



Issue Date: 22 April 2015

BALCA Case No.: 2015-TLN-00025

In the Matter of:

CUMAR, INC.,

Employer.

Certifying Officer: William W. Thompson II
Acting Administrator, Office of Foreign Labor Certification

Before: **STEPHEN R. HENLEY**
Acting Chief Administrative Law Judge

**ORDER DISMISSING APPEAL
FOR LACK OF JURISDICTION**

This matter concerns an order issued by the Acting Administrator (“OFLC Administrator”) of the Office of Foreign Labor Certification (“OFLC”) denying a request for a variance to the regulations in the form of special procedures. Cumar, Inc. (“Employer”) has requested review of this order by the Board of Alien Labor Certification Appeals (“BALCA” or the “Board”). For the reasons that follow, the Employer’s request for review is **DISMISSED** for lack of jurisdiction.

BACKGROUND

The Employer seeks to obtain H-2B temporary labor certification for two H-2B workers to serve as Specialty Stone Installation and Restoration Specialists (“stonemasons”) in phases of up to three months for a three-year period. To that end, the Employer submitted an *Application for Temporary Employment Certification* (ETA Form 9142) to the Chicago National Processing Center on September 17, 2014. An OFLC Certifying Officer denied the Employer’s application on October 17, 2014, because the stonemasons would only be working for three months at a time, and the Employer could not guarantee full-time employment for the entire period of need requested. The Employer timely requested administrative review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”).

The matter was assigned to an Administrative Law Judge (ALJ), who reviewed the Employer’s appeal and issued a Decision and Order on behalf of the Board on November 12, 2014. *Cumar, Inc.*, 2014-TLN-1 (BALCA Nov. 12, 2014). In this decision, the ALJ agreed the

Employer failed to establish that its position was a bona fide, full-time position, as required by 20 CFR § 655.22(h), but noted that the Employer's need for the position was "highly unique" and remanded the matter to the Certifying Officer with instructions to allow the Employer to request for a variance from the regulations in the form of special procedures. *Id.* The Certifying Officer filed a Motion for Reconsideration, arguing the ALJ was not authorized to order such relief and asking the ALJ to reconsider her decision. The ALJ denied this request by Order dated December 11, 2014. *Cumar, Inc.*, 2014-TLN-1 (BALCA Dec. 11, 2014). Shortly thereafter, the Certifying Officer petitioned for en banc review. On January 15, 2015, BALCA denied to hear the matter en banc.

On December 12, 2014, the Employer filed an application with the OFLC Administrator requesting a variance to the H-2B regulations in the form of special procedures. The OFLC Administrator issued an order denying the Employer's request on February 4, 2015. By letter dated February 17, 2015, the Employer asked BALCA to vacate the order and remand the matter to a Certifying Officer with instructions to consider the variance appropriately and in accordance with prior orders.

On February 24, 2015, the undersigned issued an Order directing the Employer to show cause as to why BALCA should not deny its request for lack of jurisdiction by March 24, 2015 ("Order to Show Cause"). Before a response was due, however, the United States District Court for the Northern District of Florida ("District Court") issued an Order vacating the regulations under which the Department of Labor ("DOL") currently operates the H-2B labor certification program, 73 Fed. Reg. 78,020 (Dec. 19, 2008) ("2008 Rule"), and permanently enjoining DOL from enforcing them. *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015) ("Injunction Order").

On March 12, 2015, the Certifying Officer asked BALCA to suspend proceedings in all pending H-2B labor certification matters while DOL explored its options in light of the District Court's Injunction Order. BALCA granted this request and, on March 13, 2015, placed all pending H-2B temporary labor certification matters in abeyance until further notice. On March 19, 2015, the Certifying Officer filed a status report stating that the District Court had granted a stay of the Injunction Order until and including April 15, 2015.¹ Accordingly, on March 20, 2015, BALCA issued an order lifting the stay in all pending H-2B temporary labor certification matters, including the above-captioned matter.

On March 30, 2015, the undersigned issued an Order directing both parties to file a response to the Order to Show Cause. Counsel for the OFLC Administrator filed a response on Tuesday April 7, 2015;² Counsel for the Employer filed a response on Thursday April 9, 2015. Counsel for the OFLC Administrator filed a reply to the Employer's response on Friday, April 10, 2015.

¹ The District Court later extended this stay until May 15, 2015. *Perez v. Perez*, No. 14-cv-682 (N.D. Fla. April 15, 2015).

² The Response is entitled "Certifying Officer's Response to the Board's Order to Show Cause."

DISCUSSION

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. In the instant case, the Employer asks BALCA to vacate the OFLC Administrator's order denying a variance from the regulations in the form of special procedures. The applicable regulation is silent as to whether BALCA may review the Administrator's decision not to establish, devise, continue, revise, or revoke special procedures.³ Compare 20 CFR § 655.3(b) (authorizing the Administrator "to establish or to devise, continue, revise, or revoke special procedures in the form of variances for the processing of certain H-2B applications when employers can demonstrate, upon written application to the OFLC Administrator, that special procedures are necessary," without providing for BALCA review of the OFLC Administrator's decision) with 20 CFR §§ 655.11(e); 655.3(e) (explicitly authorizing BALCA review of a prevailing wage determination or denial of temporary labor certification).

Given the limits of BALCA's jurisdiction, the parties were specifically instructed to show cause as to why BALCA should not deny the Employer's appeal for lack of jurisdiction. See *Order to Show Cause* at 2. In response, the Employer argued that "the CO has failed to follow the ALJ's order by properly administering special procedures/a variance in for the Employer." But the Employer did not cite any statute or regulation that authorizes BALCA to review the Administrator's determination not to grant the variance from the regulations that the Employer requests.

After considering the regulations and the arguments submitted by the parties, the undersigned finds that BALCA does not have jurisdiction to review the OFLC Administrator's order denying a variance from the regulations in the form of special procedures. In matters where BALCA does have jurisdiction, the regulations explicitly authorize review by BALCA. See, e.g., 20 CFR § 655.33(e) (permitting administrative review by BALCA when a temporary labor certification is denied); 20 CFR § 655.11(e) ("Any employer desiring review of a CO's decision on a [Prevailing Wage Determination] must make a written request for review of the determination by BALCA within 30 calendar days of the date of the decision of the CO."). The Board cannot assume it has jurisdiction to review a matter for which the regulations offer no source of authority.

³All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule published in the Federal Register on December 19, 2008 at 73 Fed. Reg. 78020 ("2008 Rule"). The Department of Labor ("DOL") indefinitely delayed implementation of the Final Rule published on February 21, 2012 ("2012 Rule"), 77 Fed. Reg. 10038, after the United States District Court for the Northern District of Florida ("District Court") issued a preliminary injunction enjoining DOL from implementing or enforcing it. See 77 Fed. Reg. 28764 (May 16, 2012) (announcing the continuing effectiveness of the 2008 Rule "until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation"); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183, Order at 8 (N.D. Fla. Apr. 26, 2012) (issuing order temporarily enjoining DOL from implementing or enforcing the 2012 Rule), *affirmed* by 713 F.3d 1080 (11th Cir. 2013). See also *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183 (N.D. Fla. Dec. 18, 2014) (vacating the 2012 Rule and permanently enjoining DOL from enforcing it). On March 4, 2015, the District Court also vacated the DOL's 2008 H-2B regulations, and permanently enjoined the DOL from enforcing them. See *Perez v. Perez*, No. 14-cv-682 (N.D.Fla. Mar. 4, 2015) (2015 U.S. Dist. LEXIS 27606). As discussed above, the District Court stayed this order until May 15, 2015. *Perez v. Perez*, No. 14-cv-682 (N.D. Fla. April 15, 2015).

Because the Administrator's decision is not subject to review, BALCA is precluded from further review of this matter. Therefore, the Board expresses no opinion on the merits of the OFLC Administrator's decision not to implement special procedures.

ORDER

In light of the foregoing, it is hereby ORDERED that this matter is DISMISSED.

SO ORDERED.

For the Board:

STEPHEN R. HENLEY
Acting Chief Administrative Law Judge