



Issue Date: 09 April 2019

BALCA Case No.: 2019-TLN-00078
ETA Case Nos.: H-400-18295-837336

In the Matter of:

CC'S LANDSCAPING, INC.,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Monica Markley
Administrative Law Judge

DECISION AND ORDER
AFFIRMING REVOCATION OF CERTIFICATION

This case arises from CC's Landscaping, Inc.'s ("Employer") request for review of the Certifying Officer's ("CO") Revocation of Certification issued February 27, 2019. The CO revoked a temporary alien labor certification that had issued under the H-2B non-immigrant program after determining that DOL's Wage and Hour Division had recently debarred Employer from the program. Employer requests review of the February 27, 2019 Revocation and Certification, and challenges both the debarment and the revocation of certification based on the debarment.

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

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 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.

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, or revocation of a certification under 20 C.F.R. § 655.72, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

In this case, the CO issued a temporary labor certification to Employer on February 8, 2019, but subsequently issued a Notice of Revocation on February 14, 2019, and a Revocation of Certification on February 27, 2019. Employer filed a request for review on March 8, 2019.

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 308-66.³ The application requested H-2B temporary labor certification for 10 Landscaping and Groundskeeping Workers. AF 308. On January 24, 2019, the CO issued a Notice of Acceptance, accepting the application for processing and providing instructions for the recruitment of U.S. workers. AF 300-07. Employer filed its recruitment report on February 8, 2019 (AF 292-98), and the CO issued a Notice of Certification the same day. AF 282-91.

On February 12, 2019, ETA received an email from a DOL employee in the Wage and Hour Division (WHD) providing notice that CC’s Landscaping, Inc. (Employer) had been debarred from the H-2B program for a period of three years, starting February 4, 2019. AF 265. Attached to the email were a Determination letter dated September 18, 2018, and a Final Order and Debarment Notice dated January 4, 2019. *Id.* The September 18, 2018 letter from WHD to Employer stated that following an investigation, the Administrator had determined that Employer had committed certain violations of the H-2B program requirements. AF 273-76. It stated that back wages were due to nine H-2B workers, and had been paid by Employer; and that a civil money penalty of \$21,747.71 was assessed and due within 30 days. It warned that federal regulations provide for debarment from future labor certifications for failure to pay the civil money penalty by the due date. The letter was addressed to Employer at 5839 Circle Drive, Mayfield Heights, Ohio 44124 and was sent by certified mail with a tracking number. AF 273. The January 4, 2019 letter bore the following subject line: “Final Order of the Secretary of Labor for CC’s Landscaping, Inc. and Notice of Debarment.” AF 266-69. It noted the history of the September 18, 2018 letter and its assessment of a civil money penalty, and stated that as Employer had not appealed the determination, it became a final and unappealable Order of the Secretary of Labor on October 17, 2018. AF 266. In a section titled “DEBARMENT,” the letter stated that because Employer had not paid the civil money penalty when due, the Administrator found that Employer had failed to comply with sanctions or remedies imposed by WHD for violations of H-2B obligations. It stated: “As a consequence of [Employer’s] failure to comply, the Administrator has determined that [Employer] shall be debarred from applying to the Department of Labor for H-2B certification for a period of three years from the date identified in

³ References to the appeal file will be abbreviated as “AF” followed by the page number.

the Notice of Debarment, unless an administrative appeal is properly filed as detailed below.” AF 267. The letter set forth Employer’s appeal rights and how to request an appeal. The letter was addressed to Employer at 5839 Circle Drive, Mayfield Heights, Ohio 44124 and was sent by certified mail with a tracking number. AF 266.

On February 14, 2019, ETA issued a Notice of Revocation to Employer, stating that it had approved an application for H-2B labor certification on February 8, 2019, and intends to revoke that certification. AF 261-64. The enclosure explained that after issuing the certification, ETA “became aware of the Wage and Hour Division’s debarment of the employer under 29 CFR 503.24, beginning on February 4, 2019.” AF 264. Because ETA was prohibited by regulation from issuing a certification to an employer during a period of debarment, the certification should not have been issued and would be revoked. The letter explained that Employer could submit rebuttal evidence to OFLC, or could file an appeal. It was addressed to Employer at 5839 Circle Drive, Mayfield Heights, Ohio 44124. AF 261.

On February 22, 2019 and again on March 1, 2019, Employer submitted rebuttal evidence to ETA. AF 97-260. In its transmittal letter, Employer argued that it was audited in 2017 and paid the back wages that were determined to be owed in the audit, after which “CC’s was never contacted by DOL again regarding this audit.” AF 98. Employer asserted it received a collection letter from WHD on February 6, 2019, attempting to collect a civil money penalty. Employer stated that while the letter was sent certified mail, Mr. Smith (the owner of CC’s Landscaping) “never signed for the letter” and “found it abandoned at his business address.” Employer asserted that copies of the September 18, 2018 letter from WHD (the determination letter assessing the civil money penalty) and the January 4, 2019 letter from WHD (the notice of debarment) were enclosed with the collection letter, and this “was the first notice that Mr. Smith had received regarding the assessment of the civil penalty and debarment from the H2B program.” AF 98-99. Employer submitted an affidavit from Mr. Smith and proof that the civil money penalty had since been paid, and requested that the debarment be lifted and that Employer be allowed to proceed with its H-2B labor certification.

The affidavit from Mr. Smith stated that he is the owner of CC’s Landscaping and his business address is 5839 Circle Drive, Mayfield Heights, Ohio 44124. AF 106. As reported in the transmittal letter, he stated that he received the WHD collection letter on February 6, 2019, and although it had been sent certified mail with Return Receipt Requested, he “never signed the Return Receipt Requested” and “simply found the letter abandoned at my business address.” AF 106. He further stated that the collection letter had copies of the two other letters enclosed (the September 18, 2018 determination and the January 4, 2019 notice of debarment), and that “[e]ven though both prior mailings contained the wording Certified Mail Return Receipt Requested, I had never received either of the two letters prior to the February 6th mailing.” AF 106-07.

On February 27, 2019, ETA issued a Revocation of Certification. See AF 1-3. The CO stated that Employer’s rebuttal evidence had been considered, and ETA was proceeding with the revocation. AF 2. The CO described Employer’s argument as a claim that WHD used “an old business address” and Employer “did not timely receive” the letters from WHD. The CO explained that this evidence related to WHD’s determination and debarment letters “does not

refute nor change the fact that the employer has been debarred.” AF 2. As a result of the debarment, Employer was not eligible to receive the H-2B labor certification, and OFLC would revoke the certification. The letter explained Employer’s appeal rights. It was addressed to Employer at 5839 Circle Drive, Mayfield Heights, Ohio 44124. AF 1.

Employer filed a brief as its request for review on March 8, 2019. Employer argued that the debarment of Employer from the H-2B program violates its due process rights under the U.S. Constitution, because Employer did not receive proper notice of the debarment and an opportunity to object. Employer asserted that it had not changed its address yet it did not receive the September 18, 2018 and January 4, 2019 letters from WHD, and thus was unable to comply with them. Employer argued that imposing the debarment without proper notice to Employer violated Employer’s due process rights, and asked this tribunal to overturn the debarment.

Employer also argued that the CO misstated its argument in the revocation letter, because it did not assert that WHD used “an old business address”; it asserted that it “did not receive service/proper notice of either the civil penalty assessment or the debarment that was issued on January 4, 2019 for nonpayment.” Employer also argued that the CO erred by not “remov[ing] the debarment once it was made aware that CC’s Landscaping had not been provided proper notice of the assessment or its debarment.” Therefore, Employer contended, the revocation should be rescinded.

