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

This case arises from the request for review of Artistic Snow, LLC (“Employer”) in regard to the Certifying Officer’s (“CO”) October 13, 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); 20 C.F.R. § 655.6(b). 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 August 24, 2021, the Department of Labor’s Employment and Training Administration ("ETA") received an application for temporary labor certification from Employer requesting certification for 20 landscaping and groundskeeping workers for the period of November 15, 2021 to March 15, 2022. AF 39-62. Employer indicated that the nature of its temporary need was “seasonal.” AF 39.

The CO issued a Notice of Deficiency on September 1, 2021, listing one deficiency in the job order assurances and contents. AF 32-37. The CO stated that pursuant to 20 C.F.R. § 655.18(a)(1) an 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. The CO noted that a copy of the Employer’s job order indicated, “Other benefits provided to U.S. and H2B workers are the following: paid holiday on Labor Day.” However, the CO observed that this additional language was not listed on Employer’s Form ETA 9142 (application for labor certification). The CO also observed that the SWA provided a copy of the Job Order, however it was for the company “Arctic Landscaping,” and not the Employer listed on this application which is “Artistic Snow, LLC.” In order to cure the deficiency the CO directed the Employer to amend Section F. d. Item 6 of the ETA Form 9142 to include “other benefits provided to U.S. and H2B workers are the following: paid holiday on Labor Day.” The CO also notified the Employer that it must provide a copy of the job order filed with the SWA for Arctic Snow. AF 37.

Employer, Artistic Snow, LLC, responded to the NOD by letter dated September 1, 2021. AF 30-31. Employer authorized the CO to amend its application for temporary labor certification, ETA Form 9142, Section F.d., Item 6, to indicate “Other benefits provided to U.S. and H2B workers are the following: paid holiday on Labor Day.” AF-30. Employer also attached a job order for Artistic Snow, LLC. This job order did not include a “Job Order #.” AF 31.

The CO issued a Notice of Acceptance (NOA) on September 1, 2021, notifying the Employer that its application for temporary employment certification for 20 laborers under the

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“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.

4 This appears to be a typographical error which should indicate the Employer’s correct name, “Artistic Snow.”
SOC occupational title of “Landskeeping and Groundskeeping Workers” 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 regarding the job order:

Job Order – Pursuant to 20 C.F.R. §655.15(a), the employer was required to file a copy of the job order being submitted concurrently to the SWA serving the area of intended employment. With issuance of this NOA, the SWA will place the job order into intrastate clearance and, if appropriate, interstate clearance. (Emphasis added).

The SWA will place the job order into clearance on the employer’s behalf; the employer need not take any action in this regard. The employer must consider all referrals and U.S. applicants resulting from the opening of the job order. (Emphasis in the original).

AF 25.

The NOA directed the Employer to “sign, date and submit a written recruitment report [to the Chicago NPC] by October 15, 2021.” AF 27. Employer was notified that all recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of the NOA (September 1, 2021). The CO also informed the Employer of its duty to update the recruitment report throughout the entire recruitment period which would continue until 21 days before the start date of need. AF 27-28.

The record includes email correspondence between the Chicago NPC and the Maryland SWA (state workforce agency). AF 21-22. On September 22, 2021, George Kaminski of the Chicago NPC sent an email to Anastasia Weiner of the Maryland SWA stating that Employer had submitted a recruitment report in this case. However, Mr. Kaminski noted that there are two notes from the SWA in the SWA folder in the FLAG (Foreign Labor Application Gateway electronic filing system) stating that the Employer had not opened a job order for this case as of August 31, 2021. Accordingly, Kaminski asked whether a job order was eventually opened for this case, and if so, he requested that the SWA send proof of the job order. Id.

By email dated September 22, 2021, Anastasia Weiner of the Maryland SWA responded that Artistic Snow, LLC still had not submitted a job order in the Maryland Workforce Exchange (“MWE”) system for the SWA, noting that the Employer had only submitted a draft in the FLAG system. AF 21. She noted that there was a job order #588675, which was created on January 1, 2017 and closed on March 12, 2017, which has expired and is offline. Mr. Weiner further stated that “employer needs to place an updated job order in the MWE system so the employer can advertise.” Id.

