In the Matter of:

Pacific Crossing, Inc. d/b/a Kokua Roofing Service

Employer.

DECISION REMANDING CASE

This case is before the Board of Alien Labor Certification Appeals ("the Board") pursuant to the request for administrative review by Pacific Crossing, Inc., doing business as Kokua Roofing Service, ("Employer") of the Certifying Officer’s ("CO") decision to issue a Notice of Deficiency in response to its application for temporary alien labor certification under the H-2B non-immigrant program. 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).

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor. A CO in the Office of Foreign Labor Certification of the Department’s Employment and Training Administration ("ETA") reviews applications for temporary labor certification. An employer may request review by the Board of any determination made by the CO. 20 C.F.R. § 655.61(a).

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1. 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 have 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.

I. RELEVANT BACKGROUND

ETA received Employer’s application for temporary labor certification on January 19, 2021. (AF3 at 86-109.) Employer requested certification for ten “helper-roofers” for an alleged period of temporary need from April 15, 2021 through January 15, 2022. (AF at 86.)

On March 3, 2021, the CO issued a Notice of Deficiency (“NOD”). (AF at 77-85.) The CO identified five deficiencies in Employer’s application. For each deficiency, the CO provided her reasoning, cited to the relevant regulations, and explained what information and documentation Employer could submit to remedy its application. (AF at 80-85.) The CO instructed Employer to provide this information in a response to ETA within ten business days. (AF at 77.)

The CO’s NOD also included the following direction:

In accordance with 20 CFR 655.61, the employer may request Administrative Review of this NOD before the Chief Administrative Law Judge within 10 business days from the date this NOD is issued. The employer may submit any legal arguments that it believes will rebut the basis of the CO’s actions.

(AF at 78.)

On March 13, 2021, Employer submitted an email to ETA. (AF at 7.) In this email, Employer stated “[p]lease find our appeal and all corresponding evidence attached.” Employer also provided responses to each of the deficiencies identified in the NOD and attached several supporting documents. (AF at 8-75.)

On March 25, 2021, the CO replied to Employer’s email. (AF at 4.) The CO asked Employer to clarify whether it intended its March 13, 2021 email submission to be a response to the NOD or an appeal of the CO’s issuance of the NOD. The CO further explained that, if Employer did intend its submission to be an appeal, it must make its request directly to the Office of Administrative Law Judges (“OALJ”). After receiving no reply, the CO sent Employer a follow up email on March 31, 2021. (AF at 5.)

Employer replied to the CO’s emails on April 1, 2021. (AF at 1-2.) Employer alleged that it immediately responded to the CO’s March 25, 2021 email.4 (AF at 1.) In this earlier email, Employer claimed to have explained that its March 13, 2021 email submission was “an appeal to the NOD, and that [Employer] mistakenly did not submit it to [OALJ].” Employer also stated that it was “only at the stage of submitting a response” and “therefore requesting [a]dministrative [r]eview of the NOD before [OALJ] was not done during the 10 business days from the date of the NOD, since this was only the appeal to the NOD.”

Employer further indicated that it did not request administrative review before the Board because it had “not received any communications from the [CO] determining [its] application as

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

4 The Appeal File does not contain this correspondence.
acceptable or unacceptable.” Employer then concluded that it would be requesting administrative review the following day – on April 2, 2021.

On April 13, 2021, the Board docketed this case and the undersigned received the Appeal File. The undersigned issued a Notice of Assignment and Expedited Briefing Schedule on April 14, 2021, instructing the Office of the Solicitor of the Department of Labor, on behalf of the CO, to file its brief (or indicate their intention not to do so) by April 21, 2021. The CO timely submitted its brief on April 20, 2021. This Decision is issued within seven business days of the receipt of the CO’s brief, as required by 20 C.F.R. § 655.61(f).

II. DISCUSSION

In her brief, the CO first argues that Employer’s request for administrative review was untimely. The CO issued the NOD on March 3, 2021. (AF at 77-85.) An employer must request administrative review of a determination by the CO within ten business days. 20 C.F.R. § 655.61(a)(1). Employer did not request administrative review until at least April 2, 2021.5 Thus, the CO urges the undersigned to dismiss Employer’s request for review as untimely.

Notwithstanding the timeliness of Employer’s request for administrative review, the CO also acknowledges the unclear language used by Employer in its March 13, 2021 and April 1, 2021 emails. The CO notes that Employer may have inadvertently used the word “appeal” and may have intended its March 13, 2021 email submission to be a response to the NOD. Because of this, if the undersigned does not wish to dismiss Employer’s request on timeliness grounds, the CO requests that the undersigned remand this case back to ETA so that the CO may examine Employer’s March 13, 2021 email submission.

The regulations provide the Board with the authority to remand a case to the CO for further action. 20 C.F.R. § 655.61(e)(3). After a review of the Appeal File and the CO’s brief, the undersigned finds that that this approach is most appropriate in this case. Employer’s emails are ambiguously worded and very confusing. It is possible that Employer intended its March 13, 2021 email submission to be a response to the NOD and misinterpreted the CO’s instructions regarding requesting administrative review. Accordingly, the undersigned REMANDS this case to the CO with instruction to take appropriate action and further processing of Employer’s application for temporary labor certification.

5 Employer’s request for administrative review is not included in the record. However, in its April 1, 2021 reply to the CO, Employer indicated that it would request administrative review on April 2021.
SO ORDERED.

For the Board:

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey