DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

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 H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis, if the Secretary of Labor first certifies (a) there are not sufficient domestic workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services in question; and (b) the employment of foreign workers in such labor or services will
not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. section 1188, subsection (a).

In this case, D & D Harvesting and Trucking (“Employer”) requests administrative review, under 20 C.F.R. § 655.171, subsection (a), of the Certifying Officer’s (“CO”) denial of an alien agricultural labor certification (“H-2A”) applications. Employer seeks authority to hire eight Agricultural Equipment Operators1 (AF, p. 15) to work in Byers, Texas,2 from March 1, 2021, to December 15, 2021 (AF, p.57).

Under 29 C.F.R. section 655.171, subsection (a), I decide this appeal “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 amicus curiae” (emphasis added). I received the administrative record on March 25, 2021. There were no additional submissions from either party. This decision and order is based on the administrative file.

Furthermore, this decision and order is issued within five business days after receipt of the ETA administrative file as required under 20 C.F.R. § 655.171(a).3

STATEMENT OF THE CASE

Employer filed its application on or about January 4, 2021 (AF, p. 80).4 The CO issued a Notice of Deficiency (NOD) on January 21, 2021, requesting Employer provide “written assurance that it will provide at no cost to workers an effective

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1 The exact job opportunity is unclear. Employer describes the job opportunity within the same application as both “Agricultural Equipment Operators” (AF, p. 50) and “Farm Worker Grain” (AF, p. 57). But the Final Determination lists “eight Agricultural Equipment Operator job opportunities” (AF, p. 15).

2 Employer is an H-2A Labor Contractor (AF, p. 49), with contracts to provide labor to farms located in Oklahoma, South Dakota, North Dakota, Kansas, and Texas (AF, p. 66).

3 Before the current regulations became effective on March 15, 2010, the regulatory 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 (Mar. 4, 2016) (citing Bolton Springs Farm, 2008-TLC-00028, slip. op. at 6 (May 16, 2008)). But the earlier regulations did not define “legal sufficiency.” See id.; 20 C.F.R. § 655.112(a) (2008). The current regulations omit the reference to “legal sufficiency” and do not address the deference, if any, BALCA should give to the 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 determine an appropriate standard of review. In this case it makes no difference, since I would reach the same result even under an “arbitrary and capricious” standard.

4 The date of Employer’s filing of its application is unclear. Neither the NOD, NOA, nor FD provide an application date. Some signatures within Employer’s application are dated November 24, 2021. But Employer’s agent’s signature, on the Notice of Entry of Appearance to file on behalf of Employer, is dated January 4, 2021 (AF, p. 80).
means of communicating with persons capable of responding to the worker’s needs in case of an emergency” (AF, p. 43). Employer filed its written assurance on January 22, 2021 (AF, p. 39).

On January 25, 2021, the CO issued a Notice of Acceptance (NOA). The NOA required Employer to submit the following, among other items, for certification:

Based on the results of your initial recruitment efforts, you must submit a written recruitment report containing your signature and dated to our office seven calendar days from the issuance of this notice. In order to assist with the timely processing of the application, you are encouraged to submit all required documentation no later than 3:00 pm Central Time.

(AF, p. 36) (Emphasis original).

And,

In accordance with Departmental regulations at 20 CFR 655.122(e)(2), actual proof of workers’ compensation coverage for your employees is required prior to the issuance of temporary labor certification. In order to receive a labor certification, you must submit evidence that you have obtained workers’ compensation coverage for the entire period of need for your employees. . . In order to assist with the timely processing of the application, you are encouraged to submit all required documentation no later than 3:00 pm Central Time. Failure to provide this documentation prior to the requested due date will result in a denial of your application.

(AF, p. 37) (Emphasis original).

The CO e-mailed Employer requesting this additional documentation on January 29, 2021, February 3, 2021, February 8, 2021, and February 17, 2021. Each e-mail spelled out:

To receive a positive determination the employer must provide a signed and dated Recruitment Report. . . .

