This letter issued on April 18, 2019, and the date of need listed on Employer's application is April 17, 2019. Thus, either this boilerplate paragraph was inapplicable in this case (because the NOA issued *after* Employer's stated date of need), or it indicated an uncalculated date of determination. The undersigned is unable to determine whether Employer's application had been modified at this point, and is therefore unable to determine whether the NOA set an implicit deadline for Employer to submit a surety bond.

application, and did not submit a unique bond with its present application").[7] The evidence submitted by the CO shows that the surety bond submitted by Employer in this application is the same bond it submitted in a prior application from January 2018. *Compare* CO's Br. Ex. 1 *with* CO's Br. Ex. 2 (showing the certificate number for both bonds as "7900412198"). Denial of Employer's application was therefore appropriate regardless of whether Employer's May 22 submission of the original surety bond was timely under the CO's instructions.

For this reason, the Tribunal finds that the CO properly denied Employer's request. The CO's denial of Employer's application is hereby affirmed.

SO ORDERED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

[7] The OFLC FAQ states:

> May an H-2A Labor Contractor use the same surety bond to support Applications for Temporary Employment Certification in different years?
>
> No. A new, separate bond is required for each *Application for Temporary Employment Certification*. . . . Also, submitting a rider or evidence of a "continuous" bond, even if an original document, is not sufficient to satisfy the regulations. Such documents provide evidence of an existing bond rather than a new bond specific to the application.

Accessible at: https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2alabor5.