

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 October 2020

BALCA Case Nos.: 2020-TLN-00069
ETA Case Nos.: H-400-20237-784996

In the Matter of:

HIGHLANDS DIVERSIFIED SERVICES,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Elizabeth Buckley, Esq.
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For the Employer

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For the Certifying Officer

Before: TRACY A. DALY
Administrative Law Judge

**DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION**

1. Nature of Appeal. This matter arises under the H-2B temporary non-agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A.¹ 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

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).

defined by the Department of Homeland Security. *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).²

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Highlands Diversified Services (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of the temporary labor certification under the H-2B non-immigrant program.

2. Procedural History and Findings of Fact.

a. Employer is a manufacturing facility located in London, Kentucky specializing in metal stamping, welding, powder coat painting, assembly, warehouse, and distribution functions with the telecommunications, automotive, aerospace, appliance and industrial equipment markets. (AF p. 71)

b. On August 24, 2020, Highlands Diversified Services filed a Form ETA-9142B application for temporary labor certification with the CO at the Chicago National Processing Center (CNPC) for one hundred (100) General Laborers to perform work from October 1, 2020 to September 30, 2022 in connection with a contract to provide manufacturing services to Toyota as a “one-time occurrence.” (AF pp. 60-64)³ This provided only thirty-eight (38) days between Employer’s application filing date and the start date for the requested workers.

c. Employer requested an emergency waiver of the time period in which to file its application because the company’s ten-week shutdown due to the Novel Coronavirus (COVID-19) pandemic prevents Employer from making ground for lost production during future hiatus period, and past recruitment efforts have not yielded the requisite temporary workers required to fulfill its contract. (AF p. 69)

d. On September 1, 2020, after reviewing Employer’s application, the CO issued a Final Determination letter and denied certification.⁴ The CO determined the COVID pandemic constituted good and substantial cause. However, the CO explained that, although she may waive the time period for Employer to file an H-2B application for good and substantial cause, the Employer’s waiver request was denied because there was not sufficient time to thoroughly test the labor market. (AF pp. 2-3)

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 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.

³ References to the Appeal File are by the abbreviation AF and page numbers; references to the CO’s brief are by the abbreviation CB and page numbers.

⁴ The denial featured an incorrect case number.

e. On September 8, 2020, Employer timely filed an appeal for review, which included Employer's appeal brief and supporting documentation.⁵ (AF pp. 6-49)

f. The administrative file was received on September 14, 2020.⁶ On September 23, 2020, the CO filed a timely brief.

3. Applicable Law and Analysis.

a. *H-2B Program.* The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(H)(ii)(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. Employers who seek to hire foreign workers through the H-2B program must apply for and receive a "labor certification" from the United States Department of Labor ("DOL" or the "Department"), Employment and Training Administration ("ETA"). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* ("ETA Form 9142") with ETA's Chicago National Processing Center ("CNPC"). 20 C.F.R. § 655.20. After an employer's application has been accepted for processing, it is reviewed by a Certifying Officer ("CO"), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

In seeking review, the employer's request must: (1) clearly identify the particular determination for which review is sought; (2) set forth the particular grounds for the request; (3) include a copy of the CO's determination; and (4) only contain legal argument and "such evidence as was actually submitted to the CO before the date the CO's determination was issued." 20 C.F.R. § 655.61(a).

b. *Standard of Review.* BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), "[t]he scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e)."

After considering evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO's determination; or (2) reverse or modify the CO's determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e).

⁵ Some of the supporting documentation appears to have been created after the issuance of the CO's determination, and others were not provided with the original August 24, 2020 application. The undersigned will not consider those documents.

⁶ A Notice of Case Assignment was issued prematurely on September 8, 2020, the date which the undersigned received the appeal.

However, neither the Immigration and Nationality Act nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review for an employer's request for administrative review. The Board has fairly often applied an arbitrary and capricious standard to its review of a CO's determination in a labor certification case. *Brook Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016). Conversely, in a number of other decisions, a quasi-hybrid deference standard or *de novo* standard have been used. *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018).

The arbitrary and capricious standard adopted by the Board no doubt stems from the Administrative Procedure Act. Judicial review under the Administrative Procedure Act provides that an agency's actions, findings, and conclusions shall be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review operates to prevent a reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. However, these concerns are not implicated during the administrative review by an agency tribunal of the decision of another adjudicator within the same agency. *Albert Einstein Med. Ctr.*, *supra*; *see also*, *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).

Accordingly, in reviewing the CO's decision in this matter, the undersigned will determine whether the CO's stated basis for denying the application is legally and factually sufficient. In so doing, the undersigned adopts the standard of review defined in *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) for the reasons stated therein.

BALCA may overturn a CO's decision if it finds the decision to be arbitrary or capricious. *Brook Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016).

c. Waiver of Time Period(s) and Determination as to Sufficient Time to Thoroughly Test the Labor Market. A "completed Application for Temporary Employment Certification must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need." 20 C.F.R. § 655.15(b). However, the "CO may waive the time period(s) for filing an H-2B Registration and/or an Application for Temporary Employment Certification for employers that have good and substantial cause . . ." 20 C.F.R. § 655.17(a).

Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues.