I issued a Notice of Assignment and Expedited Briefing Schedule on March 26, 2019, which allowed the CO to file a brief within seven business days of receipt of the Appeal File. The CO filed a brief on April 5, 2019. The CO argued that Employer does not, and cannot, dispute that the CO had a proper basis for revoking certification. Under 29 C.F.R. § 503.24, the CO “may not” issue certifications to Employer for the period of debarment, and Employer had been debarred effective February 4, 2019. Therefore, the certification was improper and subject to revocation. The CO further argued there was no denial of due process with respect to the revocation of certification, because Employer was provided with the CO’s notices, was given the opportunity to submit rebuttal evidence, and was provided with the final determination. With regard to the debarment, the CO argued that this is not the proper vehicle through which to challenge the debarment, as WHD and ETA are separate agencies with jurisdiction over different parts of the H-2B program. ETA did not impose the debarment, and WHD (which did impose the debarment) is not a party to this proceeding. Therefore, the CO argued, Employer cannot challenge the debarment in this appeal from the revocation of certification by ETA. For these reasons, the CO requested that the revocation of Employer’s labor certification be affirmed.

LEGAL STANDARD

BALCA’s scope of review is limited to the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may only contain legal argument and such evidence actually submitted to the CO. 20 C.F.R. § 655.61. The employer bears the burden of proof concerning its entitlement to a certification. 8 U.S.C. § 1361; *Cajun Contractors*, 2011-TLN-00004 (Jan. 10, 2011); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017).

DISCUSSION

Employer's challenge to the revocation of the labor certification rests wholly on its challenge to the debarment. Employer presents two arguments in its brief: Argument 1 challenges the debarment itself on due process grounds, and Argument 2 challenges the revocation of the labor certification on grounds that the CO erred in not lifting the debarment, and misstated Employer's argument that it did not receive the civil penalty assessment or the notice of debarment. As discussed in more detail below, because the debarment itself is not before this tribunal, Employer cannot prevail on its challenge to the debarment. Because Employer's only challenges to the revocation of certification rest on its challenge to the debarment, Employer cannot show that it is entitled to labor certification.

As the CO argued in her brief, debarment by WHD and denial or revocation of certification by ETA are two separate actions by two separate agencies within the Department of Labor. The proceeding at bar is Employer's appeal of the revocation of certification. Although the Employer argued in its rebuttal submission that the CO should lift the debarment, and argues in its brief that the CO erred by not lifting the debarment, this argument must fail for two reasons. First, pursuant to 29 C.F.R. § 503.24 (Debarment by the Wage and Hour Division),⁴ a Notice of Debarment becomes a final agency action if the employer does not request a hearing within 30 calendar days of the date of the Notice of Debarment. Here, Employer had not requested a hearing within 30 days of the January 4, 2019 Notice of Debarment, and the debarment became the final agency action on February 4, 2019. 29 C.F.R. § 503.24(d); AF 265. As the debarment had become final, the CO could not lift it. Second, any challenge to the Notice of Debarment had to be made through a request for a hearing directed to the Chief Administrative Law Judge. 29 C.F.R. § 503.43. The regulations do not provide for review of a WHD debarment by a CO in a subsequent labor certification matter.⁵ For both of these reasons, the CO did not err in not lifting the debarment.

As the CO could not lift the debarment for the reasons stated above, the CO did not err in revoking the labor certification issued on February 8, 2019. Employer was debarred by WHD effective February 4, 2019. Consequently, OFLC was prohibited from issuing labor certifications to Employer during the period of debarment, which is three years in this case. 29 C.F.R. § 503.24(a). The H-2B labor certification issued to Employer on February 8, 2019 was in violation of this regulation, because it was issued during the period of debarment. *Id.*; *see also* 20 C.F.R. § 655.51(c) ("A certification will not be granted to an employer that has failed to

⁴ ETA's Office of Foreign Labor Certification (OFLC) and the Wage and Hour Division have concurrent jurisdiction to debar employers. 20 C.F.R. § 655.73(h). Debarment by the Administrator of OFLC is governed by 20 C.F.R. § 655.73, which allows OFLC to debar an employer for three types of violations related to matters administered by OFLC. Debarment by the Administrator of WHD is governed by 29 C.F.R. § 503.24, which allows WHD to debar an employer for 12 types of violations related to matters administered by WHD. Both regulations provide that OFLC may not issue labor certifications to an employer who has been debarred. In this case, Employer was debarred by WHD under 29 C.F.R. § 503.24(a)(5), for failure to comply with one or more sanctions or remedies imposed by WHD. AF 266-67.

