



Issue Date: 30 January 2020

BALCA Case No.: 2020-TLN-00022

ETA Case No.: H-400-19309-127939

In the Matter of:

Michael Colin Verbicar and Harold Ronald Verbicar

Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from the request of Michael Verbicar and Harold Verbicar (collectively “Employers”) for review of the Certifying Officer’s (“CO”) decision to deny their 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 non-agricultural 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 (“DHS”). *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 9142B”). A CO in the Office of Foreign Labor Certification of the Department of Labor’s Employment and Training Administration (“ETA”) 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). Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

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

Employer Application

On November 5, 2019, Employers submitted their Form 9142B application for temporary H-2B labor certification with ETA. (AF 107-145.³) Employers requested certification for one laborer to perform work as a nanny. (AF 107.) Employers identified the nature of their temporary need as “seasonal” and the period of intended employment as January 19, 2020, to June 15, 2020. (AF 107.) The requested employee would work in Arlington, Virginia. (AF 110.) Employers required that the nanny be fluent in Spanish. (AF 113-14, 145.) Employers described the employee’s job duties as “the organization of play activities, positive behavior reinforcement, constructive discipline, creative stimulation, language growth, meal planning, clothing care, and daily hygiene.” (AF 109.)

Notice of Deficiency

On November 15, 2019, the CO issued a Notice of Deficiency (“NOD”).⁴ (AF 31-35.) The CO determined that the application did not comply with 20 C.F.R. § 655.20(e), which requires each job qualification to be “bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.” (AF 34.)

Specifically, the CO concluded that the requirement for the requested employee to speak Spanish “does not appear to be normal and accepted for the occupation of Nanny.” (AF 34.) The CO noted that Employers did not provide supporting documentation to establish that Spanish fluency is a “normal and accepted” qualification. (AF 34.)

In order to remedy this deficiency, the CO directed Employers to submit the following:

1. Documentation which demonstrates that the employer’s requirements for the job opportunity are consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment; and
2. A letter detailing the reasons why Spanish is necessary for the specific occupation listed on the employer’s ETA Form 9142.

(AF 34.)⁵

Employer Response to the Notice of Deficiency

³ In this Decision and Order, “AF” stands for “Appeal File.”

⁴ Apparently, the CO issued two Notices of Deficiency in this matter. (AF 31-35; 100-104.) Although both were dated November 15, 2019, it appears the revised NOD (AF 31-35) identified two deficiencies, whereas the initial NOD (AF 100-104) identified only one deficiency. For purposes of this appeal, I will consider the revised NOD (AF 31-35) and the response thereto.

⁵ The CO identified one additional deficiency, which is not at issue here.

On November 15, 2019, Employers submitted their response to the NOD in the form of an email. (AF 93-99.) Employers submitted documentation in an attempt to demonstrate that the Spanish-speaking requirement “is consistent with normal and accepted qualifications and requirements imposed by non-H2B employers in the same occupation and area of intended employment.” (AF 95.)

Employers’ documentation included screenshots of search results for Spanish-speaking nanny job postings on various employment-related internet websites. For example, the search for “Spanish Speaking Nanny” on ziprecruiter.com displayed 402 jobs. (AF 95.) The search for “Full Time Spanish Speaking Nanny” on indeed.com displayed 142 jobs. (AF 96.) A search for “Spanish speaking nanny” on snagajob.com displayed 44 jobs. (AF 96.) It does not appear that these searches included any geographic parameters because the screenshots include job postings from Colorado, Florida, North Carolina, and Washington DC. Employers also submitted a specific job posting for a Spanish-speaking nanny in New York from nanniesbynoa.com. (AF 96-97.)

Additionally, Employers explained that a Spanish-speaking nanny “would be considered not only normal and accepted, but beneficial to our son and the nanny themselves.” (AF 98.) As evidence, Employers submitted a link to a 2017 University of Washington news article titled “Bilingual babies: Study shows how exposure to a foreign language ignites infants’ learning.” (AF 98.) Employers also submitted a link to the Fairfax County Public Schools (FCPS) website, which sets forth the benefits of being bilingual and describes the FCPS language immersion programs. (AF 98.) Finally, Employers explained that their son will be enrolled in a Spanish immersion program, so a nanny fluent in Spanish would prepare him for his elementary school program. (AF 99.)

