



Issue Date: 20 August 2018

BALCA Case No.: 2018-TLN-00155

ETA Case No.: H-400-18182-141478

In the Matter of:

Leola Construction, LLC,
Employer.

Appearance: John C. Miotke, Esq.
Dehra Miotke, LLC, Tampa, Florida
For the Employer

Before: Evan H. Nordby
Administrative Law Judge

ORDER OF REMAND

This case arises from a request for review by Leola Construction, LLC, (“Employer”) of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A 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).

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

BACKGROUND

On or about July 3, 2018, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from the Employer.³ The Employer applied for temporary labor certification for two brick masons to work from October 1, 2018 to March 1, 2019 in the greater Tampa, FL area. *Id.*

On July 5, 2018, the OFLC CO issued a Notice of Deficiency to the Employer, setting out two deficiencies in the Application and requesting specific documents. AF Exhibit B. In response, by email on July 18, 2018, the Employer submitted a statement and the requested documents, totaling 14 attachments to the email. AF Exhibit D(i). The OFLC acknowledged receipt of the responsive email with 14 attachments, by email dated July 24, 2018. AF Exhibit D(ii).

Also on July 18, in a separate email, the Employer submitted an amendment to its Application, increasing the number of workers from two to four. AF Exhibit C.

The Employer's Application for Temporary Employment Certification was denied. The CO stated that the employer, in response to the Notice of Deficiency, had entirely failed to submit the requested information, and instead had submitted only a statement amending its Application from two workers to four. AF Exhibit A.

DISCUSSION

BALCA's review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO; any legal briefs submitted by the parties (none have been filed here); and the Employer's request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO before the date the CO issued a Final Determination.⁴ After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the ultimate burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, *7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, *2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, *5 (Jul. 28, 2009). The CO may only grant the Employer's Application to admit H-2B workers for temporary nonagricultural employment if

³ References to the appeal file will be abbreviated with an "AF" followed by the page number.

⁴ Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

Review of the CO's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brooks Ledge, Inc.*, 2016-TLN-00033, *4-5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). Under the "arbitrary and capricious" standard, the reviewing judge or panel looks to see if the initial 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*, 2016-TLN-00045, *19 (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted)). "If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious." *Id.*

Here, the CO failed to consider the Employer's timely response to the CO's Notice of Deficiency in the August 2, 2018, denial. The Employer submitted a considerable volume of evidence in response to the Notice of Deficiency, and the OFLC acknowledged receipt of that evidence. Since the failure to acknowledge and consider an entire body of timely submitted evidence is, almost by definition, a failure to "articulate a satisfactory explanation . . . including a rational connection between the facts found and the choice made," it is ORDERED that this matter is remanded for further action by the CO.

EVAN H. NORDBY
Administrative Law Judge