



Issue Date: 08 May 2019

BALCA Case No.: 2019-TLN-00123
ETA Case No.: H-400-19007-396776

In the Matter of:

DIVERSIFIED ROOFING CORPORATION

Employer

Appearances: Mark Schouten
Pro se

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Scott R. Morris
Administrative Law Judge

**ORDER GRANTING THE CERTIFYING OFFICER'S
MOTION TO DISMISS**

This case arises from Diversified Roofing Corporation's ("Employer") request for review 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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (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

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).

BACKGROUND

On January 7, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 145.³ Employer requested certification of 60 “Helper Roofers” from April 1, 2019 to December 31, 2019, based on a peakload need. AF 145.

On February 22, 2019, the CO issued a Notice of Deficiency (“NOD”) identifying four deficiencies with Employer’s application. Specifically, the CO found that: (1) Employer failed to submit sufficient information to establish that the job opportunity was temporary in nature, (2) Employer failed to establish a temporary need for the number of workers requested, (3) the hourly work schedule listed on the ETA Form 9142 was inconsistent with the job order, and (4) Employer’s FEIN listed on the ETA Form 9142 was inconsistent with the ETA Form 9141. AF 141-44.

On March 7, 2019, Employer responded to the CO’s Notice of Deficiency, providing additional information as requested by the CO. AF 81-136.

On March 15, 2019, the CO issued a final determination denying Employer’s application, finding that two deficiencies remained with Employer’s application despite its submissions. AF 70-80. The final determination letter stated that the denial would become final unless Employer requested administrative review before an Administrative Law Judge within ten business days of the letter. AF 72.

By letter dated April 15, 2019, Employer appealed the CO’s denial. In this appeal, Employer stated that it would have appealed within the 10-day time frame for appeals, but did not because the United States Citizenship and Immigration Services (“USCIS”) had announced on February 19, 2019 that it received enough petitions to meet the congressionally mandated H-2B cap for the second half of fiscal year 2019. Accordingly, Employer requested that the Department of Labor and Chief Administrative Law Judge grant an exception to the 10-day appeal requirement on the basis of extraordinary circumstances. AF 1. Employer also argued that the CO erroneously denied its application. AF 2-3.

This Tribunal received the Administrative File and issued a Notice of Assignment and Expedited Briefing Schedule on April 25, 2019.

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.

³ References to the Appeal File will be abbreviated with an “AF” followed by the page number.

On May 6, 2019, the CO filed a Motion to Dismiss Employer’s appeal, arguing that nothing in the record indicates that the appeal deadline should be tolled.

DISCUSSION

A. Legal Standard

In business immigration cases, regulatory filing deadlines are tolled only in “rare instances in which failing to toll regulatory deadlines would result in manifest injustice.” *See Madelein S. Bloom*, 88-INA-152, 1989 WL 250369, slip op., at 4 n.8 (Oct. 13, 1989) (en banc) (holding that the “manifest injustice” standard applied to regulatory filing deadlines in pre-PERM cases); *Dept. of Labor v. Midway Rides of Utica*, 2014-PED-00001, slip op. at 7 (May 16, 2014) (applying this standard to H-2B cases). In *Park Woodworking, Inc.*, the Board emphasized that the manifest injustice standard is to be strictly construed and that equitable relief is not mandated where there is no especially egregious factor in the case. 1990-INA-93, slip op. at 3 (Jan. 29, 1992) (en banc).

B. Analysis

Here, Employer concedes that its appeal was untimely per 20 CFR § 655.61(a)(1), since it did not file the appeal within 10 business days of the CO’s determination letter. Employer’s only asserted reason for not filing an appeal within the 10-day deadline is that it believed such an appeal would have been futile. As USCIS had announced on February 19, 2019 that “it had received enough petitions to meet the congressionally mandated H-2B cap for the second half of FY 2019,” Employer believed that its appeal would have been denied regardless of its merits.

The undersigned finds this circumstance insufficient to warrant equitable tolling of the 10-day appeal deadline under the manifest injustice standard. For one, it is unclear to the Tribunal whether the “cap reached” announcement issued by USCIS on February 19 would have applied to bar Employer from receiving certification on appeal. That announcement stated only that: “On Feb. 19, 2019, USCIS received enough petitions to meet the congressionally mandated H-2B cap for the second half of FY 2019.”⁴ However, Employer submitted its application on January 7, which was not denied by the CO until issuance of the final determination letter dated March 15. Therefore, it appears that the USCIS “cap reached” announcement on February 19 would have likely included Employer’s application in its tally of how many H-2B workers had been requested by U.S. companies. Employer thus had no good reason to conclude that an appeal of its denied application would have been ultimately futile due to imposition of the cap on H-2B worker certifications.

But even if the undersigned’s reasoning regarding whether Employer had preserved its spot in line for H-2B workers is incorrect, the uncertain nature of the efficacy of Employer’s appeal should have counseled erring on the side of caution—that is, filing the appeal. Employer

⁴ *See* <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants>.

merely speculated that any appeal would have been ultimately futile, and failed to file such an appeal within the specified regulatory timeframe. Accordingly, the undersigned finds that the circumstances of this case do not demonstrate manifest injustice that would warrant equitable tolling of the 10-day filing deadline at 20 CFR § 655.61(a)(1). Since equitable tolling is inapplicable, Employer's appeal must be denied as untimely.⁵

CONCLUSION AND ORDER

For the reasons explained above, the CO's Motion to Dismiss is hereby **GRANTED**.

SO ORDERED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

⁵ The undersigned questions whether the circumstances set forth by the ARB for equitable tolling (and used by Judge Colwell in *Dept. of Labor v. Midway Rides of Utica*, 2014-PED-00001 (May 16, 2014)) apply in this case; nevertheless, the facts of this case do not satisfy any of these circumstances. Specifically, the Department did not actively mislead Employer about the time period in which it had to file an appeal, Employer has failed to demonstrate that it was in some extraordinary way prevented from timely filing its appeal, and Employer does not contend that it sent a timely appeal to the wrong party.