And,

In addition, the employer must provide a valid workers’ compensation certificate. . . .
To receive a favorable determination, the employer must provide the required documents outlined in the notice of acceptance.

(AF, pp. 29-30, 24-25) Employer stipulates to receiving these deficiency e-mails (AF, p. 2). Hearing no reply, the CO issued her Final Determination, denying Employer's application, on February 26, 2021 (AF, p. 15), which read

On January 29, 2021, February 3, 2021, February 8, 2021, and February 17, 2021, the Chicago NPC sent email correspondences to the employer requesting proof of workers compensation. To date, the employer has failed to respond and failed to provide its proof of workers' compensation coverage in accordance with 20 CFR 655.122(e)(1)-(2).

And,

On January 29, 2021, February 3, 2021, February 8, 2021, and February 17, 2021, the Chicago NPC sent email correspondences to the employer requesting a recruitment report. To date, the employer has failed to respond and failed to provide its signed recruitment report in accordance with 20 CFR 655.156.

(AF, pp. 17-18). The Final Determination also warned Employer, “If you do not request an expedited administrative judicial review or a de novo hearing before an Administrative Law Judge within seven (7) calendar days, the denial is final and the Department of Labor will not further consider the application” (AF, p. 15).5

On or about March 18, 2021, Employer submitted its request for Administrative Review (AF, pp. 1-3).6 Employer concedes it did not submit the requested documentation, explaining it delayed submitting a recruitment report until it obtained proof of its workers’ compensation policy from its insurance provider. Additionally, it is still waiting on receipt of proof of that policy and requests “more time to acquire the insurance certificate and submit it to the DOL” (AF, pp. 1-2). Employer writes,

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5 The Final Determination (FD), or at least the original FD as initially received by Employer, seems to have been issued in unfinished draft or template form, with sections of text written in and other sections struck out (see AF, pp. 4-5). While this could possibly contribute to confusion on the part of Employer, the missing documents at issue – namely, the recruitment report and workers’ compensation documentation – were clearly requested not once, but several times, before the issuance of this FD. Employer acknowledges it never provided those documents. Therefore, I find there was no confusion about these requirements, even if the formatting of the FD created frustration.

6 The request is not dated, except stamped as “Received” by the Foreign Labor Certification National Processing Center in Chicago on March 18, 2021 (AF, p. 1). Subsequently, it is unclear if the appeal was timely filed, i.e., within seven calendar days of February 26, 2021, as directed by the FD (AF, p. 15). However, because the CO did not raise this issue, and I affirm the CO’s denial of Employer’s application on appeal regardless, I do not consider this issue now.
Due to a workers’ compensation insurance policy being a requirement for certification, we were waiting on D & D Harvesting and Trucking’s policy to be issued before sending in the recruitment report. . . . Without proof of the workers’ compensation insurance the recruitment report would have been insufficient; thus, we did not submit the report. We apologize if this was not the correct route to take.

(AF, p. 2). Employer also writes it “is willing to have the start date of their application delayed to accommodate for the delay in the workers’ compensation policy issuance” (AF, p. 3).

Both Employer and the CO agree that Employer did not submit the required documents necessary for certification following the CO’s issuance of her NOA. Employer concedes it erred and apologizes “if this was not the correct route to take.” Unfortunately, now is not the time to request additional time to submit the requested documentation, nor to ask for a modification of its application regarding the start date for employment. Employer was required to submit its recruitment report and proof of workers’ compensation, or to, in the very least, write the CO requesting modification, within seven calendar days of the issuance of the NOA on January 26, 2021. CO provided Employer ample opportunity to correspond, e-mailing Employer not once, not twice, but four additional times before issuing her FD on February 25, 2021. CO both failed to respond and to submit the required documents in a timely matter.

I conclude the CO properly determined the application, and the denial of certification is affirmed.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge