

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 28 June 2017**

**BALCA Case No.: 2017-TLN-00056**  
ETA Case Nos.: H-400-17052-868004

*In the Matter of:*

**FISHMAINE, INC.,**  
*Employer.*

Appearances: Marcus B. Jaynes, Esq.  
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Portland, Maine  
*For the Employer*

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Washington, DC  
*For the Certifying Officer*

Before: **WILLIAM T. BARTO**  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

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, I affirm the Certifying Officer's (CO) decision to deny Employer's application for temporary employment certification.

## **FINDINGS OF FACT**<sup>1</sup>

FishMaine [hereinafter Employer] owns and operates restaurants in Bar Harbor, Maine.<sup>2</sup> On or about March 3, 2017, Employer applied for temporary labor certification, seeking approval to hire 15 foreign workers as cooks for the period May 17, 2017 to October 31, 2017.<sup>3</sup> On April 7, 2017, the CO issued a Notice of Acceptance (NOA) instructing Employer that it must complete “[a]ll recruitment steps requiring action from the employer,” including two newspaper advertisements, within 14 calendar days from the date of the NOA.<sup>4</sup> Employer did not do so, and on May 24, 2017, the CO denied Employer’s application because Employer failed to place its required newspaper advertisements within 14 calendar days from the NOA, in violation of 20 C.F.R. § 655.40(b).<sup>5</sup> On May 30, 2017, Employer filed a request for administrative review of the CO’s decision by this Board. On June 9, 2017, the CO submitted the Appeal File to the Office of Administrative Law Judges. On June 20, 2017, the CO timely submitted an appellate brief in this matter.<sup>6</sup>

## **ISSUE**

I must determine whether the CO acted arbitrarily, capriciously, or unlawfully by denying Employer’s application for temporary labor certification on the basis that Employer had failed to demonstrate that it placed newspaper advertisements within the timeframe required by 20 C.F.R. § 655.40(b).

## **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

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<sup>1</sup> The Statement of Facts provided by the Certifying Officer is uncontroverted by Employer and is largely adopted by the undersigned for the purposes of this decision.

<sup>2</sup> Appeal File (AF) at 49.

<sup>3</sup> AF at 49-72. Employer’s general manager signed the application on February 6, 2017. Employer’s attorney signed the application on February 22, 2017. The CO asserts that the application was filed on March 3, 2017. For the purpose of this review, I will assume in the absence of evidence to the contrary that the application was received by the CO on or about March 3, 2017.

<sup>4</sup> AF at 26.

<sup>5</sup> AF at 9-20.

<sup>6</sup> Section 655.61 does not provide for submission of a brief by an employer in addition to the request for administrative review. On June 21, 2017, Employer’s counsel filed a copy of its original “Request for an Expedited Administrative Review” and requested that I consider it to be “the employer’s brief on appeal, as it explains the reasoning and authority for the employer’s legal position.” I need not consider the June 21<sup>st</sup> submission by Employer as it is identical to the request for review already contained in the AF, and is therefore cumulative. I will, of course, consider the original request by Employer to the extent permitted by 20 C.F.R. § 655.61(a).

briefs submitted by the parties. 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.<sup>7</sup>

The issue in this matter is whether the denial of certification by the CO is—in light of Employer's uncontroverted failure to advertise in a timely manner—arbitrary, capricious, or otherwise not in accordance with applicable law. Several factors support a conclusion that the CO's denial was lawful and reasonable under the circumstances. As a threshold matter, Employer has a regulatory duty to conduct all mandatory recruitment “within 14 calendar days from the date the Notice of Acceptance is issued.” 20 C.F.R. § 655.40(b). Moreover, the CO complied with the regulatory requirement at 20 C.F.R. § 655.33(b)(2) to inform Employer that recruitment must be conducted within this narrow timeframe.<sup>8</sup>

Departmental regulations also constrain the ability of the CO to grant temporary labor certifications. An employer bears the burden of demonstrating eligibility for the H-2B program,<sup>9</sup> 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 conducting “the recruitment described in §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued.” 20 C.F.R. § 655.40(b). Accordingly, the CO must deny certification to an employer who has failed to conduct recruiting as directed in the NOA; an action required by regulation cannot—without more—be unlawful or arbitrary.

In its “Request for an Expedited Administrative Review,” Employer acknowledges noncompliance but nevertheless contends that a number of factors relating to Employer's actions support certification of this application:

- (1) The advertising was completed “within only a few days” after the expiration of the 14 day period specified by the CO;
- (2) The delay was due to “miscommunications” between Employer and counsel, as well as misunderstanding by Employer concerning the recruiting timeline;

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<sup>7</sup> 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”).

<sup>8</sup> AF at 26.

<sup>9</sup> See *D and R Supply*, 2013TLN00029, slip op. at 6 (February 22, 2013) (citing 8 U.S.C. § 1361).

(3) No responses were received in connection with any advertisements;

(4) There is no evidence that untimely advertisement caused the effort to be an insufficient test of the availability of United States workers in the relevant labor market, “especially in light of the job order having been open for an extended period of time (since March 3, 2017) without any referrals or applications.”

In sum, Employer argues that its non-compliance was *de minimis*, inadvertent, and harmless. However, Employer provides citation to neither regulation nor precedent that supports his argument that putatively harmless noncompliance with the requirements of Subpart A of Part 655 does not bar certification. In the absence of such authority, the plain language of Part 655 must control the Board’s assessment of the CO’s action: “The CO will certify the application *only* if the employer has met *all* the requirements of this subpart.” 20 C.F.R. § 655.50(b) (emphases added).

In a similar vein, Employer also contends that because the CO has the discretion to establish a recruiting period other than the 14-day period prescribed by regulation, *see id.* § 655.40(b), the CO also has discretion to extend the regulatory interval after the fact and accept an otherwise untimely recruitment. Employer does not provide regulatory or precedential support for this assertion other than citation to 20 C.F.R. § 655.40(b), which provides, in relevant part, as follows: “Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued.” For the reasons stated below, I am not persuaded by this argument.

The plain text of § 655.40(b) does not support Employer’s assertion that the provision authorizes after-the-fact modification of the recruiting period. By stating “[u]nless otherwise instructed by the CO,” the regulation anticipates that the CO will have issued instructions to the employer via the NOA before the employer has conducted the recruitment.<sup>10</sup> Moreover, even if the regulation does authorize after-the-fact modification of the recruitment period by the CO, that is not what the CO has done in this particular instance, and the question before the Board remains whether strict enforcement of the regulatory recruitment period constituted an abuse of discretion by the CO.

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<sup>10</sup> A different outcome might be appropriate if the regulation stated “unless otherwise *authorized* by the CO,” which would seem to include retroactive authorization. That being noted, the regulation does not so state, and the CO under the instant facts neither instructed nor authorized a recruitment period other than the prescribed regulatory period.

Employer implies that strict enforcement of the regulatory recruitment period was an abuse of discretion by the CO because of purported delay by the CO in issuing the NOA in this matter; counsel argues that because the CO issued the NOA in this matter “almost two months later than normal, the completion of the advertising within 5-7 days of the expiry of the prescribed 14-day period should not be treated as fatal and result in denial of certification.” Even assuming that the factual predicate asserted is accurate, there is no statutory, regulatory, or precedential authority for the *quid pro quo* suggested by counsel; processing delay by the CO does not, without more, entitle an employer to regulatory noncompliance.<sup>11</sup> Moreover, the argument fails to consider the constrained nature of this review; the issue before me is not whether the CO could have done otherwise than she did, but is, instead, whether the CO acted arbitrarily, capriciously, or unlawfully by doing what she did.

### **CONCLUSION**

For the reasons stated above, Employer has failed to meet its burden of showing that the CO acted arbitrarily, capriciously, or unlawfully by denying Employer’s

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<sup>11</sup> Moreover, the record does not fully support Employer’s assertion that the NOA was issued “almost two months later than normal.” The timeline established by the documentation in the AF is as follows:

- **March 3, 2017:** Employer filed “Application for Temporary Labor Certification” AF at 49.
- **April 5, 2017:** CO issued Notice of Deficiency (NOD), 22 business days after receipt of application by CO. AF at 32.
- **April 6, 2017:** Employer responded to NOD.
- **April 7, 2017:** CO issued NOA, one business day after correction of deficiencies in the application.
- **April 27, 2017:** Employer submitted recruitment report to CO. AF at 20.
- **May 5, 2017:** Employer submitted status inquiry concerning application to CO. AF at 21.
- **May 24, 2017:** CO issues final determination denying application 18 business days after receipt of recruitment report. AF at 9.

In sum, the CO took approximately 41 business days to process Employer’s application. Departmental regulations require the CO to notify the employer of deficiencies in the application within seven business days of receipt, 20 C.F.R. § 655.31(a), and to notify an employer that the application has been accepted by the CO within seven business days of the acceptance. *Id.* § 655.33(a). No timeline is prescribed for issuance of a final determination by the CO. As such, the regulations anticipate—and authorize—processing delay by the CO of up to 14 business days. When taking this period of authorized delay into account, the net amount of processing delay attributable to the CO amounted to approximately 27 business days, substantially less than the 40 business days in a generic two-month period. While such processing delay is greater than that anticipated by the departmental regulations, the delay—in and of itself—does not give rise to a quasi-equitable claim for more processing time by the affected employer. As noted by the CO in her brief, “[a]lthough a strict enforcement of the regulations can sometimes lead to harsh results, it also ensures the wages and working conditions of U.S. workers will not be adversely affected by similarly employed H-2B workers” (quoting *M.A.G. Irrigation, Inc.*, 2017-TLN-00033, at \*6 (April 25, 2017)).

application for temporary labor certification on the basis that Employer had failed to demonstrate that it placed newspaper advertisements within the required timeframe. There is no evidence in the record that Employer placed newspaper advertisements within the required timeframe, and the CO cannot certify an application if Employer has not met all the requirements of Subpart A of Part 655. See 20 C.F.R. § 655.60(b). As such, Employer's request to reverse the CO's determination is **DENIED**.

**ORDER**

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

**SO ORDERED.**

For The Board:

**WILLIAM T. BARTO**  
Administrative Law Judge