



Issue Date: 12 June 2020

BALCA CASE NO.: 2020-TLC-00074

ETA CASE NO.: H-300-20070-392700

In the Matter of:

WOODHOUSE COMPANY,
Employer.

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This matter is before the Board of Alien Labor Certification Appeals on Woodhouse Company's application for a certification under the H-2A temporary alien agricultural labor certification program.¹ The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. The Certifying Officer (CO) at the Department of Labor's Employment and Training Administration denied the application. Woodhouse Company timely requested administrative review.² *See* 20 C.F.R. § 655.171.

This Decision and Order is based on the written record, which consists of the Administrative File. Having considered the full record, I will affirm the Certifying Officer's denial of the labor certification.

Findings of Fact

Woodhouse Company (d/b/a Woodhouse Farming & Seed, LLC) operates a farm in Tulelake, California in the Klamath Basin, where it cultivates and harvests alfalfa hay, grain hay, and cereal grain. AF at 114, 128.³ It applied for an H-2A Temporary Employment Certification based on a "seasonal" need, seeking to hire one "Agricultural Equipment Operator" from March 16, 2020 to November 13, 2020. AF at 111.

Notice of Acceptance and requirements for recruitment report and proof of workers' compensation coverage. After Woodhouse Company cured certain deficiencies in its application, the Certifying Officer issued a Notice of Acceptance on April 6, 2020. AF at 22.

¹ *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B.

² In its request for review, Employer did not state whether it was electing administrative review or a *de novo* hearing. ETA wrote that it understood Employer to be seeking administrative review. Employer's representative confirmed this to my staff.

³ "AF" refers to the Administrative File.

The Certifying Officer notified Employer that, to receive a final approval, it to submit “a written recruitment report” and “proof of workers’ compensation coverage” within seven calendar days of the issuance of the Notice of Acceptance. AF at 22-24. The Certifying Officer warned: “Failure to provide [proof of workers’ compensation coverage] prior to the requested due date will result in a denial of your application.” AF at 24. Seven calendar days would run on April 13, 2020.

The Certifying Officer summarized the recruitment process and specified what needed to be included in the required recruitment report:

(1) identify the name of each recruitment source; (2) state the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report and the disposition of each worker; (3) confirm that former U.S. employees were contacted and by what means; and (4) if applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring each U.S. worker.

AF at 23 (quoting 20 C.F.R. § 655.156).

The Certifying Officer also detailed what was required for proof of workers’ compensation coverage:

Such evidence should include the name of the insurance carrier, the policy number, proof of insurance for the dates of need or proof of State law coverage In the event that the current coverage will expire during the period of need, the employer must submit a signed and dated written statement showing the employer’s intent to renew and maintain coverage for the entire dates of need.

AF at 24 (emphasis omitted) (citing 20 C.F.R. § 655.122(e)(2)).

Reminder emails. On April 29, 2020, ETA emailed Woodhouse Company’s representative, Janice A. Woodhouse, stating, “The employer must note that its recruitment report was due on April [13], 2020. However, the employer is yet to provide its recruitment report. [ETA] will be able to issue a favorable final determination upon receipt of its recruitment report.” AF at 16.⁴ ETA then explained the submission process. *Id.*

On May 19, 2020, ETA again emailed Employer, stating that Employer still had not submitted a recruitment report (which was due more than a month before). AF at 15. ETA gave Employer two days to file the report (“by close of business on May 21, 2020”). *Id.* ETA warned Employer that, “After May 21, 2020, a final determination will be issued based upon the information the [ETA] has at hand.” *Id.* ETA again stated what was required in the submission. *Id.* Minutes later, ETA emailed Employer a revision of the same email, adding that a “workers’ compensation certificate” was also required no later than May 21, 2020.

⁴ The Chicago NPC erroneously wrote that the due date was April 14, 2020.

Denial of application. Having received nothing, on May 26, 2020, the Certifying Officer denied Employer's application for failure to provide (1) a recruitment report and (2) proof of workers' compensation insurance coverage. AF at 13.

Discussion

On administrative review, "the ALJ will, 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).

Standard of review. The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer's determination.⁵ When the certifying officer's determination turns on the Employment and Training Administration's long-established, policy-based interpretation of a regulation, it would seem that considerable deference is owed to ETA. Cf. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (describing the deference courts give administrative agencies). In such cases, BALCA likely should not overturn a certifying officer's reliance on the established policy interpretation unless it is arbitrary or capricious. Absent ETA's long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer's denial *de novo*. On the present record, I need not determine the deference owed the certifying officer, for I would affirm the denial of the application on the less deferential *de novo* review standard.

H-2A program requirements. The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361. An employer seeking certification under the H-2A program must comply with all of the regulations and satisfy "all the recruitment obligations" that those regulations require. 20 C.F.R. § 655.161(a).

Notice. Employer contends that it did not receive notice of the requirements to submit proof of workers' compensation insurance coverage and a recruitment report until it received the ETA's email on May 19, 2020. But throughout the application process, ETA sent emails to the same address, which Employer had placed on file, and Employer received other emails at that address. See AF at 8, 14-16, 21, 72, 83, 92, 94, 98, 103. It is Employer's obligation to update ETA with any changes in its contact information. I therefore find that Employer received notice of the requirements relevant here, including in the Notice of Acceptance, emailed on April 6, 2020, and the two reminder emails. AF at 23-24,

⁵ Before the current regulations went into effect on March 15, 2010, the prior regulations specified that the standard of review was "legal sufficiency." 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted legal sufficiency to imply an arbitrary and capricious standard of review. See *J and V Farms, LLC*, 2015-TLC-00022, slip op. at 3 n.1 (March 4, 2016) (citing *Bolton Springs Farm*, 2008-TLC-00028, slip op. at 6 (May 16, 2008)). But the prior regulations never defined "legal sufficiency." See *id.*; 20 C.F.R. § 655.112(a) (2008). The current regulations removed the reference to legal sufficiency and did not address the deference, if any, BALCA should accord to a certifying officer's decision. See 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations' silence leaves the question open and requires BALCA judges to find an appropriate standard of review.

Proof of workers' compensation coverage. "Prior to issuance of the temporary labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage" 20 C.F.R. § 655.122(e)(2). Nothing on the record shows that Employer submitted proof of this coverage. The Notice of Acceptance notified Employer that this was due on or before April 13, 2020. Having received no submission, on May 19, 2020, ETA reminded Employer and extended two additional days for Employer to comply. Employer does not dispute receiving the reminder notice, and I have found that it also received the initial Notice.

The administrative record contains no filing of a workers' compensation certificate. Employer asserts that it did respond timely to the reminder notice. It states that it emailed ETA a copy of its workers' compensation insurance certificate on May 20, 2020. Employer enclosed a copy of the workers' compensation insurance certificate with its appeal letter.

This argument fails for two reasons. First, Employer has requested administrative review, and I therefore cannot consider any evidence that isn't included in the administrative record. *See* 20 C.F.R. § 655.171(a). The certificate, filed only after the process at ETA was complete, is not in the administrative file.

Second, Employer did not submit (even to BALCA outside the administrative file) a copy of the email it asserts that it timely sent to ETA, attaching the certificate. Employer submitted only the certificate, not the email. There thus is no evidence that Employer sent the certificate to ETA. As a result, even if I considered Employer's outside-the-record submission, I would conclude, for this purpose, that Employer did not timely submit to ETA (on or before May 21, 2020) a copy of the workers' compensation insurance coverage certificate.

Recruitment report. "The employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted on a date specified by the CO in the Notice of Acceptance" 20 C.F.R. § 655.156(a). Much as with the workers' compensation certification, there is no evidence that Employer met this requirement timely or at all.

Employer asserts that, on May 20, 2020, it emailed ETA, asking what a recruitment report was. Again, this email is not in the administrative file, and I therefore cannot consider it. And, again, even if I considered what Employer submitted with its request for BALCA review, Employer did not include this email in that submission. I therefore conclude for this purpose that there was no such email.

Even if there had been such an email, it would be insufficient. It is Employer's obligation to learn the requirements of the H-2A program if Employer wishes to participate in and benefit from that program. Moreover, the Certifying Officer explained in detail in the Notice of Acceptance what was required, and the reminder that ETA sent on April 29, 2020, explained again. There is no dispute that Employer failed to file a recruitment report by the extended May

21, 2020 deadline or at all. I therefore conclude that it did not.

Conclusion and Order

Woodhouse Company has failed to comply with the regulatory requirements to submit proof of workers' compensation coverage and to submit a recruitment report for one agricultural equipment operator under the H-2A temporary alien agricultural labor certification program. Accordingly, the Certifying Officer's denial of Woodhouse Company's application is AFFIRMED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge