



Issue Date: 08 August 2016

BALCA Case No.: 2016-TLN-00056
ETA Case Nos.: H-400-16043-212402

In the Matter of:

GREAT HUNAN,
Employer.

DECISION AND ORDER

This matter arises under the labor certification process for temporary non-agricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A. This is commonly referred to as the H-2B Nonimmigrant Visa Program. The H-2B visa classification applies to an individual coming to the United States as a temporary worker in a non-agricultural job with no plans to stay permanently. An employer who wants an H-2B visa must first obtain a "temporary labor certification" from the Department of Labor ("DOL").

As explained below, this Decision and Order affirms the CO's decision to deny Employer's application for temporary employment certification.

BACKGROUND

On February 15, 2016, Great Hunan (hereinafter "Employer") filed an "Application for Temporary Employment Certification" on ETA Form 9142B (hereinafter "Application") describing a temporary need for two traditional cooks from May 15, 2016, until October 30, 2016 (Appeal File [AF] at 109). The CO issued a Notice of Acceptance (NOA) on May 17, 2016 and directed Employer to "prepare, sign, date and submit a written Recruitment Report to our office by **June 10, 2016**" (AF at 20)(emphasis in original). The CO sent the NOA via email to the addresses provided in the Application for Employer, i.e., don.thach@hotmail.com (AF at 110), and Employer's agent, i.e., sandra@if.rmci.net (AF at 111). When no Recruiting Report was received from Employer by the stated deadline, the CO sent a reminder email to Employer's agent on June 17, 2016 requiring a response by email from Employer no later than 2:00 p.m. on June 21, 2016 (AF at 14).¹ Employer did not submit a Recruiting Report by the adjusted deadline, and the CO issued a Final Determination on June 23, 2016, denying the Application on that basis (AF at 6).

¹ The CO also sent a reminder email to Employer at don.thach@hotmail.com instead of the email address provided in the Application (AF at 14). However, the reminder email to Employer's agent was sent to the correct address.

Employer filed a timely request for review and asserts insufficient notice of the requirement to submit the Recruitment Report. Specifically, Employer avers that English is not his first language and he did not understand what was required by the NOA. He also states that the email address provided for Employer's agent in the Application was unmonitored during the relevant period due to an employee absence. Also, Employer argues that the CO should have sent the NOA and reminder email to another email address, i.e., holainc@if.rmci.net, which he states "has been and continues to be our main line of communication" (AF at 1). Employer has not submitted a legal brief on review, but in a written submission acknowledges that he is "asking for a very special consideration" and that he has "been working with this for about a year and a half and there have been regulation changes through the process."² Counsel for the CO argues that Employer was provided "ample opportunity to submit its recruitment report, but Great Hunan failed to do so and thus failed to carry its burden of proof" (CO Brief at 6).

DISCUSSION

The scope of review for a denial of a temporary labor certification is limited to the written record, which consists of the Appeal File, the request for review, and any legal brief submitted. *See* 20 C.F.R. § 655.61(e). The standard of review is similarly constrained: this Board may reverse or modify the CO's determination or remand to the CO for further action only if the determination at issue is arbitrary, capricious, or otherwise not in accordance with applicable law. *See, e.g., Brook Ledge Inc.*, 2016TLN00033, slip op. at 5 (May 10, 2016)(acknowledging that "BALCA reviews decisions under an arbitrary and capricious standard").

The issue in this matter is whether the denial of certification by the CO is—in light of Employer's failure to submit the Recruiting Report in a timely manner—arbitrary, capricious, or otherwise not in accordance with applicable law.³ Several factors support a conclusion that the CO's denial was lawful and reasonable under the circumstances. As a threshold matter, the CO has a regulatory duty to "[r]equire the employer to submit a report of its recruitment efforts." 20 C.F.R. § 655.33(b)(7). Departmental regulations are silent as to the minimum period of time that must be afforded an employer to submit the report, but the time granted by the CO in this case was significant. The original deadline established by the CO gave Employer 24 calendar days to submit the report. The extended deadline established in the reminder email was 34 days after the issuance of the NOA. The CO did not make her Final Determination in this matter until 37 days had elapsed since she issued the NOA to Employer. And it is uncontroverted that Employer did not submit a Recruitment Report on any date before the Final Determination was made in this matter, either by the date specified by the CO in the NOA or the extended deadline set forth in the subsequent reminder email sent after the original deadline had passed. In the absence of any

² I received correspondence from Employer on August 2, 2016, in which he states that his failure to submit the report was unintentional. The mailing also includes a copy of what he describes as the Recruitment Report in question. In light of the limited scope of review in these cases, I cannot and did not consider the contents of the Recruitment Report in reaching my decision in this matter. 20 C.F.R. § 655.61(e).

³ Counsel for the CO states the issue differently: "[w]hether the CO's determination that the employer failed to submit a satisfactory recruitment report was arbitrary, capricious or otherwise not in accordance with the law?" (CO Brief at 3). But there is no factual dispute that Employer failed to submit the Recruitment Report. The action under review is the denial of certification, not an undisputed factual predicate for the decision.

regulatory timeline mandating additional time for employer compliance, the actions of the CO in these circumstances were reasonable rather than capricious.

Departmental regulations also constrain the ability of the CO to grant certification in the absence of the required recruitment report. The employer bears the burden of demonstrating eligibility for the H-2B program, *see D and R Supply*, 2013TLN00029, slip op. at 6 (February 22, 2013)(citing 8 U.S.C. § 1361), and a CO may not grant a temporary labor certification unless the employer seeking the certification has complied with all the requirements of the labor certification process for H-2B workers. 20 C.F.R § 655.50(b). These requirements include the preparation of a recruitment report by the employer seeking certification and submission of the report to the CO by the date specified by the CO in the NOA. *See id.* § 655.48(a). Accordingly, the CO must deny certification to an employer who has failed to submit the mandatory recruitment report; an action required by regulation cannot—without more—be unlawful or arbitrary.

Employer acknowledges noncompliance but argues that he did not receive adequate notice of the requirement to submit the report due to language difficulties and an absent employee. To ensure adequate notice, departmental regulations require that the CO provide the NOA to the employer and (if applicable) the employer's attorney or agent. 20 C.F.R. § 655.33(a). In this case, the CO complied with the requirement by emailing the NOA to employer and his agent using the email addresses provided in the Application (AF 15). Employer does not dispute receipt of the NOA requiring the recruitment report, but asserts that the CO should have also mailed the reminder to a different email address at Employer's agent (i.e., holainc@if.rmci.net). This particular email address was provided by Employer in Appendix B of the Application in connection with the "Attorney or Agent Declaration" (AF 115), and was the source of two mailings to the CO in connection with deficiency correction prior to issuance of the NOA (AF 23 & 42). However, all communications from the CO to Employer's agent had been mailed to the email address in part E of the main body of the Application entitled "Attorney or Agent Information," i.e., sandra@if.rmci.net (P10 & 111). These mailings included two Notice of Deficiency documents (AF 34 & 36) to which Employer had responded without apparent incident or difficulty. In the absence of any evidence articulating an express preference by employer for contact via a particular email address, there is no failure of notice if the CO mails an NOA or other correspondence to the employer and at least one of the email addresses provided for employer's attorney or agent on ETA Form 9142B.⁴

⁴ It must also be noted that neither Employer nor his agent contacted the CO after the receipt of the NOA on or about May 17, 2016. If Employer did not understand the NOA or what it required of him, then it was incumbent upon him to contact his agent or the CO for explanation or additional assistance in responding to the NOA.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

For The Board:

WILLIAM T. BARTO
Administrative Law Judge