

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 May 2018

BALCA Case No.: 2018-TLN-00117
ETA Case No.: H-400-17363-336426

In the Matter of:

BEST SOLUTIONS USA, LLC,
Employer.

Certifying Officer: **LESLIE ABELLA**

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

DECISION AND ORDER DIRECTING GRANT 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 for an individual must first obtain a "temporary labor certification" from the Department of Labor ("DOL"). A Certifying Officer ("CO") in the Office of Foreign Labor Certification ("OFLC") of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO's denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a). As explained below, I reverse the CO's decision to deny Employer's application for temporary employment certification.

BACKGROUND

On January 4, 2018, the Department of Labor's Employment and Training Administration ("ETA") received an application from Employer seeking temporary labor certification for 20 "Restaurant Cooks." AF 59.¹ On March 6, 2018, ETA issued a Notice of Acceptance to the Employer in which the following was stated: "All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter." AF 53 (emphases in original). Employer subsequently provided its recruitment report to ETA on March 30, 2018. AF 36. In its Recruitment Report, Employer stated the following concerning the required recruitment: "All applicants learned of position through The Post and Courier newspaper posted on Sunday, March 04, 2018 and Monday, March 05, 2018 and the Job Order posted with South Carolina Department of Employment and Workforce (One Stop Career Center)." AF 43. These dates precede the Notice of Acceptance issued on March 6, 2018, and were therefore not within 14 calendar days after the date the Notice of Acceptance is issued. On April 17, 2018, ETA denied the application on that basis. AF 26; see 20 C.F.R. § 655.40(b). On April 21, 2018, Employer requested administrative review of the adverse determination, asserting that the Recruitment Report previously submitted contained "an inadvertent clerical / typographical newspaper advertisement date errors," and submitting a revised recruitment report stating that the newspaper advertisement ran on Sunday, March 11, 2018, and Monday, March 12, 2018. AF 1, 18. In support of this assertion, Employer provided various pieces of documentary evidence corroborating the revised report. AF 8-17. On April 23, 2018, I was assigned to conduct the requested administrative review and issue a decision and order in this matter. On May 1, 2018, the CO transmitted the Appeal File to the Board for review. As of the date of this decision, no brief in support of the CO's decision has been received.

ISSUE

I must determine whether the CO erred 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

¹ References to the appeal file will be abbreviated with an "AF" followed by the page number.

briefs submitted by the parties. See 20 C.F.R. § 655.61(e). I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided. See 20 C.F.R. § 655.61(e).²

Several factors support a conclusion that the CO's denial was sufficient 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). Temporary labor certification may not be granted to an employer who fails to comply with this requirement. See *id.* § 655.51(a). Moreover, the CO emphatically 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. AF 53. Notwithstanding this notice, it is uncontroverted that the Recruitment Report initially submitted by Employer stated that the required recruitment had taken place *before* the issuance of the Notice of Acceptance. AF 43.

Departmental regulations constrain the ability of the CO to grant temporary labor certifications in such circumstances. An employer bears the burden of demonstrating eligibility for the H-2B program,³ 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

² I am aware of other decisions that adopt a standard of review more deferential to the decision by the CO, and which 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.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016) (acknowledging that "BALCA reviews decisions under an arbitrary and capricious standard"); cf. *Bolton Spring Farm*, 2008-TLC-00028, slip op. at 5 (May 12, 2008) (concluding CO did not abuse discretion by declining to accept untranslated form). And I have applied such a standard in these matters, as well. E.g., *Fishmaine, Inc.*, 2017-TLN-00056, slip op. at 3 (June 28, 2017). However, I have come to the conclusion that this standard of review is not appropriate for administrative review under Part 655. 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, are silent as to the proper standard of review under 20 C.F.R. § 655.61(e). The Administrative Procedure Act provides in relevant part that an agency decision may be set aside during judicial review by U.S. courts only if the decision at issue is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" by the reviewing court. 5 U.S.C. § 706(2)(A). This is an intentionally narrow standard of review that operates to prevent a reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. See *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989). However, these concerns are not implicated during the administrative review by an agency tribunal of the decision of another adjudicator within the same agency. Cf. *Albert Einstein Medical Center et al.*, 2009-PER-00379-81, slip op. at 31-32 (Nov. 21, 2011)(en banc) (citing 5 U.S.C. § 577(b) rather than § 706(2)(A) and concluding that de novo review of CO decisions denying permanent labor certification is appropriate due to intra-agency nature of the adjudication). Accordingly, I decline to apply the so-called "arbitrary or capricious" standard of review in this matter, and will instead simply determine whether the basis stated by the CO for the denial of the application is legally and factually sufficient in light of the written record provided.

³ See *D and R Supply*, 2013-TLN-00029, slip op. at 6 (February 22, 2013) (citing 8 U.S.C. § 1361).

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; failure to perform an action required by regulation is—without more—a legally sufficient basis for denying certification.

However, the question remains as to whether this decision is still factually sufficient in light of the evidence now contained in the written record, i.e., whether the evidence of record rationally supports the legal determination made by the CO in denying the certification. After the CO denied the certification, Employer submitted a corrected Recruitment Report reflecting recruitment advertising during the 14-day period following the issuance of the Notice of Acceptance. In support of this assertion, Employer enclosed a number of documents:

- Four pages of what appears to be actual newsprint containing the required advertisement from the March 11th edition of the newspaper, and a copy of the two pages containing the advertisement in the March 12th edition. AF 8.
- A copy of one page of what appears to be a multi-page electronic mail exchange concerning “COOKS ADS,” in which an individual associated with Employer apparently transmits “ads to be placed this Sunday, March 11 and Monday, March 12,” to which an individual apparently associated with the newspaper replies with “the attached proof to run this Sunday, March 11 and Monday March 12.” AF 12.
- Two pages of what appear to be newspaper tear sheets containing advertisements from the March 11th and 12th newspapers. AF 14;
- A single page of what appears to be a receipt for payment to the newspaper for the advertisement in question. AF 17.

If these uncontroverted documents are properly part of the Appeal File,⁴ they strongly corroborate Employer’s assertion that the required advertisements were, in fact, run within 14 calendar days from the date the Notice of Acceptance was issued, and issuance of the labor certification would therefore have been appropriate. In the absence of any contrary statutory or regulatory prescriptions, I will consider all

⁴ The question of whether these documents are properly part of the Appeal File is complicated by the absence of any definition of the term “Appeal File” or description of its required contents in either statute or implementing regulation. I am also hampered in making this determination by the absence of a brief on behalf of the CO that might have informed my decision as to whether all documents submitted by the CO to the Board are, in law and fact, the “Appeal File” as that term is used in 20 C.F.R. § 655.61(e).

documentation submitted to BALCA by the CO to constitute the Appeal File, and, as such, all documentation so submitted is properly before me and may be considered during administrative review.

In this light, the weight of the evidence in the Appeal File does not support the denial of certification. While the initial Recruitment Report does state that the required advertising took place before the Notice of Acceptance was issued, the revised Recruitment Report indicates that the required advertising was timely. The implementing regulations clearly anticipate and even require the submission of updated recruiting reports as necessary.⁵ And unlike the procedures associated with applications for Permanent Labor Certifications, the Labor Certification Process for Temporary Non-Agricultural Employment authorizes modification and amendment of applications during processing,⁶ and the written record indicates that such amendment was initiated and completed by the CO at least once before the issuance of the Notice of Acceptance in this matter. AF 59. After examining the documentary evidence submitted to the CO and the Board by Employer, I am persuaded that Employer properly and timely conducted the advertising required by regulation and has complied with all of the requirements necessary to grant the temporary labor certification. As such, I conclude that the evidence of record is factually insufficient to support the CO's decision to deny temporary labor certification to Employer.

The question remains as to the appropriate disposition of this matter. In light of the insufficient evidence supporting the CO's determination, I may remand this matter to the CO for further action or reverse the CO's determination. 20 C.F.R. § 655.61(e). As the CO has already been provided the revised Recruitment Report and accompanying documentation but has chosen not file a brief or otherwise participate in this review, it is not necessary to remand this matter for the CO for consideration of those materials. In the interest of judicial economy, I will therefore grant appropriate relief.

⁵ 20 C.F.R. § 655.48(b). Specifically, an "employer must continue to update the recruitment report throughout the recruitment period," which ends "21 days before the date of need." See 20 C.F.R. § 655.40(c). Strict application of this standard to the instant facts is not practicable. The "date of need" is the "first date the employer requires services of the H-2B workers as listed on the *Application for Temporary Employment Certification*," *id.* § 655.5, and in this case that date was April 1, 2018. AF 59. Accordingly, 21 days before the date of need would have been on or about March 11, 2018, meaning that the regulatory "recruitment period" ended just five days after the issuance of the Notice of Acceptance and the beginning of the 14-day advertising period required by regulation, and before any advertisements had actually been placed by Employer. Such an illogical result could not have been intended by the drafters of Part 655, and as such I decline to apply § 655.48(b) as a bar to receipt of the revised Recruitment Report in this matter. As long as the report is part of the Appeal File and was not expressly excepted by the CO, it is part of the written record, and may be considered by me during administrative review.

⁶ See *id.* § 655.32-35.

Order

Based on the foregoing, **IT IS HEREBY ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 655.52.

SO ORDERED.

For the Board:

WILLIAM T. BARTO
Administrative Law Judge