In the Matter of

LG BEES,

Employer,

DECISION AND ORDER
DENYING APPEAL FOR LACK OF JURISDICTION

This matter arises under the labor certification process for temporary agricultural employment of non-immigrant workers in the U.S. under the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, and 1188, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B, (collectively the “H-2A program”)

On February 24, 2021, the Certifying Officer (“CO”) for the Office of Foreign Labor Certification denied the H-2A application for temporary labor certification of LG Bees (hereafter “Employer”). The CO forwarded the matter to this Office for administrative review on September 9, 2021, and the Administrative File was received on September 10, 2021. The matter was assigned to me for all purposes on September 10, 2021, and I issued Notice of Docketing and Order for Briefing directing the parties to file any briefing by September 17, 2021. On September 17, 2021, the CO filed Certifying Officer’s Brief and Motion to Dismiss (“CO’s Brief”). Employer did not file a brief or otherwise respond to the order.

This Decision and Order is based on the written record, which consists of the Administrative File, the request for review, and the brief from the CO. 20 C.F.R. § 655.171(a). As explained below, the appeal is denied for lack of jurisdiction.

Facts

On January 29, 2019, Employer submitted an application for temporary certification for five beekeepers to work from March 29, 2021, through January 29, 2022. AF 30. Employer stated successful applicants must have six months of beekeeping experience and a high school degree or equivalent. AF 31. Employer only submitted page three of Appendix A with its application. AF 27. The CO issued a Notice of Deficiency (NOD) on February
In the NOD, the CO stated that Employer’s application failed to meet the criteria for acceptance because (1) the application was missing required pages from Appendix A and (2) Employer required six months of beekeeping experience without explanation. AF 16. In prior applications, Employer had only required three months of experience, and the CO requested that Employer explain the increase or amend the application to indicate only three months of experience were required. AF 16.

The NOD advised Employer it could submit a modified application within five business days from the date it received the NOD, and the CO would consider the modified application no later than 30 days before the date of need. AF 14. If the modified application did not address the issues identified in the NOD, the CO would not accept it. Id. The NOD stated that if the Employer did not submit a modified application within 12 days of receiving the NOD, the CO would deem the application abandoned. AF 14. Additionally, the CO advised Employer it could request expedited administrative review of the NOD or a de novo hearing of the NOD. Id. Under the applicable regulations, failure to submit a modified application or appeal the NOD results in a final denial that could not be appealed. See 20 CFR § 655.141(b).

Subsequently, Employer failed to either (1) submit a modified application or (2) appeal the NOD within 5 business days. 20 CFR § 655.141(b)(2) and (c). After 12 calendar days passed, the CO deemed the application abandoned. 20 C.F.R. § 655.142.

On February 22, 2021, the CO emailed Employer to inform it that no response had been received and a denial letter would be issued the following day. AF 12. On February 24, 2021, the CO denied the application in accordance with Departmental regulations at 20 CFR § 655.142(a) and 20 CFR § 655.141(b)(5) because Employer did not submit a modified application within 12 calendar days of the NOD or request an expedited administrative appeal or de novo hearing. AF 10. The CO stated the denial was final and could not be appealed. AF 10. Id.

Employer sent an undated letter to the Office of Foreign Labor Certification requesting that the CO reconsider its case. See AF 8. In the undated letter, LG Bees owner, Luis Gonzales, references the date as February 25, 2021, and claimed he had sent every document requested. Id. Employer referenced an email regarding housing inspection and stated he attempted to contact the area coordinator, but received no answer. AF 8.

On March 22, 2021, Employer sent an email to the CO stating it was sending all of the documents needed for its appeal. Employer explained the delay was due to issues contacting the housing inspector. AF 4. Someone at ETA’s Help Desk informed Employer that the department received Employer’s appeal and the documentation would be forwarded to the CO for review. Id.

Employer sent a letter to the CO dated March 19, 2021, affirming it had satisfied the recruitment requirements of the H-2A program as set fourth [sic] in [the CO’s] Notice of

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1 The Notice of Docketing incorrectly stated that the NOD was issued on February 2, 2021.
Acceptance. Employer agreed to “interview all U.S. applicants referred by the SWA through the first half (fifty percent) of the H-2A contact period and offer employment to any qualified U.S. applicant willing and able to perform the job. Employer stated it was exempt from the fifty percent recruitment rule under 20 C.F.R. Sec. 655.135, and that it complied with the requirements of 20 C.F.R. sec. 655.153. Id. at 5. Employer also included evidence of workers’ compensation insurance. Id.

On March 29, 2021, Miguel Lozano emailed ETA to ask about the status of Case No: H-300-21029-041430 (Employer’s case). AF 2. He stated he had submitted all documents and needed H-2A workers. Id. The same day, someone at ETA’s Help Desk responded that the application was denied in February 2021 because Employer failed to respond to the issued NOD. Id. ETA informed Employer the application was “no longer in our consideration and [he] must follow through with the appeal process.” Id. ETA told employer it had “no further information regarding this case.” Id.

There are no documents in the AF after March 30, 2021, until the September 9, 2021, referral letter from the CO stating that Employer requested administrative review. Six months after the email from Mr. Gonzales, the CO referred the matter for administrative review. The CO denied Employer’s application under a regulation that deems the matter final and not appealable, but then referred the case for review.

Legal Standard

The standard of review in H-2A cases is limited. When an employer requests a review by an administrative law judge (“ALJ”) under § 655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. Id.

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; Salt Wells Cattle Co., LLC, 2011-TLC-00185, slip op. at 4 (Feb. 8, 2011). The CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. J & V Farms, LLC, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016). A decision is not arbitrary and capricious if the decision-maker examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Three Seasons Landscape Contracting Serv., 2016-TLN-00045, slip op. at 19 (June 15, 2016) (cleaned up).

An employer who desires to apply for temporary employment certification of one or more nonimmigrant foreign workers must file a completed Application for Temporary Employment Certification form. 20 CFR § 655.130. If a CO determines the Application for Temporary Employment Certification or job order are incomplete, contain errors or inaccuracies, or do not meet regulatory requirements, the CO will notify the employer within

2 There is no evidence that the CO issued a Notice of Acceptance, thus it is unclear what the Employer is referencing.
7 calendar days of the CO’s receipt of the Application for Temporary Employment Certification.” 20 CFR § 655.141(a). Additionally, “each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer. 20 C.F.R. § 655.122(b). Finally, when an applicant fails to submit a modified application or appeal the NOD, the CO’s denial is final and cannot be appealed. 20 CFR § 655.141(b)(5). The NOD must include a statement that a failure to modify the application or appeal the NOD will result in a final denial that cannot be appealed. 20 CFR § 655.141(b)(5).

Discussion

The CO timely filed a brief in this matter, but Employer did not submit a brief or otherwise respond. Based on the Administrative File, Employer’s submissions, and the brief filed by the CO, for the reasons explained below, the appeal is denied and the matter is dismissed.

Denial of Employer’s Application was Final and Not Subject to Appeal

Employer’s appeal is denied because the CO’s denial of Employer’s application was final and not appealable. Therefore, the BALCA lacks jurisdiction to hear the appeal. Under the regulations applicable to this proceeding, Employer must submit a modified application or appeal the NOD within five business days of the CO’s denial. 20 CFR § 655.141(b)(5). If the employer does not do so, the “denial is final cannot be appealed and the Department will not further consider that Application for Temporary Employment Certification.” Id.

The CO argues that the denial issued on February 24, 2021, was final and could not be appealed, but an internal miscommunication led to the appeal being filed at BALCA six months after the denial was final. CO Brief at 3. The notice from the CO in fact makes it clear that the appeal will be abandoned, and that even though it does not explicitly state that the appeal is final and not subject to appeal, the regulation does. Under 20 CFR § 655.141(b)(5), the content of the notice to the employer must,

State that if the employer does not comply with the requirements of § 655.142 or request an expedited administrative review or a de novo hearing before an ALJ within 5 business days the CO will deny the Application for Temporary Employment Certification. That denial is final cannot be appealed and the Department will not further consider that Application for Temporary Employment Certification.

The CO argues that it gave proper notice to Employer, but even if it had not, Employer had constructive notice of the rule citing Bennett v. U.S. Dept. of Labor, 717 F.2d 1167, 1169 (1983) (citing 44 U.S.C. § 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (“It has long been established that publication of regulations in the Federal Register has the legal effect of constructive notice of their contents to all who are affected thereby.”).
Here, I find that the record reflects that Employer neither submitted its modified application timely nor appealed the NOD within five business days. The CO notified Employer in writing that it had not timely received the modification information or received notice of an appeal, and therefore it denied the application, which was final and not subject to appeal. AF at 10. Therefore, by operation of law, the appeal was final and not appealable. “BALCA is a tribunal of limited jurisdiction; it may only render a decision in a matter if a statute or regulation provides it jurisdiction to do so.” Cumar, Inc., 2015-TLN-00025, at 3 (BALCA Apr. 22, 2015). “The Board cannot assume it has jurisdiction to review a matter for which the regulations offer no source of authority.” Id. Thus, the Board is without jurisdiction to hear the appeal and the appeal is denied on that basis.

**ORDER**

The denial by the CO was final and not subject to appeal. Thus, the appeal is denied for lack of jurisdiction.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge