



Issue Date: 03 September 2020

BALCA Case No.: 2020-TLN-00059
ETA Case No.: H-400-20216-748870

In the Matter of:

BLAKE HERSHBERGER ENTERPRISES LLC,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Monica Markley
Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF EMERGENCY WAIVER REQUEST

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial of Employer’s request for a waiver of the time periods in the above-captioned H-2B temporary labor certification matter. 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 “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR § 214.2(h)(1)(ii)(D); *see also* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 CFR § 214.2(h)(6)(ii)(B); 20 CFR § 655.1(a). Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR § 655.53.

Here, Employer sought a waiver of the time periods for filing its *Application for Temporary Employment Certification* under 20 C.F.R. § 655.17. The CO denied the waiver of the time periods, and Employer appeals from the Final Determination setting forth that denial.

STATEMENT OF THE CASE

On August 3, 2020, the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B or “Application”) from Blake Hershberger Enterprises LLC (“Employer”) for 15 Construction Laborers to be employed from October 1, 2020, through December 18, 2020, to meet a temporary peakload need related to concrete work in Iowa City, Iowa and nearby areas. (AF¹ 18-23.) In its request for a waiver of the filing time period, dated August 3, 2020, the employer stated that its reason for seeking a request for a waiver of the required filing time period was based on difficulties in finding and recruiting workers due to the COVID-19 pandemic.²

On August 11, 2020, the CO issued a *Final Determination on Emergency Waiver Request*. (AF 12-15). The CO stated:

In accordance with 20 Code of Federal Regulations (CFR) § 655.17, the CO may waive the time period(s) for filing an H-2B Registration and/or an H-2B Application for Temporary Employment Certification for employers that have good and substantial cause, 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 20 CFR § 655.50.

(AF 13). The CO noted that Employer filed its Application on August 3, 2020, which is less than 60 days before its start date of need of October 1, 2020. Thus, “[t]he employer’s application was filed outside the accepted time frame for filing an application. As required in 20 CFR § 655.15(b), 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.” (AF 13). To allow its Application to proceed, the Employer sought waiver of the time period under Section 655.17.

The CO found that the effects of the COVID-19 pandemic constituted good and substantial cause for a waiver of the filing time period, but further found that “if the request were

¹ The Appeal File will be cited as “AF” followed by the relevant page number.

² Employer stated:

THE UNITED STATES IS CURRENTLY IN THE MIDDLE OF A PANDEMIC DUE TO THE CORONAVIRUS (COVID-19). SEE EXHIBIT B. IT HAS BEEN EXTREMELY DIFFICULT TO FIND WORKERS AND THE PANDEMIC HAS ONLY INTENSIFIED THE DIFFICULTY IN FINDING WORKERS WHO ARE WILLING TO WORK IN PUBLIC. IN ADDITION, THE STATE OF IOWA'S UNEMPLOYMENT NUMBERS ARE DECREASING, WITH THE MOST CLAIMS BEING IN MANUFACTURING, SELF-EMPLOYED OR INDEPENDENT CONTRACTORS, HEALTH CARE AND SOCIAL ASSISTANCE, ACCOMMODATION AND FOOD SERVICES, AND THE RETAIL TRADE. CONSTRUCTION IS NOT ONE OF THESE INDUSTRIES. THUS, IT HAS BEEN EXTREMELY DIFFICULT TO FIND WORKERS AND THE PANDEMIC HAS ONLY FURTHER INTENSIFIED THIS DIFFICULTY. THIS QUALIFIES AS GOOD AND SUBSTANTIAL CAUSE UNDER 20 CFR 655.17(B).

(AF 23, 29-30).

approved there would be insufficient time to thoroughly test the domestic labor market.” (AF 13). Consequently, the request for a waiver of the filing period was denied. (AF 13).

On August 20, 2020, BALCA received Employer’s Notice of Appeal (AF 6-9), in which Employer requested administrative review of the Certifying Officer’s *Final Determination on Emergency Waiver Request*. Employer argued that the CO “arbitrarily and capriciously denied the Appellant’s request for a waiver of the time period(s) for filing despite the Appellant having good cause and having more than enough time to thoroughly test the domestic labor market on an expedited basis.” Employer set forth the process for testing the labor market “on a normal basis,” and asserted it can be completed through normal processing within 15 business days after issuance of a Notice of Acceptance. Employer argued that the CO “did not explain why it was too short of a time to ‘thoroughly test the domestic labor market’” in this case, and contended the CO “arbitrarily and capriciously decided the present application’s time period was too short.” Employer argued its Application was filed 59 days before its date of need, a difference of only 16 days from the normal filing time, which left enough time to thoroughly test the labor market. Employer reiterated that the CO “did not provide any justification or explanation in how the CO determined” that there was insufficient time to thoroughly test the labor market; did not describe “what would constitute an allowable expedited period”; and stated only that the time period in this case was not sufficient. Employer contended that the denial was therefore arbitrary and capricious, and should be vacated and remanded for further processing.

On September 2, 2020, the CO filed a brief in support of her Final Determination. The CO argued:

[W]hile pandemic health issues constitute good and substantial cause, this is not the only requirement necessary for an employer to be granted an emergency waiver. The CO must still be able to determine, in accordance with § 655.51, ‘whether there are insufficient U.S. workers to fill the employer’s job opportunity’ and the way to do this is to ‘thoroughly test the domestic labor market.’”

The CO noted that the preamble to the regulations explains that “[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)). Because the CO reached that conclusion here, she acted within her discretion in denying the request for waiver of the time period for filing.

The CO further noted that “the Employer is *not* foreclosed from filing an application for labor certification with a different start date of need and a valid PWD. The underlying application in this matter was *not* reviewed. The Employer was only denied an emergency waiver of the time period for filing ...” (Emphasis in original). The CO requested that her determination be affirmed.

On September 3, 2020, Employer filed a “Motion for Summary Decision.” There is no summary decision procedure in administrative review of H-2B determinations, as there is no trial

and therefore no reason to determine whether, in the light most favorable to the non-moving party, a trial is unnecessary because there are no genuine disputes of material fact. Further, Employer does not argue the issues under the summary decision standard in its “motion”; instead, it presents a reply to the arguments in the CO’s brief. The regulations do not permit a reply brief from Employer, and its attempt to present one under the guise of a motion for summary decision is unavailing.

LEGAL STANDARD

The standard of review in H-2B cases is limited. A reviewing judge may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed de novo, and a reviewing judge must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.

DISCUSSION

A CO may only grant an employer’s H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Burnham Companies*, 2014-TLN-00029 (May 19, 2014). Consequently, before a temporary labor certification may issue, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity.³ See 20 C.F.R. § 655.40-§ 655.47. In order to show that it has complied with the regulations and conducted these affirmative recruitment efforts, an employer must file a recruitment report addressing the regulatory requirements. 20 C.F.R. § 655.48. “The CO will certify the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought and that the employment of the H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.” 20 C.F.R. § 655.50(b). The recruitment process “ensure[s] that there are not qualified U.S. workers who will be available for the positions listed in the *Application for Temporary Employment Certification*.” 20 C.F.R. § 655.40(a).

In a typical case, an “employer seeking H-2B workers must file a completed *Application for Temporary Employment Certification* (ETA Form 9142B and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of

³ 20 C.F.R. § 655.40(a) provides: “Employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *Application for Temporary Employment Certification*.” The regulation further provides: “Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.” 20 C.F.R. § 655.40(b).

intended employment, as set forth in § 655.16, and copies of all contracts and agreements with any agent and/or recruiter, executed in connection with the job opportunities and all information required, as specified in §§ 655.8 and 655.9,” no less than 75 days and no more than 90 days before the employer’s date of need. 20 C.F.R. § 655.15. An employer may request a waiver of the required time periods by submitting “a request for a waiver of the time period requirement, a completed *Application for Temporary Employment Certification* and the proposed job order identifying the SWA serving the area of intended employment,” among other requirements. 20 C.F.R. § 655.17(b). “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, 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.” *Id.* § 655.17(a). “If the CO determines that the certification cannot be granted because, under paragraph (a) of this section, the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51, the CO will send a Final Determination letter to the employer in accordance with § 655.53.” *Id.* § 655.17(c).

Here, Employer filed its *Application* 59 days before its date of need, and requested a waiver of the filing time period to allow the *Application* to proceed. As set forth above, the CO found that the COVID-19 pandemic constituted good and substantial cause, but denied waiver of the required time periods because “if the request were approved there would be insufficient time to thoroughly test the domestic labor market.” Employer challenges that denial as arbitrary and capricious.

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.⁴

Because the CO exercised her discretion in full compliance with the regulations, I find no basis on which to vacate or reverse her Final Determination denying waiver of the time periods in this matter. The Final Determination is not arbitrary or capricious, and the CO acted within her discretion in denying the Employer’s request for a waiver of the time periods for filing its *H-2B Application for Temporary Employment Certification*.

ORDER

It is hereby ORDERED that the Certifying Officer’s *Final Determination on Emergency Waiver Request* denying Employer’s request for a waiver is AFFIRMED.

For the Board:

MONICA MARKLEY
Administrative Law Judge

⁴ As the CO argued in her brief, Employer remains able to file a new *Application* for temporary labor certification with a different start date of need and a valid prevailing wage determination, abiding with the regular processing times.