DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DENIAL OF TEMPORARY LABOR CERTIFICATION

This case arises from the request for review of Weddle and Sons Construction, Inc. ("Employer") in regard to the Certifying Officer’s (“CO”) January 4, 2021 denial of Employer’s application for temporary labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural 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 (DHS). See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 1 20 C.F.R. § 655.6(b).2 Employers who seek to

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hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration 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 of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

**BACKGROUND**

On January 1, 2021, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for six residential roofing laborers for the period of April 1, 2021 to November 1, 2021. AF 44-109. Employer indicated that the nature of its temporary need was “seasonal.” AF 44.

The CO issued a Notice of Acceptance (NOA) on January 22, 2021, notifying the Employer that its application for temporary employment certification for six residential roofing laborers under the H-2B temporary non-agricultural labor certification program had been reviewed and accepted for processing. AF 37-43. The NOA informed the Employer that it must comply with additional regulatory requirements as listed in the Notice of Acceptance. The CO directed the Employer to conduct the recruitment steps noted in the regulations at 20 C.F.R. §§ 655.40-655.48 including the following notice of posting requirement:

If there is no bargaining representative, provide notice of the job opportunity in accordance with 20 CFR § 655.41 by posting a notice in at least two conspicuous locations at the place(s) of employment or otherwise provide reasonable notification to all employees in the job classification in the area where work will be performed by H-2B workers. Prominent electronic posting of the notice on the employer’s internal or external Web site customarily used to provide notices to employees about terms and conditions of employment is permissible. The notice of the job opportunity must be posted for 15 consecutive business days. The employer’s recruitment is not complete until the job opportunity has been posted for at least 15 consecutive business days. Note: There is no exception to this posting requirement. An employer must post notice as instructed, including for a position in a private home or other location where there may not be other employees. (emphasis in the original.)

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The NOA directed the Employer to “sign, date and submit a written recruitment report [to the Chicago NPC] by March 1, 2021, by uploading the recruitment report to the correct pending

“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.

3 References to the appeal file will be abbreviated with an “AF” followed by the page number.
application in FLAG.” (Foreign Labor Application Gateway electronic filing system). AF 40-41. Employer was notified that it could alternatively submit the report by email to the Chicago NPC, or if the employer did not have internet access, the report could be submitted by facsimile or hard copy mail. AF 41.

The NOA also noted that “[t]he employer’s recruitment report may not be submitted until the employer-conducted recruitment is complete, including the notice of the job opportunity, which must be posted for 15 consecutive business days, if applicable.” AF 38. The CO also informed the Employer of its duty to update the recruitment report throughout the entire recruitment period which continues until 21 days before the start date of need. AF 42.

On February 5, 2021, Employer submitted its recruitment report. AF 34-36. Employer noted the recruitment steps it had taken. In regard to the notice of job opportunity requirement, Employer stated, “Company posted a notice of the job opportunity in two (2) locations at the place of employment for a period of at least fifteen (15) consecutive business days from January 22, 2021 to February 5, 2021.” AF 34. Employer signed the recruitment report, noting that it had received zero applications for the position in question. Employer’s signature is dated February 5, 2021. AF 36.

On February 8, 2021, the Chicago National Processing Center (NPC) notified Employer by email that it had received the Employer’s recruitment report dated February 5, 2021. The CNBC stated that the required postings pursuant to regulation 20 C.F.R. § 655.45 “must be posted for at least 15 consecutive business days.” AF 33. The NPC noted that the Employer’s application was accepted for processing on January 22, 2021, and that the submitted report was signed on February 5, 2021. Therefore the CNBC stated:

The employer has not allowed sufficient time to elapse before finalizing its recruitment report. These job postings must be posted for at least 15 consecutive business days before signing and submitting a recruitment report.

Id.

Therefore the Chicago CNPC requested that Employer submit “a revised recruitment report dated February 6, 2021 or after because [its recruitment report] was submitted one day too early.” The Chicago NPC also directed that Employer respond no later than February 10, 2021. Id.

The record includes another copy of Employer’s recruitment report signed and dated February 5, 2021 at AF 30-32.

On March 2, 2021, the Chicago NPC notified Employer, by email, that it required further information or documentation in order to continue processing its H-2B application due to a deficiency in the Employer’s recruitment report. AF 29. The NPC noted that it had received the Employer’s recruitment report dated February 5, 2021 which was submitted on February 5, 2021. The agency also noted that it had requested, by email dated February 8, 2021, that Employer submit a revised recruitment report dated February 6, 2021 or later, because the “report was
submitted one day too early.” The NPC stated that it received the same report dated February 5, 2021 on February 8, 2021. The NPC further stated that “an updated report signed and dated February 6 or after has yet to be received.” The NPC directed the Employer to submit its recruitment report no later than March 9, 2021. *Id.*

On March 10, 2021, the CO issued a Final Determination denying Employer’s application for temporary labor certification. AF 23-28. The CO determined that Employer failed to comply with the Notice of Job Posting requirement at 20 C.F.R. § 655.45(b) because the “employer did not provide a recruitment report which allowed sufficient time to elapse before finalizing its recruitment report.” The CO noted that the Chicago NPC sent emails dated February 8, 2021 and March 2, 2021 to Employer, requesting a revised recruitment report which complied with the regulation, and which was dated February 6, 2021 or later. However, the NPC did not receive the updated recruitment report. Accordingly Employer’s application for temporary labor certification was denied.

