This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Catelli Brothers, Inc. (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination regarding the Employer’s H-2B temporary labor certification. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“DOL”). Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

H-2B Application

On June 8, 2021, the Employer filed an ETA 9142B, Application for Temporary Employment Certification and supporting documentation (“Application”) with the CO. The Employer requested 10 workers for the job title of General Labor, SOC Occupational Title Laborers and Freight, Stock, and Material Movers, Hand from the period of August 1, 2021 to May 31, 2022. In addition, the Employer requested to “waive the regulatory time period due to an emergency need that satisfies the good and substantial cause standard.”

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3 8 C.F.R. §214.2(h)(6)(iii).

4 Citations to the Administrative File are abbreviated as “AF.”
In its Application, the Employer noted that 20 C.F.R. § 655.17(b) permits a petitioner to request a waiver of the regulatory time period if good cause exists, including a substantial loss of U.S. workers due to pandemic health issues. (Id. at 49). Concerning its own position, the Employer stated:

[The Employer] experienced a substantial reduction in available workers due to the ongoing Covid-19 pandemic. Despite the Petitioner's good faith efforts to recruit and hire United States workers by posting job notices on its company website Facebook, Indeed, and in person, and despite receiving hundreds of applications during the initial phase of recruitment, most applicants did not attend their interview, show up for work, or attend their orientation. See Exhibit A. As such, the Petitioner has been unable to staff its business at full capacity.

(Id. at 49-50).

The Employer asserted that it had provided evidence of good and substantial cause and requested that the regulatory time period be waived. (Id. at 50).

**CO’s Final Determination**

On June 17, 2021, the CO issued a Final Determination on Emergency Waiver Request (“Final Determination”), denying the Employer’s request for a waiver to the filing period. (Id. at 36-40). In the Final Determination, the CO noted that pursuant to 20 C.F.R. § 655.17, an H-2B application must be filed no more than 90 days and no less than 75 days before the Employer’s date of need. (Id. at 38). In addition, the CO stated that under 20 C.F.R. § 655.17, the CO has discretion to waive the time period for filing for Employers that demonstrate 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.” (Id. at 38).

After reviewing the Employer’s Application, the CO noted that granting a waiver of the filing timeline would reduce a test of the domestic labor market, which is central to the H-2B program. (Id.). The CO further determined that the Employer had not established good and substantial cause. (Id.). The CO acknowledged that “while the [E]mployer has indicated that it cannot find domestic workers, such recruitment must be conducted under the provisions of the program.” (Id.) Accordingly, the CO denied the Employer’s request for a waiver of the time period for filing an H-2B Registration and/or an H-2B Application for Temporary Employment Certification. (Id. at 37).

Since the waiver of the time period for filing was denied, the CO returned the Employer’s Application without review as it did not include a valid Prevailing Wage Determination, which is required under 20 C.F.R. § 655.10. (Id. at 39). The CO noted that 20 C.F.R. § 655.15 requires that an H-2B application with a valid Prevailing Wage Determination be returned without review.5

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5 The CO acknowledged that 20 C.F.R. § 655.15 contains an exception for employers that qualify for emergency procedures under 20 C.F.R. § 655.17.
**Procedural History**

The Employer filed a Request for Administrative Review, dated June 25, 2021, appealing the CO’s denial of the Employer’s request to waive the regulatory time period. (Id. at 2). On July 14, 2021, I issued a Notice of Docketing and Order Establishing Briefing Schedule. Subsequently, on July 20, 2021, the Associate Solicitor, for Employment and Training Legal Services, on behalf of the CO, filed a brief. Thereafter, the Employer, through counsel, also filed a brief.

**Standard of Review**

BALCA’s standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. See *Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). 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 the CO issued the Final 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).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc.*, dba Great Chow, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer’s application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

**Discussion**

Pursuant to 20 C.F.R. § 655.15(b), an H-2B application must be filed no more than 90 calendar days prior to an employer’s date of need and no less than 75 days before an employer’s date of need. However, the regulations provide for emergency situations where a CO may waive the time period for filing if the Employer shows good and substantial cause and 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). Ultimately, it is within the CO’s discretion to determine whether or not there is sufficient time to test the domestic labor market.

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6 BALCA received the Request for Administrative Review on June 29, 2021.

7 Under 20 C.F.R. § 655.17(b), such good and substantial cause may include: “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.”

Prior BALCA cases are instructive concerning a CO’s discretion to determine the sufficiency of the time period needed to test the domestic labor market. In Blake Hershberger, the Administrative Law Judge (“ALJ”) affirmed the CO’s determination that 59 days was insufficient to test the labor market where the CO also determined that the COVID-19 pandemic constituted good cause. 2020- TLN-00059, 5-6 (Sept. 3, 2020). Similarly, in Handy Andy Snow Removal, 2021-TLN-00002, 3-4 (Nov. 10, 2020), the ALJ concluded that “the CO’s finding that 60 days is an insufficient time to determine the labor market is within her discretion.”

On June 8, 2021, the Employer filed its request for an emergency waiver for a period of need beginning on August 1, 2021. As a result, the CO needed to determine whether or not 55 days was sufficient to “thoroughly test the domestic labor market on an expedited basis.” 20 C.F.R. § 655.17. Although the CO noted that the Employer asserted that it had difficulty finding U.S. workers, the Employer did not provide evidence that it had such difficulty in recruitment within the parameters of the H-2B program. (See AF 38). Given the amount of time previously determined to be insufficient to thoroughly test the labor market, the CO did not abuse his or her discretion in determining that 55 days did not constitute a sufficient time period.

Upon consideration of the record, I find that the Employer has failed to show that the CO’s decision was arbitrary or capricious, or otherwise not in accordance with the law. The CO did not err in denying the Employer’s request to waive the time period for filing and returning the Application without review. Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper.

ORDER

Wherefore, the Certifying Officer’s Final Determination on Emergency Waiver Request is AFFIRMED.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge
Washington, D.C.