Kaminski of the Chicago NPC sent a second email to Ms. Weiner of the Maryland SWA asking whether “[b]y any chance,” there was “anything under Artistic Landscaping, Inc. with the same case number,” as the recruitment report was signed by the Office Manager of Artistic
Landscaping Inc.  *Id.  Ms. Weiner responded that she checked the MWE system and she did “find the last job order for Artistic Landscape, Inc.  #933840 which was created on 1/10/19 and closed on 3/12/2019,” but she did not think it was the same case number.  She attached a copy of this job order.  *Id.*

On September 23, 2021, the Chicago NPC notified the Employer that it had received the Employer’s recruitment report for Artistic Snow, LLC (H-400-21237-543130), dated September 22, 2021.  AF-20.  However, NPC stated that the report had two deficiencies that prevented further processing.  First of all, the Chicago NPC noted the recruitment report was signed by Marta Cruz, the office manager for Artistic Landscaping, Inc., while the application for temporary labor certification was filed for Artistic Snow, LLC, and therefore NPC noted the report must be signed by an official of Artistic Snow, LLC.  Secondly, the NPC observed that the recruitment report did not indicate any recruitment activity with the Maryland SWA, such as the job order or any referrals.  It was also noted that the NPC had checked with the SWA and found that the job order had not been ordered by Artistic Snow, LLC for this job opportunity and there was only a copy of the Employer’s proposed job order in the FLAG system.  The NPC directed the Employer to submit an updated recruitment report with the required information or submit permission to withdraw the application for temporary labor certification, and then Employer could refile a new application.  *Id.*

On September 30, 2021, Employer emailed the Chicago NPC stating that it had sent an email to the Maryland SWA on September 10, 2021 with the job order.  AF 13-19.  Employer asserted that it follows this procedure each year and the SWA posts the job order for the Employer and then sends notification to the Employer via email when there is an applicant.  Employer also asserted that since it did not receive an email from the SWA, it assumed there were no applicants.  Employer acknowledged that the procedure has apparently changed and Employer is now required to enter its job order through the Maryland SWA portal.  Employer attached a copy of the job order for Artistic Landscaping, Inc. and indicated that it would follow up on applicants, if any, and document its efforts until the start date which is November 15, 2021, and update its recruitment report as necessary.  Employer also submitted a copy of an updated recruitment report dated September 30, 2021 and a copy of the Maryland job order #14443242 for Artistic Landscaping, Inc. which was printed on September 28, 2021.  AF 16-19.

On October 13, 2021, the CO issued a Final Determination denying Employer’s application for temporary labor certification.  AF 8-12.  The CO noted that the regulation at 20 C.F.R. §655.15(a) provides that an employer is required to file a copy of the job order being submitted with the application, concurrently to the SWA serving the area of intended employment.  When the NOA is issued, the SWA will then place the filed job order into intrastate clearance.  The CO observed that the Employer’s recruitment report submitted on September 30, 2021 makes no mention of whether Employer had submitted a job order to the Maryland SWA as part of its recruitment of workers for this job opportunity.  No job order number or other proof of the actual job order was provided.  Further, an inquiry to the Maryland Workforce Exchange resulted in confirmation from the SWA on September 22, 2021 that there was no filed job order for this case.  Although there was a proposed job order in the FLAG system, it was never filed with the SWA.  The CO also noted that the Employer and its agent were provided an opportunity to explain this deficiency on September 23, 2021.  The CO
acknowledged the response submitted by the Employer on September 30, 2021 which included the September 30, 2021 recruitment report and a copy of a job order issued to Artistic Landscaping, Inc., a different corporate entity than Artistic Snow, LLC, the named employer on the application for temporary labor certification (ETA Form 9142) in this case. The CO also noted that although the two corporate entities are located at the same address, they have different FEIN numbers. The CO determined for these reasons, that the case must be denied on the basis that there was no filed job order for this application.


By Order issued on November 15, 2021, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before November 24, 2021. Neither the Certifying Officer nor the Employer filed a brief in this matter.

**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 due to Employer’s failure to file a job order with its state workforce agency as required by the applicable program regulations?

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 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 regulatory requirement at 20 C.F.R. §655.15(a) which provides as follows:

A registered employer seeking H-2B workers must file a completed Application for Temporary Employment Certification (ETA Form 9142B and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, … and copies of all contracts and agreements with any agent and/or recruiter … (Emphasis added.)

20 C.F.R. §655.15(a).

In regard to the requirement that a job order must be filed by an employer, the regulations further provide:

The employer must submit the job order to the SWA serving the area of intended employment at the same time it submits the Application for Temporary Employment Certification and a copy of the job order to the NPC in accordance with §655.15.

20 C.F.R. §655.16.

The posting of the filed job order by the SWA is a fundamental step in the recruitment process as it is one of the primary ways that the job opportunity is advertised to potential U.S. workers. The record in this case reflects that the Employer failed to submit a copy of the job
order to the NPC and also failed to follow the necessary procedures in submitting the job order to the SWA in the state of Maryland which serves the area of intended employment in this case.

The NPC noted that a job order was not filed in this case for the listed employer, Artistic Snow, LLC. The NPC then took the additional step of contacting the Maryland SWA to determine whether a job order had been filed with the SWA at the time the application was filed as required by the regulations. The SWA confirmed by email communication with the NPC that there was no current job order filed by this Employer, Artistic Snow, LLC or by the related entity Artistic Landscaping, LLC under this case number. AF 21-22.