Email Correspondence

The appeal file contains numerous emails from Employers to the Chicago National Processing Center between November 15, 2019, when the NOD was issued, and January 6, 2020, when the Final Determination was issued. (AF 58-85.) These emails contain repeated inquiries regarding the status of Employer’s application and whether any additional information was necessary to process the application.

Final Determination

On January 6, 2020, the CO issued a Final Determination denying the application.⁶ (AF 51-57.) The lone deficiency that is the basis for the denial is the “Failure to satisfy the obligations of H-2B employers” under 20 C.F.R. § 655.20(e). (AF 54.) The CO indicated that the information Employers submitted in response to the NOD failed to demonstrate that Spanish fluency is a normal and accepted qualification of a nanny in the area of intended employment. (AF 55.) The CO explained that, although the news article and FCPS information “may demonstrate why the employer considers a nanny fluent in Spanish beneficial to its son” and “may support the employer’s decision to enroll its son in a bilingual kindergarten program,” the

⁶ Although the Final Determination letter is dated January 8, 2020 (AF 52), Employer received email notification of the denial on January 6, 2020. (AF 62.)

information does not establish that Spanish fluency is a normal and accepted requirement among non-H-2B employers of nannies in the area of intended employment. (AF 56.)

Similarly, the CO concluded that the screenshots of online job search results were insufficient to remedy the deficiency in the application. The CO observed that the search results “do not appear to be limited to the employer’s area of intended employment” and “all but one was a summary of search results and not a detailed job posting.” (AF 56.) Therefore, according to the CO, “employer did not provide the necessary information or context for the CO to evaluate whether a Spanish language requirement is normal and accepted among non-H-2B employers of Nannies in the area of intended employment.” (AF 56.)

Employer Appeal

On January 6, 2020, Employers responded to the Final Determination via email to the Chicago National Processing Center, writing:

I would like to grant official written permission to remove the Spanish-speaking element as part of the job description. With this element out of the job description, all elements would meet regulations, since all other elements were previously approved. ... TLC asked for an explanation for why a Spanish-speaking element would be a normal and accepted one for the position, so I responded the same day, attempt to satisfy that request with an explanation. I added, “**If you need further modifications, please let me know, and I would be happy to oblige.**”

I followed TLC’s direct request by explaining why it seemed being a Spanish speaker seemed to be fitting ... while also explicitly offering to modify that or whatever else was needed if that would help. I would have been fine modifying the Spanish element, and I remain fine modifying the Spanish element. I simply did not know that the explanation for the Spanish element was insufficient because I had not heard. I did everything I could to immediately comply with TLC’s request, based on the information provided, attempting to demonstrate my willingness to comply by reaching out 11 times over the 44 days since TLC made the request. Since the response from TLC came back 44 days later, I was not able to directly address modifying the Spanish element (by removing it) until now.

Now, though, I would like to formally remove it, making everything in the application compliant. Hopefully this forgoes the need for an extended Administrative Law Judge appeal since I would be fixing the one prior issue the first day I was able to do so.

(AF 61.)

On January 9, 2020, Employers submitted a formal request for administrative review. (AF 1-50.) The gravamen of their objection to the denial of their application is that they would have amended the application, and removed the Spanish-speaking requirement entirely, in order to ensure that the application would be approved. However, because of a lack of responsiveness

from the CO in the period following their response to the NOD and prior to the issuance of the Final Determination, Employers were unaware that their documentation was insufficient and did not have an opportunity to remove the Spanish-speaking requirement until it received notice that its application was being denied on January 6, 2020. Employers emphasize that they were willing to comply with all program requirements at all times during the pendency of their application.

The Office of Administrative Law Judges received the appeal file on January 21, 2020. I issued a Notice of Assignment and Expedited Briefing Schedule on January 21, 2020. The CO did not submit a brief. This decision is issued within ten business days of receipt of the Appeal File, as required by 20 C.F.R. § 655.61(f).

