In the Matter of:

NORTH SHORE RESORT,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Joseph E. Kane
Administrative Law Judge

DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DETERMINATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to North Shore Resort’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter. 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 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).

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.
STATEMENT OF THE CASE

On January 3, 2021, the Employer filed with the Certifying Officer (“CO”) an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. The Employer requested certification for seven Housekeepers, SOC Occupational Title, Maids and Housekeeping Cleaners. On February 24, 2021, the CO issued a Notice of Acceptance (“NOA”) informing the Employer that its application for temporary labor certification had been accepted for processing. (AF 31-37). The NOA explained that the Employer “must conduct recruitment of U.S. workers and prepare and submit a recruitment report in accordance with 20 CFR 655.40-655.48 and the instructions provided below.” (AF 31-37). The NOA further stated that the employer must prepare, sign, date and submit the written Recruitment Report by March 22, 2021. (AF 31-37).

The Employer failed to submit a written Recruitment Report. On March 24, 2021, the CO e-mailed the Employer requesting a copy of the report. (AF 30). The Employer failed to respond to the request. On April 2, 2021, the CO made its final determination regarding the Employer’s Application. (AF 27-29). The CO found that the Employer’s recruitment did not comply with regulations at 20 C.F.R. § 655.48(a) because it did not prepare, sign, date and submit a written Recruitment Report. (AF 27-29). Thus, the CO denied the Employer’s application.

After the issuance of the Final Determination, the Employer then filed a copy of the recruitment report. (AF 18-26). On April 12, 2021, the Employer requested administrative review of the CO’s Denial before BALCA, as permitted by 20 C.F.R. § 655.61.7 (AF 1-17). On April 20, 2021, the Board of Alien Labor Certification Appeals (“BALCA”) received the request for administrative review. The matter was assigned to Administrative Law Judge Joseph E. Kane. The appeal file was received on the same date. Per a notice of docketing issued April 20, 2021, the parties were given 7 days to file a brief. The Employer filed a brief on April 28, 2021.

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. Therefore, any arguments and evidence submitted on appeal, including that submitted with the briefs, cannot be considered unless presented to the CO. 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 unless shown by the Employer to be arbitrary and capricious or otherwise not in accordance with the law.

2 “AF” refers to the Appeal File.
The Employer bears the burden of proving that it is entitled to temporary labor certification. The CO may only grant the Employer’s Application to admit H-2B workers for temporary non-agricultural 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. Consequently, before a temporary labor certification is issued, an employer must conduct recruitment steps designed to inform U.S. workers about the job opportunity.

Section 655.48(a) requires the Employer to prepare, sign, and date a recruitment report informing the CO of 1) the name of each recruitment activity or source; 2) the name and contact information of each U.S. worker who applied or was referred to the job opportunity and the disposition of each worker's application including whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined; 3) that former U.S. employees were contacted, if applicable; 4) that a bargaining representative was contacted, if applicable; 5) that a community-based organization designated by the CO was contacted, if applicable; 6) that additional recruitment was conducted as directed by the CO, if applicable and; 7) the lawful job related reason(s) that each U.S. worker who applied for the position was not hired, if applicable.

In the present case, the Employer never submitted the recruitment report with the required information to the CO. It was only after the CO issued the Final Determination that the Employer submitted the report. The CO even emailed the Employer asking for the report on March 24, 2021. While the Employer discusses the report’s contents in its brief, without this report prior to the determination, the CO had no way of determining if there are insufficient qualified U.S. workers to perform the temporary services or labor for which the Employer desires to hire foreign workers and that the wages and working conditions of U.S. workers will not be adversely affected by the hiring of H-2B workers. Producing the report and its contents, after the fact, does not comply with the regulations.

The Employer asserts that it substantially complied and only inadvertently failed to upload the report. In its brief, the Employer goes through its recruitment efforts. However, these efforts needed to be timely presented to the CO. They cannot submit them after the fact. Administrative errors in transmitting documents to the CO cannot be forgiven. Fullerton Landscape Architects, 2014-TLC-00030 (May 23, 2014) (denial upheld where the employer sent an email with the wrong attachment); Running Sports, 2016-TLN-00049 (June 20, 2016) (denial upheld where NOD response sent to wrong email address); Montauk Manor, 2016-TLN-00066 (Sept. 22, 2016) (ambiguous email from the CO did not constitute a waiver from meeting the deadline to submit a recruitment report). Applications were properly denied because the employer did not supply requested information. Saigon Restaurant, 2016-TLN-00053 (July 8, 2016); Munoz Enterprises, 2017-TLN-00016 (Jan. 19, 2017); Cater Farms, 2015-TLN-00022 (Feb. 13, 2015) (failure to

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4 20 C.F.R. § 655.1(a).
6 20 C.F.R. § 655.48(a).
Therefore, based on the evidence in the record, I find that the Employer has failed to comply with the recruitment requirements under 20 C.F.R. § 655.48(a) that it must submit a timely written recruitment report to the CO. Therefore, I find that the CO properly denied the Employer’s application.

**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