



Issue Date: 06 May 2019

BALCA Case No.: 2019-TLN-00111
ETA Case No.: H-400-19052-014033

In the Matter of:

MALDONALDO NURSERY & LANDSCAPING, INC.,
Employer.

**DECISION AND ORDER AFFIRMING THE
DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Employer's request for review of the Certifying Officer's (CO) Non-Acceptance Denial in this H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (Department).³ A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

FACTUAL BACKGROUND

Employer is located in Travis County, Texas, and employs workers to perform landscape construction and maintenance.⁵ On 21 Feb 19, Employer applied for H-2B temporary labor certification, seeking approval to hire 2 foreign nationals as Outdoor Power Equipment and Other Small Engine Mechanics from 7 May 19 to 15 Nov 19, based on a peakload need.⁶

¹ 20 C.F.R. Part 655.

² See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ Appeal File (AF) 37.

⁶ AF 36.

On 13 Mar 19 the CO issued a Notice of Deficiency (NOD), which outlined two deficiencies in employer's application.⁷ Specifically, the CO determined that employer failed to submit a complete and accurate ETA Form 9142.⁸

The CO stated that Employer had not accurately completed the following fields/items.⁹

- # The dates of need requested on the ETA Form 9142 Section B. Items 5 and 6 and the Job Order is 7 May 19 to 15 Nov 19. However, the employer attached a Statement of Temporary Need letter with conflicting dates of need which indicated "this is a re-file application for a start date of 7 May 19 and an end date of 15 Nov 19." Further in the letter, it states "Our dates have not changed substantially from last year's application and the number of workers has not changed. Last year we applied for April 1st through October 31st dates. This year we are applying for June 30th through February 13th dates"; and
- # The ETA Form 9142 Section F. C. indicates a zip code of 78247, while the ETA Form 9141 indicates a zip code of 78754.

The required modification was as follows:

- # The dates of need must be consistent in all areas of the employer's application; and
- # The employer must amend the ETA Form 9142 Section F. C. to accurately reflect the correct zip code.

Later, on 13 Mar 19, Employer filed an email response¹⁰ to the CO's NOD attaching an amended statement of temporary need, which changed the date "June 30th" to "May 7th", and giving written permission to DOL to make a correction to the zip code found in Section F.¹¹

On 14 Mar 19, the CO issued a minor deficiency email, noting that Employer had failed to change the erroneous end date of February 13th to the date found elsewhere in the application, 15 Nov 19.¹² The CO requested written permission to correct the application on Employer's behalf by 2:00pm on 18 Mar 19.

On 20 Mar 19, the CO issued a second email, noting that it had not received a response and again requesting written permission to correct the application on Employer's behalf by 2:00pm on 22 Mar 19. No response was received from Employer and on 26 Mar 19, the CO issued a Final Determination denying the application.

⁷ AF 15.

⁸ AF 18.

⁹ AF 18.

¹⁰ AF 11.

¹¹ AF 11-13.

¹² AF 9-14.

On 1 Apr 19, Employer appealed the final determination, noting that it reserved the right to fully articulate with legal authority in a brief in support of the appeal until after the Board received the administrative record.

I was assigned this case on 19 Apr 19, and a Notice of Docketing and Expedited Briefing schedule was issued on 23 Apr 19, informing the parties that briefs were due within 7 business days. Neither Employer nor the Solicitor filed briefs.

APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and Employer's request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.¹³ A CO's denial of certification must be upheld unless shown by the employer to be arbitrary or capricious or otherwise not in accordance with law.¹⁴ 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.¹⁵ Employer bears the burden of proving that it is entitled to temporary labor certification.¹⁶ The regulations do not specify a standard of review for BALCA but the Board has adopted the arbitrary and capricious standard.¹⁷

The regulations include the following about the requirements and procedures of submitting a modified application:

20 C.F.R. § 655.32 Submission of a Modified Application or Job Order.

The interim final rule permits the CO to deny any *Application for Temporary Employment Certification* where the employer neither submits, following request by the CO, a modification nor requests a timely administrative review, and such a denial cannot be appealed. The interim final rule also requires the CO to deny an *Application for Temporary Employment Certification* if the modification(s) made by the employer do not comply with the requirements for certification in § 655.50.

§ 655.50 requires the CO to certify an application only when the employer has fully complied with requirements for H-2B temporary labor certification[.]

¹³ 20 C.F.R. § 655.61.

¹⁴ See *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016).

¹⁵ 20 C.F.R. § 655.61(e).

¹⁶ 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011).

¹⁷ *Brook Ledge*, 2016-TLN-00003 (May 10, 2016); *Three Season Landscape Contracting Services*, 2016-TLN-00045 (June 15, 2016).

DISCUSSION

The CO determined that Employer's application included discrepancies within Section B of ETA form 9142 in the dates of need requested. Employer was notified of multiple errors, corrected all but one, and notified again with an additional opportunity to correct the single remaining error. Employer did not respond within the first two business days, so the CO gave Employer two additional days to respond. Employer failed to respond, and has not provided any reasoning as to why it did not respond timely. I cannot find the CO's denial to be arbitrary or capricious.

ORDER AND DECISION

In light of the foregoing, the Certifying Officer's decision denying certification is **AFFIRMED**.

SO ORDERED.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge