In the Matter of:

HANDY ANDY SNOW REMOVAL,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Chris Pooley, Esq.
Avon, Colorado

For the Employer

Matthew Bernt, Esq.
Micole Allekotte, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.

For the Certifying Officer

Before: Joseph E. Kane
Administrative Law Judge

DECISION AND ORDER AFFIRMING WAIVER DENIAL

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Handy Andy Snow Removal’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.1 The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis. 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). Employers who seek to hire foreign workers under this program must apply for and

1 On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.
receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). 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. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

On September 28, 2020, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. (AF 50-85).\(^2\) The Employer requested certification for 15 snow removal laborers, Occupational Title, landscapers and grounds keeping workers, from November 28, 2020 until April 30, 2021. (AF 50-85). The Employer’s Application requested an emergency waiver of the time period in which to file its application under 20 CFR § 655.17. The Employer asserted that it had good and substantial cause to receive a waiver because it “experienced unforeseeable changes in market conditions and unforeseeable unavailability of both United States workers and H-2B workers” due to the Covid-19 pandemic. (AF 69).

On October 1, 2020, the CO issued a Final Determination denying the Employer’s request for waiver. The CO determined she “may” waive the time period for filing an H-2B application for good and substantial cause and, while the pandemic can constitute good and substantial cause, there was not sufficient time to thoroughly test the labor market in this matter. (AF 45-49).

By letter dated October 6, 2020, the Employer requested administrative review of the CO’s Final Determination. (AF 1-44). The Employer argued that the CO failed to adequately explain why there was not enough time to complete an analysis of the domestic labor market. On October 14, 2020, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). Thereafter, on October 26, 2020, the undersigned received the Appeal File from the CO. The Employer and the Solicitor both filed briefs on November 4, 2020. The matter is now ripe for decision.

DISCUSSION AND 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 the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date of the CO’s determination. 20 C.F.R. § 655.61. 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. 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA has adopted the arbitrary and capricious standard in reviewing the CO’s determinations. The Yard Experts, Inc., 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017). Therefore, a CO’s denial of certification must be upheld

\(^2\) “AF” refers to the Appeal File.
unless shown by the Employer to be arbitrary and capricious or otherwise not in accordance with the law.

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 regulations provide the “CO may waive the time periods 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). The regulations go on to prove 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). The CO is expected to adjudicate the emergency based on the individual circumstances of the case.

The CO agrees in its brief that the Covid-19 pandemic can be sufficient cause to grant a waiver. However, the CO asserts that the sixty days between the filing of the Application and the need is an insufficient time to test the labor market. The CO further argues that at the time of the Application the Employer did not have a valid prevailing wage determination.

Prior to filing this application, the Employer filed an application on July 16, 2020, but failed to respond to the CO’s request for additional information. The CO closed the matter as unprocessed. The Employer asserts that at the time of the original application they were unaware of the market and whether H-2B workers would be available. The CO determined that while the prior Application allowed sufficient time to test the labor market, the current Application does not allow sufficient time.

The Employer asserts that after reviewing the market they determined that American workers are not available and filed a new Application. The Employer attached a number of articles regarding the labor market. However, none of these articles discuss the actual availability of employees in the area, they simply address how the Covid-19 pandemic has affected the loss of jobs and the need for tourism in the area. There is no information in the record showing that the Employer has attempted to hire American workers or searched for American workers.

The CO’s finding that 60 days is an insufficient time to determine the labor market is within her discretion. BALCA has previously found that the CO was within her discretion to deny the emergency waiver request due to insufficient time to thoroughly test the labor market for an application submitted 59 days prior to the anticipated need date. Blake Hershberger Enterprises, LLC., 2020-TLN-00059. Similarly, the CO has not abused her discretion in this case and not acted arbitrarily and capricious.

In Blake Hershberger, BALCA specially 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 contacted 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 grounds 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 here exercised her discretion in this matter in a way that complied with the applicable regulations. There is no evidence that there is sufficient time to complete the necessary review of the domestic market. The CO has the discretion to determine whether a time waiver is warranted. The CO’s concern that there is insufficient time is a reasonable basis for declining the Employer’s waiver request.

Therefore, after reviewing the evidence considered by the CO and all legal arguments, I find that the Employer has not demonstrated that the CO’s decision to deny a waiver of the filing deadline was arbitrary, capricious, or otherwise not in accordance with the law. Therefore, the Employer has not met its burden of showing that it is entitled to temporary labor certification.
ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer’s denial is AFFIRMED.

For the Board:

JOSEPH E. KANE
Administrative Law Judge