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under § 655.61(a), the request for review may contain only legal arguments and evidence that were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). The Board “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

Although neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing a CO’s determinations. *Brazen & Greer Masonry, Inc.*, 2019-TLN-00038 (Mar. 6, 2019); *The Yard Experts, Inc.*, 2017-TLN-00024 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016).

Under the “arbitrary and capricious” standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has 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.” *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). In reviewing the CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.*

A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” *Id.* Inquiry into factual issues “is to be searching and careful,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but the Board “may not supply a reasoned basis” that the CO has not provided. *State Farm*, 463 U.S. at 43; *see also FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

DISCUSSION

As set forth above, the CO denied Employers' application because they failed to establish that the qualification/requirement that its nanny speak Spanish "is consistent with normal and accepted qualifications imposed by non-H-2B employers in the same occupation and area of intended employment." The applicable regulation regarding job qualifications and requirements provides:

Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must not be less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement specified in the job order.

20 C.F.R. § 655.20(e) (emphasis added).

In the NOD, the CO directed Employers to submit documentation to establish that Spanish fluency is "consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment." (AF 34.) Upon review of the information Employers submitted in response to this request, the CO concluded Employers had failed to make the required showing that Spanish fluency is a normal and accepted requirement among employers of nannies in the geographic area of intended employment. (AF 56.)

I agree with the CO's conclusion. The documentation submitted by Employers in response to the NOD (AF 95-99) contains no indication that requiring a nanny to speak Spanish is a "normal" and "accepted" qualification in the Arlington, Virginia area. Employers' online job search results included postings from Denver, Colorado, and North Carolina. Although one of the searches showed a job posting for a Spanish-speaking nanny in Washington, DC, I cannot conclude that the Spanish-speaking requirement is a normal and accepted qualification for a nanny on the basis of a single job posting. Moreover, as the CO determined, although Employers submitted information regarding the potential benefits of a child learning Spanish, that information did not provide any support for the assertion that Spanish fluency is a "normal" and "accepted" requirement for a nanny in Arlington, Virginia.

I recognize that Employers are now offering to remove the Spanish fluency requirement in order to bring their application into compliance. However, I disagree with Employers' contention that they offered to remove that requirement on "the first day [they were] able to do so." (AF 61.) On the contrary, Employers could have offered to modify their application by

removing the Spanish fluency requirement immediately upon receiving the NOD.⁷ Instead, Employers chose to try to establish that Spanish fluency is a normal and accepted requirement for a nanny. Employers failed to adequately support that assertion and now face the consequence of that failure of proof.

I am somewhat sympathetic to Employers' argument that they would have offered to remove the Spanish fluency requirement had the CO simply informed them that their documentation was insufficient to overcome the deficiency. However, the CO notified Employers of the deficiency and gave Employers a chance to respond. Thus, Employers received the process they were due; Employers were not entitled to any further guidance or commentary on their pending application. In other words, it is not the duty of the CO to guide Employers through the application process until their application becomes certifiable.

This is not to say I approve of the CO's handling of this case. Employers' frustration is justifiable considering their numerous essentially-unanswered status requests over the forty-five day period following the NOD. It appears that one routine response to one of their many emails likely would have resulted in Employers bringing their application into compliance, which would have obviated the need for this appeal. Nonetheless, the fact remains that Employers did not offer to modify their application by removing the Spanish requirement until *after* their application had already been denied.

Accordingly, though it appears this appeal was entirely avoidable, I cannot say the CO acted in an arbitrary and capricious manner in denying Employers' application. Based on the foregoing analysis and my review of the entire record, I find that the CO considered the relevant evidence and rationally concluded that Employers failed to establish that their Spanish-speaking requirement is "consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment."

CONCLUSION AND ORDER

The Certifying Officer did not act in an arbitrary and capricious manner in denying Employers' Application for Temporary Employment Certification (ETA Form 9142B). Accordingly, the Certifying Officer's denial of the Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey

⁷ The general statement in Employers' email response to the NOD ("If you need further modifications, please let me know, and I would be happy to oblige.") was not an explicit offer to remove the Spanish-speaking requirement.