The record includes an email sent from Employer to the Certifying Officer on March 11, 2021, in response to the Final Determination, stating that the “Certifying Officer is mistaken that the second Recruitment Report submitted on February 8, 2021 was signed and dated on February 5, 2021.” Employer asserted that the second recruitment report submitted on February 8, 2021 was in fact signed and dated February 8, 2021. Employer attached a copy of its recruitment report which is signed and dated February 8, 2021. AF 12-22.

By letter dated March 16, 2021, the Employer requested administrative review of the March 11, 2021 Final Determination Denial. Employer asserts that it submitted a revised recruitment report on February 8, 2021 and that the CO was mistaken in finding that the revised recruitment report was also dated February 5, 2021. Employer again asserts that the revised recruitment report was signed and dated February 8, 2021. Based on this assertion Employer requests that the application be certified.

By Order issued on March 31, 2021, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before April 8, 2021. No brief was received from the Certifying Officer.

Employer filed a timely brief on April 8, 2021. Employer reasserted its previous allegation that it had submitted its revised recruitment report on February 8, 2021 and that revised report was signed and dated February 8, 2021, contrary to the representations of the Certifying Officer. Although Employer submitted some documentary evidence and attestations of counsel pertaining to this matter, this evidence is beyond the scope of this administrative review and therefore is not considered. Pursuant to 20 C.F.R. § 655.61, in cases where an administrative review is requested “BALCA must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655(e).
SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

(1) Affirm the CO’s determination; or
(2) Reverse or modify the CO’s determination; or
(3) Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO in H-2B matters. BALCA has, fairly consistently, applied an arbitrary and capricious standard to its review of the CO’s determination in H-2B temporary labor certification cases. See Brook Ledge Inc., 2016-TLN-00033 at 5 (May 10, 2016) (BALCA panel acknowledging that it reviewed the CO’s determination under an arbitrary and capricious standard).

ISSUE

Whether the Certifying Officer properly denied the Employer’s application on the basis that Employer had not submitted a recruitment report in compliance with the regulatory requirements at 20 C.F.R. §§ 655.40(b) and 655.45(b).

DISCUSSION

Employer bears the burden of proof concerning its entitlement to temporary labor certification under the H-2B program. 8 U.S.C. §1361; Cajun Contractors, 2011-TLN-00004 (Jan. 10, 2011); BMGR Harvesting, 2017-TLN-00015 (Jan. 23, 2017). As part of this burden, Employer must demonstrate compliance with the regulatory recruitment requirements found at 20 C.F.R §§ 655.40-655.48 which are in place to “ensure that there are not qualified U.S. workers who will be available for the positions listed in the Application for Temporary Employment Certification [and that] U.S. applicants [are] rejected only for lawful job-related reasons.” 20 C.F.R. § 655.40(a). The recruitment report assists in determining whether the employer has met its burden. See Whittle, Inc., 2016-TLN-00019 (Mar. 9, 2016).

In the Final Determination Denial the CO denied the Employer’s application on the basis that Employer failed to comply with the Notice of Job Posting requirement at 20 C.F.R. § 655.45(b) and because the “employer did not provide a recruitment report which allowed sufficient time to elapse before finalizing its recruitment report.”
In the Notice of Acceptance, the CO notified the Employer of the regulatory recruitment requirements including the Notice of Job Posting requirement. In regard to this requirement Employer was instructed to:

… provide notice of the job opportunity in accordance with 20 CFR § 655.41 by posting a notice in at least two conspicuous locations at the place(s) of employment or otherwise provide reasonable notification to all employees in the job classification in the area where work will be performed by H-2B workers. Prominent electronic posting of the notice on the employer’s internal or external Web site customarily used to provide notices to employees about terms and conditions of employment is permissible. The notice of the job opportunity must be posted for 15 consecutive business days. The employer’s recruitment is not complete until the job opportunity has been posted for at least 15 consecutive business days. Note: There is no exception to this posting requirement. An employer must post notice as instructed, including for a position in a private home or other location where there may not be other employees. (emphasis in original).

AF 40.

Employer was also informed in the NOA of the regulatory requirement that the employer’s recruitment report may not be submitted until the employer-conducted requirement is complete, including the notice of the job opportunity, which must be posted for 15 consecutive business days, if applicable. AF 38. See also 20 C.F.R. § 655.40 (b).

AF 38.

Employer initially submitted its recruitment report on February 5, 2021 alleging that the required recruitment steps had been taken. AF 34-36. The recruitment report was signed and dated February 5, 2021. On February 8, 2021 Chicago National Processing Center (NPC) notified Employer by email that it had received the Employer’s recruitment report dated February 5, 2021. However the agency determined that since the required job posting (pursuant to 20 C.F.R. §655.45) “must be posted for at least 15 consecutive business days,” Employer had not allowed sufficient time to elapse before finalizing its recruitment report. Therefore, the NPC directed Employer to submit “a revised recruitment report dated February 6, 2021 or after because [its recruitment report] was submitted one day too early.”

The record supports that Employer submitted a recruitment report on February 8, 2021. The report in the record, however, is identical to the report submitted on February 5, 2021, and is also dated February 5, 2021. AF 30-32. On March 2, 2021, by email communication, the Chicago NPC notified Employer that it had received the same report on February 5, 2021 and February 8, 2021, and that both reports were dated February 5, 2021. AF 29. Thus the Chicago NPC informed the Employer it had not received the requested revised report dated February 6, 2021, or later, and gave the Employer a second opportunity to submit the revised report no later than March 9, 2021. The record shows no response from Employer to this email. The Final
Determination was issued on March 10, 2021 denying the application due to Employer’s failure to submit the compliant recruitment report.

The instant case presents a factual issue. Employer contends in its response filed after the CO’s Final Determination, and in its request for review and brief, that the recruitment report it submitted on February 8, 2021 was also dated February 8, 2021. Per the regulation pertaining to administrative review of this matter BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a).

Thus, my review of this matter is limited to the appeal file and the legal arguments of the parties as found in the request for review and briefs. Although the Employer contends that it, in fact, submitted a revised recruitment report on February 8, 2021 which was also dated February 8, 2021, the appeal file does not support this allegation. The record shows that both reports in the record before the CO are dated February 5, 2021. It is possible that an error may have occurred in the submission of the Employer’s report through the FLAG system on February 8, 2021, which could have been due to the Employer’s error, or perhaps a system error. However, the Chicago NPC notified the Employer again on March 2, 2021, that both reports in the record were dated February 5, 2021 and the agency gave the Employer another opportunity to submit the compliant report as well as an extension of time to March 9, 2021 to do so. Employer did not respond to this March 2, 2021 notice, nor did it resubmit its revised report. As the Employer had notice of the potential error in the submission of the revised recruitment report and was given another opportunity to submit the revised report, the CO reasonably denied the Employer’s application for Employer’s failure to submit the revised report by the requested date of March 9, 2020. Employer’s failure to respond to the March 2, 2021 notice from the agency regarding the deficiency in the application is not addressed in the Employer’s request for review or brief.

BALCA has upheld the CO’s strict application of the regulatory recruitment requirements. In general, these requirements are in place to protect U.S. workers and to assure that there are not sufficient workers, willing and able to perform the temporary jobs that are the subject of the H-2B temporary labor certification application. See 20 C.F.R. §§ 655.40-655.48; Duane L. Elliot, 2018-TLN-00088 (Apr. 2, 2018) (BALCA adopts a strict application of the recruitment requirements set forth in the regulations); see also H & R Drains & Waterproofing LLC, 2016-TLN-00061 (Sept. 8, 2016) (affirming CO’s denial where job had not been posted for 15 consecutive business days at the time the recruitment report was submitted); Montauk Manor Condominiums, 2016-TLN-00066 (Sept. 22, 2016) (Affirming denial where recruitment did not occur within 14 day period and recruitment report was not filed timely); Boothill Properties, Inc. 2017-TLN-00034 (Apr. 25, 2017) (affirming denial where Employer requested to be excused from required timeframe because it was out of town when the Notice of Acceptance was issued); Clippers Lawn Maintenance Inc., 2014-TLN-00028 (May 19, 2014) (affirming denial where the newspaper advertisements did not identify the name of the employer); Burnham Companies, 2014 TLN-00029 (May 19, 2014) (affirming denial where the advertisements did not state start and end dates of employment and did not fully state the offered wage range); Ridgebury Management LLC, 2014-TLN-00020 (Apr. 7, 2014) (affirming denial and finding that SWA job order must list anticipated end date of employment).
Regardless of whether an error occurred in the submission of the Employer’s revised recruitment report on February 8, 2021, Employer was notified on March 2, 2021, that the agency did not have the revised report dated February 8, 2021 and was given additional time to resubmit a report that was in compliance with the regulations. Employer failed to respond to this notice or resubmit a revised report.

For the above reasons, I find the Certifying Officer did not act arbitrarily or capriciously in enforcing the regulatory recruitment requirements, or in denying the Employer’s application for its failure to submit a compliant report within the timeframe allowed in the March 2, 2021 email notifying Employer that the deficiency remained.

**CONCLUSION**

The undersigned finds the CO’s denial of Employer’s application for temporary labor certification, due to Employer’s violation of the applicable recruitment regulations, was not arbitrary, capricious, or an abuse of discretion. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

PATRICIA J. DAUM
Administrative Law Judge