⁵ Compare 29 C.F.R. § 503.24(d) (providing that a party debarred by WHD may request a debarment hearing by filing an administrative appeal with the Chief ALJ under 29 C.F.R. § 503.43) with 20 C.F.R. § 655.73(g) (providing that a party debarred by OFLC may submit rebuttal evidence to OFLC, or may request a debarment hearing by filing a request for review with the Chief ALJ).

comply with one or more sanctions or remedies imposed by final agency actions under the H-2B program.”). Because Employer had been debarred for failure to comply with sanctions or remedies imposed by WHD, the CO properly revoked the labor certification that had been granted during the period of debarment. 20 C.F.R. § 655.72(a).

For these reasons, I find that the CO’s revocation of certification should be affirmed.

My conclusion would not change even if the debarment challenge were properly before this tribunal. Employer’s due process challenge to the debarment depends on its allegation that it did not receive the letter assessing the civil money penalty or the letter providing notice of the debarment, in violation of its due process rights.⁶ Each of those letters was sent to Employer at its business address (5839 Circle Drive, Mayfield Heights, Ohio 44124), which Mr. Smith confirmed was the correct address. Employer received other letters sent by DOL to that address. Both letters were sent by WHD to Employer via certified mail, which provides a tracking number that appears on each letter.⁷ There is no evidence before me that either letter was returned to WHD as undeliverable. Employer’s only evidence to support its claim of a due process violation is Mr. Smith’s affidavit, in which he stated that he received WHD’s February 6, 2019 letter without signing the Return Receipt Requested card and “simply found the letter abandoned at my business address,”⁸ and that he had not received the September 18 and January 4 letters prior to their enclosure in the February 6, 2019 letter. AF 106-07. I do not find Mr. Smith’s claim credible, and I find it does not outweigh the evidence that the letters were properly addressed to the correct business address and sent via certified mail.⁹ Thus, whether based upon the government providing notice “reasonably calculated” to apprise Employer of the penalty assessment and the debarment, or upon actual delivery of the letters to Employer’s address, I would find that Employer was provided with proper notice of the assessment of the civil money penalty and of the debarment and no due process violation occurred. Accordingly, I would not

⁶ I note that in *Jones v. Flowers*, 547 U.S. 220 (2006)—the case cited by Employer in its brief—the Supreme Court stated that “[d]ue process does not require that a property owner *receive* actual notice before the government may take his property”; instead, due process “requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 226 (emphasis added; internal marks and citation omitted). The Court noted its prior holdings that notice is “constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent,” including where “the government attempted to provide notice and heard nothing back indicating that anything had gone awry.” *Id.*

⁷ The tracking numbers appear in the Appeal File, and the tracking results available at www.usps.com show that both letters were delivered to Employer’s address. The tracking results for the September 18, 2018 letter show that it was delivered on September 24, 2018 at 10:36 a.m. The tracking results for the January 4, 2019 letter show that it was delivered on January 9, 2019 at 2:07 p.m.

⁸ Mr. Smith’s characterization of the February 6, 2019 letter as “abandoned” at his business address is likely the reason the CO construed Employer’s argument as a claim that it was “an old business address.” Employer is correct that it did not argue a change of address, and in fact remains at the same address. However, the mail was not “abandoned” at Employer’s business address; it was delivered to his business address.

⁹ Thus, this case is unlike *Jones v. Flowers*, 547 U.S. 220 (2006), upon which Employer relies. In *Jones*, the packet sent to the petitioner by the Commissioner of State Lands was returned to the Commissioner unopened and marked “unclaimed.” Here, there is no indication that the letters from WHD to Employer were returned to WHD.

find in Employer's favor even if the debarment challenge were properly raised in this proceeding.

For the reasons set forth above, the CO's revocation of certification is **AFFIRMED**.

SO ORDERED.

For the Board:

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA