In the Matter of

FIVE GUYS FARMS LLC,
Employer.

Certifying Officer: Chicago Processing Center

Before: Joseph E. Kane
Administrative Law Judge

DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DETERMINATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to North Shore Resort’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.1 The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peak load, or intermittent basis. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). 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 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer 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 before BALCA. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

On June 7, 2021, the Employer filed with the Certifying Officer (“CO”) an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. (AF 48-64). The Employer requested certification for eight Agricultural Equipment Operators. (AF 48-64). On June 11, 2021, the CO issued a Notice of Deficiency. (AF 38-41). The Employer responded on June 14, 2021 and the CO issued a Notice of Acceptance.

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1 On April 29, 2015, the Department of Labor (the “Department”) and the Department of Homeland Security jointly published an Interim Final Rule ("IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.

2 “AF” refers to the Appeal File.
(“NOA”) informing the Employer that its application for temporary labor certification had been accepted for processing. (AF 17-22).

The Notice of Acceptance notified the Employer that it must provide housing in compliance with the applicable housing standards as set forth in Departmental regulations at 20 CFR 655.122(d). The Employer was instructed to work with the Georgia State Workforce Agency (SWA) to obtain a housing inspection and ensure the housing complied with the regulations. (AF 20).

The Employer submitted its Migrant Housing Safety & Health Checklist. (AF 10-13). However, the checklist provided that a number of the required housing requirements were not complete. (AF 10-13). The SWA provided the Employer until June 15, 2021 to make any necessary repairs to meet compliance and then email the form back to the office for final inspection. (AF 9). The Employer did not provide the documentation by this time. The SWA provided the Employer with an extension until June 18, 2021 to provide the updated documentation. (AF 8). As of the morning of June 21, 2021, the Employer had not provided the necessary documentation and a housing inspection had not taken place. (AF 8). Therefore, the SWA notified the CO that the housing inspection was denied for failure to provide the requested documentation. (AF 8). Thereafter, the Employer submitted additional documentation to the SWA.

The CO issued a Final Determination denying the Employer’s request for temporary labor certification on June 22, 2021. (AF 3-6). The CO based its findings on the Employer’s failure to secure adequate housing per 20 CFR § 655.122(d)(1)(i). The CO addressed the Employer’s failure the timely respond to the SWA’s requests. (AF 5-6).

On June 29, 2021, the Employer requested administrative review of the CO’s Denial before BALCA, as permitted by 20 C.F.R. § 655.61.7 (AF 1-2). On July 8, 2021, the Board of Alien Labor Certification Appeals (“BALCA”) received the request for administrative review. The matter was assigned to Administrative Law Judge Joseph E. Kane. BALCA received the appeal file on the same date. Per a notice of docketing issued July 9th, 2021, the parties were given until July 13th to file a brief. Neither party filed a brief.

**DISCUSSION AND APPLICABLE LAW**

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date of the CO’s determination. 20 C.F.R. § 655.61. Therefore, any arguments and evidence submitted on appeal, including that submitted with the briefs, cannot be considered unless presented to the CO. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA has adopted the arbitrary and capricious standard in reviewing the CO’s determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017). Therefore, a CO’s denial of certification must be upheld unless shown by the Employer to be arbitrary and
capricious or otherwise not in accordance with the law. The Employer bears the burden of proving that it is entitled to temporary labor certification.\(^3\)

Section 655.122(d)(1)(i) governs employer-provided housing; it states in full:

Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter[.]

20 C.F.R. § 655.122(d)(1)(i). Employers work with their state SWA to ensure compliance, SWA performs a housing inspection, and then sends the findings to the CO. The Employer failed to timely obtain a housing inspection in this matter. (AF 8). The SWA provided the Employer with multiple extensions to provide the necessary documentation to obtain the inspection. (AF 8-10). The Employer failed to timely provide the requested documentation. (AF 8-9).

The Employer asserts that it provided the requested documentation on June 21, 2021 prior to the issuance of the Notice of Determination. However, it is unclear whether the documentation provided was sufficient. No housing inspection also occurred. Furthermore, the SWA had already denied the request as of 6:26 am on June 21, 2021. (See AF 8). The SWA had provided the Employer an extension until June 18, 2021, to submit the requested documentation. (AF 8-9).

Therefore, based on the evidence in the record, I find that the Employer has failed to comply with Section 655.122(d)(1)(i) and provide adequate housing within the requested timeframe. Therefore, I find that the CO properly denied the Employer’s application.

For the Board:

JOSEPH E. KANE
Administrative Law Judge