



Issue Date: 12 February 2021

BALCA CASE NO.: 2021-TLN-00013

ETA CASE NO.: H-400-20266-838083

In the Matter of:

AAA SNOW REMOVAL, INC.,
Employer.

DECISION AND ORDER AFFIRMING THE DENIAL OF CERTIFICATION

This case arises from the AAA Snow Removal (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an 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 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. *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).¹ The issuance of a temporary labor certification is a determination by the Secretary of Labor that there are not sufficient qualified U.S. workers available to perform the temporary labor and that employment of foreign workers “will not adversely affect the wages and working conditions of U.S. workers similarly employed.” 20 C.F.R. § 655.1(a); *see also* 8 C.F.R. § 214.2(h)(6)(i)(A).

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142” or “Application Form”). 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).

BALCA docketed the appeal and received the Appeal File (“AF”) on February 1, 2021. The case was assigned to the undersigned on February 3, 2021. On February 4, 2021, the undersigned issued a *Notice of Docketing and Expedited Briefing Schedule*. On February 9, 2021,

¹ On April 29, 2015, the Department of Labor (“DOL”) 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.

counsel for the CO submitted an email stating it would not be filing a brief in this matter. Accordingly, this proceeding is now before the undersigned as a designated member of the Board of Alien Labor Certification Appeals. 20 C.F.R. § 655.61. This Decision and Order is based on the written record which consists of the AF and the Employer's request for review. The undersigned affirms the CO's denial.

I. Procedural Background

On September 22, 2020, Employer submitted an application for temporary labor certification to the Department of Labor's Employment and Training Administration ("ETA"). (AF pp. 64-83.)² Employer stated that it is engaged in the business of snow clean up and removal in the Denver, Colorado area, and that most business activity and need would occur between December 5, 2020, and March 15, 2021. (AF p. 69.) Employer sought to hire 24 workers to work between December 6, 2020, and March 15, 2021, for duties including snow removal, winter maintenance of yards, hanging and taking down Christmas decorations, and maintenance of equipment such leaf blowers and plows. (AF pp. 64, 69.)

The Office of Foreign Labor Certification issued a Notice of Deficiency on October 20, 2020. (AF pp. 47-56.) The CO cited two deficiencies in Employer's application. First, the CO cited a failure to submit an acceptable job order in violation of 20 C.F.R. §§ 655.16 and 655.18. (AF p. 61.) The CO also cited a failure to complete an accurate ETA form 9142 in violation of 20 C.F.R. § 655.15(a). (AF pp. 62-63.) Employer responded to the Notice of Deficiency on October 20, 2020, providing an amended job order. (AF pp. 47-56.)

On October 23, 2020, the CO emailed Employer noting a number of outstanding deficiencies, including that the Colorado State Workforce Agency (SWA) had confirmed that Employer had not placed a job order for the requested position, and the CO ordered Employer to submit a job order to the SWA. (AF p. 45.) The CO set a deadline of October 27, 2020, to respond with the requested information. (*Id.*) On October 28, 2020, Employer responded to the CO, including an amended job order and stating that the SWA was cc'd on the email. (AF p. 40.) Employer explained that it did not yet have an account with the SWA. (*Id.*) The Appeal File includes emails between Employer and the SWA, between October 23, and October 28, 2020, regarding attempts by employer to set up an account and post a job order. (AF pp. 33-39.) The CO is copied on these emails.

On November 5, 2020, the CO issued a Notice of Acceptance containing instructions for recruitment of U.S. workers, with which Employer was required to comply. (AF pp. 19-26.) The CO explained that, as a result of the COVID-19 pandemic, there was widespread unemployment and many qualified U.S. workers were available for employment. (AF p. 21.) The CO reasoned that under these conditions, it was appropriate to invoke 20 C.F.R. § 655.46, which allows the CO to require employers to take additional steps to recruit U.S. workers. (AF p. 21.) Part D of the Notice of Acceptance instructed Employer to conduct additional recruitment by requesting additional recruitment assistance from its local SWA, and providing the SWA with a copy of the job order. (AF p. 23 (citing 20 C.F.R. § 655.46).) The CO instructed Employer to include full

² References to the administrative file will be abbreviated with an "AF" followed by the page number.

details on such contact in its recruitment report, and to submit such a recruitment report by November 16, 2020. (AF pp. 23-24.) Specifically, the CO instructed Employer to provide confirmation of its activities, including **“Confirmation that additional recruitment was conducted as directed by the CO, including the name and contact information for the SWA staff with which the employer worked, if available.”** (AF p. 24) (emphasis added).

On November 18, 2020, the CO sent an email to Employer noting that they had not received Employer’s recruitment report, and reminding Employer of the required information. (AF p. 18.) On November 19, 2020, Employer submitted a one-page letter, with no attachment, titled “Summary Recruitment Results Letter.” (AF p. 17.) Employer stated that it had placed the job order on connectingcolorado.com under job order #8627961, had posted copies of the job order in their place of business, and had received no applicants. (*Id.*)

On November 19, 2020, and again on November 24, 2020, the CO emailed Employer to inform it that it that the recruitment report submitted on November 18, 2020, was insufficient. It specified that Employer did not provide confirmation that additional recruitment was conducted, including the name and contact information for the SWA staff. (AF pp. 15-16.) It instructed Employer that “In order for the Chicago NPC to continue processing the application, the employer must submit an updated recruitment report which includes confirmation that additional recruitment was conducted as directed by the CO, including the name and contact information for the local SWA staff.” (*Id.*) On December 1, 2020, Employer resubmitted a copy of the same letter which it had submitted on November 19, 2020, with no attachments.³ (AF p. 14.)

The Office of Foreign Labor Certification issued its Final Determination denying Employer’s application on December 3, 2020. (*See* AF pp. 8-13.) In its Final Determination, the CO stated that Employer had failed to conduct additional recruitment in violation of 20 C.F.R. §655.46. (AF p. 5.) The CO again cited widespread unemployment due to the COVID-19 pandemic as its basis for directing Employer to conduct additional recruitment. (*Id.*) The CO specifically cited Employer’s failure to submit confirmation of conducting additional recruitment with the SWA as directed in Section D of the Notice of Acceptance, and noted that Employer had twice submitted the same insufficient recruitment report. (AF p. 6.)

On January 14, 2021, Employer filed a Notice of Appeal, to which it attached a copy of the Final Determination and a copy of a FedEx envelope, addressed from Employer’s counsel to the CO, dated December 17, 2020. (AF pp. 1-7.) In an email to the undersigned’s law clerk and counsel for the CO on February 4, 2021, Employer’s counsel explained that its Notice of Appeal had initially been returned as undeliverable due to the receiving office being closed. In a response email dated February 9, 2021, counsel for the CO stated that Employer’s counsel had shared evidence of an attempt to timely file an appeal. Given this reason for delay, the undersigned finds that Employer’s Notice of Appeal was timely filed.

³ On the letter itself, there is no indication that it was mailed or received on December 1, 2020. (*See* AF p. 14.) It is the identical letter, again dated November 19, 2020. The CO indicated that the letter was re-sent on December 1, 2020, and Employer does not contest this.

II. Standard of Review

The Board's scope of review in the H-2B program is limited. When an employer requests review under Section 655.61(a), the Board considers "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board may not consider new evidence that was not before the Certifying Officer. *See* 20 C.F.R. § 655.61(a)(5). The Board's authority to act is similarly limited; the Board may either affirm the determination of the Certifying Officer, reverse or modify the determination, or remand the matter back to the Certifying Officer for further action. 20 C.F.R. § 655.61(e). Finally, Section 655.61(f) provides for expedited review of any request for administrative review by the Board. 20 C.F.R. § 655.61(f).

The regulations do not specify the deference that BALCA should accord to a CO's determination, nor is there a consensus in the cases as to the appropriate standard of review. Some members of the Board have applied an arbitrary and capricious standard. *See e.g., Jose Uribe Concrete Constr.*, 2019-TLN-00025 (Feb. 21, 2019) (collecting cases). Other members have rejected this standard and applied a less deferential standard. *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) (whether the basis for denial was legally and factually sufficient); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016) and *Sands Drywall, Inc.*, 2018-TLN-00007 (Nov. 28, 2017) (*de novo* standard of review). In the present case, the undersigned need not reach this issue. The undersigned would affirm the CO's denial whether the undersigned applied an arbitrary and capricious standard or reviewed the matter *de novo*.

III. Discussion

Unless otherwise instructed by the CO, the employer must conduct the recruitment described in 20 C.F.R. §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48. The recruitment steps described in §§ 655.42 through 655.46 include: newspaper advertisements; contact with former U.S. employees; contact with employees' bargaining representative or posting of the job opportunity. After the employer's recruitment activity is complete, the employer must prepare and submit a recruitment report detailing its recruitment activity, as specified in 20 C.F.R. § 655.48.

Pursuant to 20 C.F.R. § 655.46, the CO may instruct the employer to conduct additional reasonable recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there is a likelihood that U.S. workers who are qualified and will be available for the work. 20 C.F.R. § 655.46(a). In such situations, the CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but is not limited to, posting on the employer's Web site or another Web site, contact with additional community-based organizations, or additional contact with State One-Stop Career Centers. 20 C.F.R. § 655.46(b). The CO will also 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(c).

Here, the CO acted within its discretion in determining that the mass unemployment caused by the COVID-19 pandemic creates a likelihood that there are U.S. workers who are qualified and

available for work with Employer. The additional recruitment efforts which the CO required, posting a job with the local SWA, is not only reasonable, but specifically contemplated by the regulation. *See* 29 C.F.R. 655.46(b). Likewise, the CO's requirement of providing documentation of the additional recruitment with the SWA is reasonable and contemplated by the regulation. *See* 29 C.F.R. § 655.46(c). There is no question that Employer failed to provide sufficient documentation of additional recruitment. In response to the CO's request in the Notice of Acceptance, Employer provided only a letter, in which it represented that it had posted a job order and provided a job order number. Employer did not provide any documentation or evidence, and did not provide the name and contact information of the SWA staff with which Employer worked, as the CO had specifically requested. (AF p. 24.) When given an additional opportunity to provide the requested documentation, Employer again failed to do so. (AF p. 14.) Given this failure to respond to the CO's request in the Notice of Acceptance, the undersigned finds that Employer failed to conduct additional recruitment as required by 20 C.F.R. § 655.46.

Conclusion

For the above reasons, the undersigned concludes that Employer has failed to establish that there are not sufficient qualified U.S. workers available to perform the temporary labor. Upon review of the record and relevant legal authority, the undersigned **AFFIRMS** the Certifying Officer's denial.

SO ORDERED.

For the Board:

SUSAN HOFFMAN
Administrative Law Judge