On September 23, 2021, the Chicago NPC notified the Employer that it had received the Employer’s recruitment report for Artistic Snow, LLC (H-400-21237-543130), dated September 22, 2021. AF-20. The NPC observed that the recruitment report did not indicate any recruitment activity with the Maryland SWA, such as the job order or any referrals. It was also noted that the NPC had checked with the SWA and found that the job order had not been ordered by Artistic Snow, LLC for this job opportunity and there was only a copy of the Employer’s proposed job order in the FLAG system. The NPC directed the Employer to submit an updated recruitment report with the required information or submit permission to withdraw the application for temporary labor certification, so that Employer could refile a new application. Id.

On September 30, 2021, Employer emailed the Chicago NPC stating that it had sent an email to the Maryland SWA on September 10, 2021 with the job order. AF 13-19. Employer asserted that it follows this procedure each year and the SWA posts the job order for the Employer and then sends notification to the Employer via email when there is an applicant. Employer also asserted that since it did not receive an email from the SWA, it assumed there were no applicants. Employer acknowledged that the procedure has apparently changed and Employer is now required to enter its job order through the Maryland SWA portal. Employer attached a copy of a job order for “Artistic Landscaping, Inc.” and indicated that it would follow up on applicants, if any, and document its efforts until the start date which is November 15, 2021, and update its recruitment report as necessary. Employer also submitted a copy of an updated recruitment report dated September 30, 2021 and a copy of the Maryland job order #1443242 for Artistic Landscaping, Inc. which was printed on September 28, 2021. AF 16-19.

After reviewing Employer’s response the CO issued a Final Determination denial in this case due to Employer’s failure to file a job order for this case with the Maryland SWA. The CO acknowledged the response submitted by the Employer on September 30, 2021 which included the September 30, 2021 recruitment report and a copy of a job order issued to Artistic Landscaping, Inc., a different corporate entity than Artistic Snow, LLC, the named employer on the application for temporary labor certification (ETA Form 9142) in this case. The CO also noted that although the two corporate entities are located at the same address, they have different FEIN numbers. The CO determined for these reasons that the case must be denied on the basis that there was no filed job order for this application.

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. After reviewing the record in this matter I find that the CO correctly determined that Employer’s response failed to cure the deficiency.
Employer’s response admits that a job order was never filed with the SWA for this Employer and this job opportunity. Although Employer alleged that it sent an email to the Maryland SWA on September 10, 2021 with the job order, there is no proof of this in the record as Employer never provided a copy of this email to the CO. Further, Employer acknowledged that the procedure has apparently changed and Employer is now required to enter its job order through the Maryland SWA portal. It is clear from Employer’s response that it did not file the procedures currently in place which resulted in the fact that no valid job order was placed and no recruitment on the basis of a job order was conducted by the SWA. The errors committed by the Employer are further compounded by the fact that a copy of a job order was submitted by the Employer with the recruitment report for a different, but related entity, Artistic Landscaping, Inc. which is an Employer that the CO noted has a different FEIN than the Employer that filed the current application, Artistic Snow, LLC.

The regulatory requirements to obtain labor certification under the H-2B program are admittedly lengthy and sometimes confusing. However, ignorance of the regulatory requirements or necessary procedures that must be followed in order to obtain temporary labor certification is not an excuse for noncompliance, nor is carelessness in submitting the necessary documents. In this case Employer failed to follow one of the most fundamental steps in the process, which is, filing the job order with the SWA and providing a copy of the correctly filed job order with the NPC.

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. Duane L. Elliot, 2018-TLN-00088 (Apr. 2, 2018) (BALCA adopts a strict application of the recruitment requirements set forth in the regulations). BALCA has affirmed denial where a copy of the job order was not submitted to the NPC. See Garcia Enterprises, Inc. 2015-TLN-00053 (Aug. 13, 2015); Kudar Enterprises, Inc. 2018-TLN-00130 (May 31, 2018). Deficiencies in job order contents and posting requirements are grounds for denial. See Ridgebury Management LLC, 2014-TLN-00020 (Apr. 7, 2014) (affirming denial and finding that SWA job order must list anticipated end date of employment); see also A & W Builders of Jacksonville, Inc., 2012-TLN-00044 (Aug. 17, 2021) (affirming denial where the employer’s job order did not include the content required by § 655.17).

In this case, the Employer failed to comply with one of the most fundamental steps in the recruitment process by failing to file a job order with the SWA for this job opportunity. 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 job order to the SWA for this job opportunity as required by the program regulations.

CONCLUSION

The undersigned finds the CO’s denial of Employer’s application for temporary labor certification, due to Employer’s failure to submit a job order to the SWA pursuant to 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