



**Issue Date: 18 February 2021**

**BALCA Case No.:** 2021-TLN-00012  
**ETA Case No.:** H-400-20272-848481

*In the Matter of:*

**LNW Landscaping, LLC**  
*Employer.*

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to LNW Landscaping, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its application for temporary alien labor certification under the H-2B non-immigrant program.<sup>1</sup> 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. *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).<sup>2</sup>

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor (“Department”) using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification of the Department’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. 20 C.F.R. § 655.61(a).

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<sup>1</sup> On April 29, 2015, the Department of Labor 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.

<sup>2</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current legislation. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019). Accordingly, the undersigned disregards any definition of temporary that is inconsistent with 8 C.F.R. § 214.2(h)(6)(ii)(B), including portions of 20 C.F.R. § 655.6(b).

## I. STATEMENT OF THE CASE

On September 28, 2020, ETA received an application for temporary labor certification from Employer. (AF<sup>3</sup> 28-32.) Employer requested certification for seventy-five laborers for an alleged period of temporary seasonal need from December 12, 2020 through March 30, 2021. (AF 28.) In addition to its Form 9142B, Employer also submitted a statement further describing its alleged temporary need and prevailing wage documentation. (AF 33-34, 39-46.)

The CO issued a Notice of Acceptance (“NOA”) for Employer’s application on October 6, 2020. (AF 20-27.) Consistent with the applicable regulations, the NOA set forth the requirements with which Employer must comply in recruiting U.S. workers. Among other things, the NOA explained the required content of Employer’s recruitment advertisements and directed Employer to contact former employees about the position. (AF 23-24.)

Relevant to this appeal, the CO also determined that qualified U.S. workers were likely available because of the “wide-spread unemployment due to the COVID-19 pandemic.” (AF 22.) Because of this, the CO instructed Employer to undertake additional recruitment of U.S. workers. The CO required that the Employer contact the local state workforce agency (“SWA”) to “obtain information and referrals of available, eligible U.S. workers for this job opportunity. (AF 24.) The CO explicitly stated that Employer “must consider U.S. candidates resulting from this contact and must include full details on such contact in its recruitment report.” (AF 24.)

On November 19, 2020, Employer submitted its recruitment report. (AF 19.) The report consisted of one page titled “Recruitment Results Summary Letter.” Employer explained that it has attempted to recruit U.S. workers for the positions identified in its application through advertisements posted in its place of business and on the websites of the U.S. Department of Labor and the Texas Workforce Commission. Despite its efforts, Employer did not receive any applications. Employer also noted that, because it is a new business, it could not contact former employees.

The CO issued a Minor Deficiency Email (“MDE”) on November 19, 2020. (AF 17-18.) In this email, the CO explained that Employer had not complied with the instructions provided in the NOA. (AF 17.) The CO explained that Employer’s recruitment report did not contain any information that showed that it had contacted the SWA about available, eligible U.S. workers. The CO directed Employer to submit an updated recruitment report that contained confirmation that Employer has contacted the SWA. The CO also added that Employer must include the name and contact information of the SWA staff member it had contacted. The CO informed Employer that it could not continue to process its application without this information. After Employer did not respond, the CO sent additional follow-up MDEs to Employer on December 2, 2020 and December 7, 2020. (AF 14-16.) Employer submitted no response.

On December 9, 2020, the CO issued a Final Determination denying Employer’s application. (AF 9-13.) The CO explained that she denied Employer’s application because Employer had failed to demonstrate that it had completed all of the recruitment

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<sup>3</sup> Citations to the Appeal File will be abbreviated with an “AF” followed by the page number.

requirements. (AF 12-13.) Specifically, Employer did not provide confirmation that it contacted the SWA as the CO had instructed in the MDEs. (AF 13.) Because of this, the CO determined that Employer had not complied with 20 C.F.R. § 655.46 and denied its application. (AF 12-13.)

In a letter received by ETA on January 14, 2021, Employer, through counsel, requested administrative review of the CO's Final Determination. (AF 1.) Employer disputed the CO's findings and conclusion. Employer's appeal contained no evidence or argument, but indicated that it intended on submitting a brief in support of its position.

The undersigned received the appeal file on February 3, 2021 and issued a Notice of Assignment and Expedited Briefing Schedule on February 4, 2021. The undersigned instructed the parties to file briefs (or indicate their intention not to) by February 12, 2020. Neither Employer nor the Office of the Solicitor of the Department of Labor, on behalf of the CO, submitted a brief in this matter. This decision is issued within ten business days of the receipt of the appeal file, as required by 20 C.F.R. § 655.461(f).

## II. SCOPE AND STANDARD OF REVIEW

The Board has a limited standard of review in H-2B cases. Specifically, the Board may only consider the appeal file, the parties' legal briefs, and the employer's request for review, which may contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e). After considering the evidence, the Board must take one of the following actions in deciding the case:

- (1) Affirm the CO's denial of temporary labor certification;
- (2) Direct the CO to grant temporary labor certification; or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

While 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 the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016); see also *J&V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 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).

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 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 itself provided. *See State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1946)); *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”).

### III. 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); *A New Image Landscape, Inc.*, 2017-TLN-00046 (May 5, 2017); *Burnham Companies*, 2014-TLN-00029 (May 19, 2014). Consequently, before ETA issues a temporary labor certification, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity. *See* 20 C.F.R. § 655.40-§ 655.47.

After the employer has conducted the required recruitment, the CO may instruct an employer to make additional reasonable recruitment efforts if there is a likelihood that qualified U.S. workers are available. 20 C.F.R. § 655.46(a). The CO must clearly describe the additional recruitment to be conducted by the employer and may specify the “documentation or other supporting evidence that must be maintained by the employer as proof that the additional recruitment requirements were met.” 20 C.F.R. § 655.46(b)-(c).

In the present case, the CO required Employer to conduct additional recruitment of U.S. workers in light of the increased domestic unemployment caused by the COVID-19 pandemic. (AF 22-24.) The CO instructed Employer to inform the SWA of its need for temporary workers and to submit documentation confirming this contact had occurred.

Employer was required to submit proof of its additional recruitment through the SWA under 20 C.F.R. § 655.46. The record clearly shows that Employer failed to comply with the CO’s valid instructions. Consequently, the CO did not act in an arbitrary or capricious manner in denying Employer’s application. *See e.g., Bay Area Landscape Nursery, LLC*, 2020-TLN-00018 (Jan. 9, 2020) (affirming the CO’s denial on the employer’s application for failing to submit a required recruitment report). Therefore, the CO’s denial of Employer’s application for temporary labor certification was not arbitrary and capricious or an abuse of discretion.

IV. ORDER

In light of the foregoing, the Certifying Officer's decision is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**THERESA C. TIMLIN**  
Administrative Law Judge

Cherry Hill, New Jersey