U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 December 2020

BALCA Case No.: 2021-TLN-00007

ETA Case No.: H-400-20231-774470

In the Matter of:

SAMB3 SERVICES, INC.,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Kevin Lashus, *Esq*
For the Employer

Before: Peter B. Silvain, Jr.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to a request for administrative review filed by Samb3 Services, Inc., (the "Employer") of the Final Determination issued by the Certifying Officer ("CO") in the above-captioned H-2B temporary labor certification matter.[1] 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.[2] 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").[3] 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.[4]

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[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.

[2] *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). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B), pursuant to the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

[3] 8 C.F.R. § 214.2(h)(6)(iii).

[4] 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

On August 18, 2020, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B ("Application"). (AF[5] at 34-51). The Employer requested certification for fifteen laborers[6] from November 5, 2020, to January 15, 2021, based on a seasonal need. (AF at 34).

On August 20, 2020, the CO issued a Notice of Deficiency ("NOD"), which outlined one deficiency in the Employer's Application. (AF at 29-33). According to the NOD, the Employer failed to comply with application filing requirements at 20 C.F.R. § 655.18(a)(1). Specifically, the CO stated that the Employer's job order must "offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on . . . H-2B workers." (AF at 33). The CO explained that, on the Employer's Application, the dates of need are listed as November 5, 2020 to January 15, 2021; however, in the job order, the dates of need are November 5, 2019, through January 15, 2020. (*Id.*). The CO informed the Employer that it must submit an amended job order with dates of need that are consistent with its Application. (*Id.*). On August 26, 2020, the Employer responded the NOD to correct this deficiency. (AF at 23-28).

On August 27, 2020, the CO issued a Notice of Acceptance ("NOA"), notifying the Employer that its Application had been accepted for processing and providing instructions for recruitment of U.S. workers. (AF at 14-21). The NOA outlined several requirement steps for the Employer to perform, as well as recruitment report requirements. (*Id.*). In particular, the NOA required the Employer to submit its recruitment report by October 15, 2020. (AF at 19).

The Employer did not submit a recruitment report. On October 16, 2020, the CO sent a Minor Deficiency email to the Employer stating that its recruitment report had not been received and directing the Employer to submit its report by October 20, 2020. (AF at 13). Thereafter, on October 21, 2020, the CO sent a second Minor Deficiency email notifying the Employer that no report had been received and providing the Employer until October 23, 2020, to submit a response. (AF at 12). The Employer did not respond to either Minor Deficiency emails.

On October 28, 2020, the CO issued a Final Determination denying the Employer's Application. (AF at 7-11). The CO concluded that the Employer failed to submit a recruitment report as required by 20 C.F.R. § 655.48(a). (AF at 10). By letter dated November 5, 2020, the Employer requested administrative review of the CO's Final Determination. (AF at 1-6).

On November 13, 2020, BALCA assigned this case to me. That same day, I issued a Notice of Assignment and Order Setting Briefing Schedule, permitting the Employer and counsel for the CO (the "Solicitor") to file briefs within seven business days of receiving the Appeal File.

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[5] "AF" refers to the Appeal File.

[6] SOC (O*Net/OES) occupation code 53-7062.00 and occupation title "Laborers and Freight, Stock, and Material Movers, Hand." (AF at 34).

On November 16, 2020, I received the Appeal File. The parties did not file briefs and the record is now closed.

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.[7] 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.[8] While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA has adopted the arbitrary and capricious standards in reviewing the CO's determinations.[9] 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.

The Employer bears the burden of proving that it is entitled to temporary labor certification.[10] The CO may only grant the Employer's Application to admit H-2B workers for temporary nonagricultural 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.[11] Thus, before a temporary labor certification may be issued, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity.[12] Consequently, in order to show that it has complied with the regulations and conducted the requisite recruitment efforts, an employer must file a recruitment report in accordance with 20 C.F.R. § 655.48. Particularly, the regulation requires that the recruitment report contain specific information regarding an employer's recruitment activity and "be submitted by a date specified by the CO in the Notice of Acceptance[.]"[13]

In this case, the Employer did not file a recruitment report. Consequently, I agree that the Employer did not comply with the recruitment report requirements set forth at 20 C.F.R. § 655.48. Further, I find that the Employer has not demonstrated that the CO's decision to deny certification under 20 C.F.R. § 655.15(f) was arbitrary, capricious, or otherwise not in accordance with the law.

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[7] 20 C.F.R. § 655.61.
[8] 20 C.F.R. § 655.61(e).
[9] *See The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).
[10] 8 U.S.C. § 1361; *see also Cajun Constructors, Inc*., 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).
[11] 20 C.F.R. § 655.1(a).
[12] *See* 20 C.F.R. § 655.40(a) ("Employers must conduct recruitment of U.S. workers 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."); 20 C.F.R. § 655.40(b) ("Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 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.").
[13] 20 C.F.R. § 655.48(a).

After reviewing the evidence considered by the CO, I find Employer has failed to meet its burden of establishing that it complied with the recruitment requirements set forth in the regulations. Accordingly, the CO properly denied the Employer's H-2B Application for Temporary Employment Certification.

ORDER

In light of the foregoing, is hereby **ORDERED** that the Certifying Officer's decision denying the Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

PETER B. SILVAIN, JR.
Administrative Law Judge