20 C.F.R. § 655.17(b). The CO may waive the time period(s), "provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50." 20 C.F.R. § 655.17(a). According to the preamble to the regulations, the CO "will adjudicate the foreseeability of the emergency based on the precise circumstances of each situation presented. The burden of proof is on the employer to

demonstrate the unforeseeability leading to a request for a filing on an emergency basis.” Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 FR 24042-01, 24061-62.⁷

In brief, the CO argues that Employer has not met its burden to establish substantial and good cause for the requested waiver. Specifically, the CO argues that:

[b]roadly stating the existence of a pandemic without drawing more of a connection to the specific employer’s circumstances and reasons for late-filing is insufficient. In this particular case, high unemployment across the United States means there is a *surplus* of U.S. workers looking for jobs, rather than a substantial *loss* of U.S. workers.

According to the Bureau of Labor Statistics as of July 2020, the civilian unemployment rate was at 10.2%, the highest in at least 20 years. The fact that unemployment is trending downward, [*sic*] does not change the fact that the unemployment rate is still very high.

(CB pp. 4-5)(citations omitted) A waiver of the requested time period would serve to shorten the recruitment period, which, the CO avers, “could foreclose the ability of qualified and available U.S. workers, many of whom are out of work, from applying for the job opportunity.” *Id.* at 5.

The CO further argues that thirty-eight (38) days between application and the anticipated start date is insufficient time for the CO to thoroughly test the labor market. (AF p. 52; CB pp. 5-6) “The Employer was only denied an emergency waiver of the time period for filing because it has not provided sufficient justification as to why it should be granted such a waiver in light of the insufficient time for the CO to thoroughly test the labor market.” (CB p. 8). In support, the CO cites BALCA’s decision in *Blake Hershberger Enterprises, LLC*, 2020-TLN-00059. In *Blake Hershberger*, the Board affirmed the CO, holding that the CO was within her discretion to deny the emergency waiver request due to an insufficient time to thoroughly test the labor market for an application submitted fifty-nine (59) days prior to the anticipated need date.

Employer contends that it has already thoroughly tested the labor market by performing an in-depth recruitment for these positions to no avail, and that “the Department seems to have arbitrarily determined that a fair testing of the local market is impossible and does not seem to take into account the on-going and exhaustive efforts” made by Employer. (AF p. 11) The original application contained “an Employer Attestation indicating the massive recruitment campaign that the Employer launched in order to recruit workers for the instant temporary position.” (AF pp. 8, 80-82) These efforts included advertisements in four (4) newspapers, two (2) billboard advertisements, ten (10) partnerships to “assist with advertising and recruiting” and three (3) temporary staffing agencies. (AF pp. 13, 80) Also included was correspondence from the Executive Director of the London-Laurel County Economic Development Authority (EDA)

⁷ The undersigned notes that “[r]egulatory preambles provide some of the most probative interpretive guidance, though of course the plain language of the regulation ultimately controls.” *Y.M. Yanez Construction, Inc.*, 2019-TLN-00072 at note 6 (April 1, 2019).

confirming that they “have simply tapped [their] labor pool and the H-2B program is [their] last possible solution.” (AF pp. 8, 84)

In *Blake Hershberger*, the board specifically noted:

The regulations make waiver of the time periods discretionary. Section 655.17 provides that the CO *may* (not shall) waive the time periods for filing an Application where both good and substantial cause exists, *and* “the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination.” As the CO argued in her brief, the preamble to the regulations also emphasized the discretionary nature of the waiver provision: “[t]he regulation gives the CO the discretion not to accept the emergency filing if the CO concludes there is insufficient time to thoroughly test the U.S. labor market and make a final determination.” (Quoting 80 Fed. Reg. 24042, 24061 (April 28, 2015)).

A CO’s discretion is not boundless; the regulation sets forth two determinations to guide the CO’s exercise of discretion. The CO must determine whether good and substantial cause exists to waive the time periods, and the CO must determine whether she has sufficient time to thoroughly test the domestic labor market on an expedited basis. Where “there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51,” certification cannot be granted. 20 C.F.R. § 655.17(c).

A CO who deviates from these grounds would commit error; it would be an abuse of discretion to grant or deny waiver on some other ground outside of those set forth in the regulation. But that is not what happened here. In this matter, the CO denied waiver based explicitly on her determination that there is insufficient time to thoroughly test the domestic labor market on an expedited basis and make a final determination. That determination is expressly within the CO’s authority to make, under the regulations. Employer’s argument that *it thinks* sufficient time exists is unavailing; the regulations commit this determination to the CO, who specifically determined in this case that “there would be insufficient time to thoroughly test the domestic labor market” if waiver were granted.

As in *Blake Hershberger*, the CO exercised her discretion in this matter in a manner that complied with the applicable regulations. While Employer’s recruitment strategy demonstrates a sincere and considerable effort to recruit employees in this matter, the regulations provide the CO with the discretion to determine whether a time waiver is warranted. In this regard, the CO articulated a reasonable basis for declining to grant Employer’s waiver request: her concern that 38 days was an insufficient period of time necessary to thoroughly test the domestic labor market. The fact Employer may have previously made robust efforts to recruit workers to fill the positions does not negate the CO’s concern about thoroughly testing the domestic labor market during the time period immediately preceding the application. Additionally, as the CO’s brief persuasively asserts, Employer has not provided detailed information connecting the good cause with the Employer’s need for a waiver under the circumstances.

The undersigned concludes the CO's decision was neither arbitrary and capricious nor legally and factually insufficient. Consequently, under either prior standard of review used by the Board in past cases of a similar nature, the CO's decision to deny Employer's emergency waiver request was a reasonable exercise of her discretion given the facts of this case. As such, the CO's decision complies with the applicable regulations, and Employer failed to establish grounds supporting reversal of the decision.

4. **Order**. The Certifying Officer's decision in this matter is **AFFIRMED**.

For the Board:

TRACY A. DALY
Administrative Law Judge