In the Matter of

BLUE WHITE ROBOTICS,

Employer.

Before: Jodeen M. Hobbs
Administrative Law Judge

Appearances: Alon Ascher
General Manager
Blue White Robotics
Syracuse, NY
For Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION


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 a Form ETA-9142B, Application for Temporary Employment Certification (Application). A Certifying Officer (CO) in the Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration (ETA) 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).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.
PROCEDURAL BACKGROUND

On October 5, 2021, Blue White Robotics (Employer) filed an Application requesting certification to hire 30 mechanic field operators. On October 15, 2021, the CO issued a Notice of Deficiency (NOD) to Employer. Employer timely responded to the NOD on October 25, 2021. On November 3, 2021, the CO notified Employer that the response also was deficient and that the certification was denied. On November 7, 2021, Employer requested review of this decision by BALCA. BALCA timely received Employer’s request on November 15, 2021. The matter was docketed by BALCA on November 16, 2021 and the Appeal File docketed on November 29, 2021. No brief was filed on behalf of the CO.

FACTUAL BACKGROUND

Employer provides autonomous farm equipment that, among other things, allows for robotic crop spraying. (Appeal File (AF) at 278-281). Employer filed its Application to hire 30 foreign workers to work as field mechanic operators and requested a waiver of the time periods for filing an Application. Employer argued that it had been unable to fill the positions despite its best efforts and urgently needed foreign workers so that it could timely complete the data collection and research necessary for a new client. (AF at 286-290).

The CO notified Employer of seven deficiencies in its application and provided Employer with an opportunity to modify its Application. (AF at 257-268). Employer submitted additional information and offered some clarifications. (AF 152-256). Employer, however, failed to submit basic clarifying information regarding inconsistencies on its Application. (AF 152-256).

Following review of the additional submissions, the CO issued a Final Determination denying the application for the following deficiencies:

1. Failure to set forth an emergency situation under 20 C.F.R. § 655.17. The CO advised Employer that it did not provide the information required to amend Section B, Item 5, on the ETA Form 9142.

2. Failure to establish job opportunity as temporary in nature as required by 20 C.F.R. § 655.6(a) and (b). The CO advised Employer that it did not sufficiently demonstrate that the workers were requested to fill a one-time need.

3. Failure to establish temporary need for the number of workers requested as required by 20 C.F.R. § 655.11(e)(3) and (4). The CO advised Employer that it had not provided sufficient documentation of its position that 30 Mechanic Field Operators were needed during the requested time period.

4. Failure to submit an acceptable job order as required by 20 C.F.R. §§ 655.16 and 655.18. The CO identified numerous deficiencies in Employer’s Application including but not limited to identification of the worksite county, the hours of work per week and the hourly work schedule.
5. Failure to state that Employer will pay at least the prevailing wage as required by 20 C.F.R. § 655.10(a). The CO noted that Employer failed to state that it would pay the required overtime wage.

6. Failure to submit a complete and accurate ETA Form 9142 as required by 20 C.F.R. § 655.15(a). The CO noted that Employer did not clarify the number of hours of work per week or correct the inconsistencies between ETA Form 9142 and the job order.

7. Failure to submit a complete and accurate ETA Form 9142 as required by 20 C.F.R. § 655.15(a). The CO noted multiple sections of the Form that were not properly completed.

(AF 133-150). Many of the deficiencies noted related to either missing information or information that was inconsistent across Employer’s application. Deficiency No. 4, for example, relates to information that is required by regulation to be in a job order. Employer’s job order is included in the Appeal File at 308-315. As noted by the CO, the job order does not provide information about the specific worksite and it lacks details regarding the hours of work per week and the hourly work schedule. Further, the information supplied on the job order is inconsistent with the information supplied on ETA Form 9142 as noted in Deficiency 6. *Compare AF 308-315 (job order) with AF 331-337 (ETA Form 9142).*

In its appeal letter, Employer concedes the errors identified in Deficiencies 4, 6 and 7 by referring to future actions it will take. (AF 18-23). With respect to Deficiency 4 (failure to submit an acceptable job order), for example, Employer states “The ETA Form 9142 will be consistent with the application as requested and indicated.” (AF 22) (emphasis supplied). Further with respect to Deficiencies 6 and 7, Employer states that “An updated complete and accurate ETA Form 9142 will be completed along with a permission to make any corrections to the application on our behalf. . . .” (AF 22) (emphasis supplied).

**LEGAL FRAMEWORK**

The Board’s standard of review in H-2B certification cases is limited.¹ The Board may only consider the appeal file prepared by the certifying officer, any legal briefs submitted, and the employer’s request for review. 20 C.F.R. § 655.61(e). The employer’s request for review may only contain legal arguments and such evidence that the employer submitted to the certifying officer before the date of the certifying officer’s final determination. 20 C.F.R. § 655.61(a)(5).

The employer bears the burden of establishing its eligibility for a temporary alien labor certification. 8 U.S.C. § 1361. Relevant to this appeal, the regulations require that very specific information be included on a job order. 20 C.F.R. §§ 655.16, 655.18. Likewise, the regulations

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¹ The chief administrative law judge may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61. Chief Judge Henley designated a single member of the Board to hear this appeal.
are very specific regarding the information that must be submitted on an Application for Temporary Employment Certification (ETA Form 9142). 20 C.F.R. § 655.15(a).

After considering the evidence of record, the Board must: (1) affirm the certifying officer’s determination; (2) reverse or modify the certifying officer’s determination; or (3) remand the case to the certifying officer for further action. 20 C.F.R. § 655.61(e). An employer’s failure to comply with a notice of deficiency, including a failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification. 20 C.F.R. § 655.32(a).

The regulations do not address whether the certifying officer’s determination should be reviewed under an arbitrary and capricious or de novo standard. In this instance, the standard of review applied would not change the outcome of this appeal, as I would affirm the certifying officer’s determination under either standard.

ANALYSIS

The CO identified seven deficiencies in Employer’s Application and notified Employer of the documentation necessary to correct the deficiencies. Employer did not supply all of the requested documentation, after which the CO issued a final determination denying the Application. In its appeal letter, Employer attempts to correct or offers to correct some of the remaining, basic deficiencies in the Application. Employer’s position, however, reflects a lack of understanding regarding the very specific submissions needed to support an application for temporary employment certification. It also does not recognize the fact that on appeal I am not permitted to consider information that was not previously provided to the CO.

As discussed above, and as conceded by Employer, there is basic information missing from Employer’s job order and the information supplied on the job order is inconsistent with the information supplied on ETA Form 9142. After reviewing all of the documentation in the Appeal File and Employer’s appeal letter, I find that Employer has failed to supply the documentation necessary under 20 C.F.R. §§ 655.15(a), 655.16 and 655.18 to support its Application. I therefore find that the CO’s denial was proper under 20 C.F.R. § 655.32(a). As Employer’s Application is deficient and may be denied under these regulatory sections, I do not address the remaining deficiencies noted by the CO.

[continued]
ORDER

For the reasons discussed herein, I AFFIRM the Certifying Officer’s denial of certification.

SO ORDERED.

JOdeen M. Hobbs
Administrative Law Judge