In the Matter of:

TINA SCHNIEBS,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to the request of Tina Schneibs (“Employer”) for review of the decision by the Certifying Officer (“CO”) to deny Employer’s application for temporary alien labor certification under the H-2B non-immigrant program.1 The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural 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).2

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor (“Department”) using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification of the Department’s 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. 20 C.F.R. § 655.61(a).

BACKGROUND

1 On April 29, 2015, the Department of Labor 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 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.

On July 5, 2021, ETA received an application for temporary labor certification from Employer. (AF at 38-53.) Employer requested certification for one live-in nanny based on an alleged one-time occurrence need covering a period from October 1, 2021 through September 30, 2024. (AF at 38.) Employer indicated that the position did not require any particular education, training, or experience. (AF at 41.)

On July 8, 2021, the CO issued a Notice of Acceptance, explaining that Employer’s application had been accepted for processing. (AF at 31-37.) In this notice, the CO provided detailed instruction for Employer moving forward. Relevant to this appeal, the CO carefully explained the requirements for recruiting and considering eligible U.S. workers, and for accepting referrals of U.S. applicants from the state workforce agency (“SWA”). (AF at 32-34.) The CO also directed Employer to submit a recruitment report, detailing its compliance with the CO’s instructions no later than August 31, 2021. (AF at 34-35.)

Employer submitted its recruitment report on August 31, 2021. (AF at 22-30.) Employer indicated that it had considered 35 individuals for the live-in nanny position, but that none were available. Employer stated that the SWA had provided a list of 34 potential candidates on July 26, 2021. (AF at 23-29.) Employer contacted 32 of these candidates via certified mail sent on August 23, 2021. In this communication, Employer requested that each candidate complete and submit an application within seven days of receipt. Employer stated that none of the 32 candidates responded within the seven-day period and were, thus, deemed unavailable for the position. Employer also noted that the SWA referred another potential candidate named Leila on an unspecified date; that Employer had similarly contacted Leila by certified mail sent on August 24, 2021; and that she had not responded. (AF at 23.) Finally, Employer noted that the SWA did not provide contact information for two potential candidates. (AF at 29.) Employer contacted these two candidates through the SWA’s “connection system” on an unspecified date and requested that each provide Employer with their mailing address. Neither candidate responded to Employer’s communication.

On September 15, 2021, the CO denied Employer’s application for labor certification. (AF at 12-19.) The CO concluded that Employer had failed to establish that

1. There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification at the place where the foreign worker is to perform the work; and
2. The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(AF at 13.)

The CO stated that Employer’s recruitment report and information obtained from the SWA demonstrated that Employer failed to make the live-in nanny job opportunity available to U.S. workers and failed to properly consider eligible U.S. workers. (AF at 16-17.) The Notice of Acceptance established a recruiting period beginning on July 11, 2021 and ending on August 31,
2021 (the deadline for the submission of the recruitment report). See also 20 C.F.R. § 655.20(t). The CO explained that the SWA had clarified that it provided Employer with a list of potential candidates on July 15, 2021 (not July 26, 2021) and that the list included a phone number and email address for each candidate. (AF at 17.) The SWA also informed the CO that it provided Employer with Leila’s application and contact information on August 13, 2021. Finally, the CO had also learned that the SWA had provided Employer with another potential candidate, named Hoa, on August 31, 2021.

The CO noted that Employer did not provide any explanation for not contacting the potential candidates sooner; for using certified mail as opposed to a more expeditious means of communication; and for requiring potential applicants to reply with seven days. (AF at 18.) Based on this information, the CO concluded that Employer had “failed to reasonably and appropriately contact” the potential candidates. (AF at 18.)

On September 29, 2021, Employer submitted a formal request for administrative review. (AF at 1-11.) On October 20, 2021, the undersigned received the Appeal File from the CO. On October 21, 2021, the undersigned issued a Notice of Assignment and Expedited Briefing Schedule, permitting counsel for the CO (the “Solicitor”) to file a brief within seven business days of receiving the Appeal File. See 20 C.F.R. § 655.61(c). That same day, the Solicitor informed the undersigned that she did not intend to submit a brief and would instead rely upon the evidence included in the Appeal File. This decision is issued within 10 business days of receipt of the Appeal File, as required by 20 C.F.R. § 655.61(f).

**STANDARD OF REVIEW**

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board “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. § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case to the CO for further action. Id.

While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO’s determinations. The Yard Experts, Inc., 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); Brooks Ledge, Inc., 2016-TLN-00033 (May 10, 2016); see also J&V Farms, LLC, 2016-TLC-00022 (Mar. 4, 2016). Under the “arbitrary and capricious” standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. See Judulang v. Holder, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Id.
A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” Id. Inquiry into factual issues “is to be searching and careful,” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), but the Board may not supply a reasoned basis that the CO has not itself provided. See State Farm, 463 U.S. at 43 (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1946)); see also FCC v. Fox Television Stations, Inc. 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

**ANALYSIS**

Among other things, the regulations governing the certification of H-2B non-immigrant visas require an employer seeking to hire foreign workers demonstrate that there is not a sufficient number of qualified U.S. workers available to fill the open position. 20 C.F.R. § 655.50(b); see also 20 C.F.R. § 655.51 (permitting the CO to deny an application for failing to comply with the regulations). The lone issue in this case is whether Employer met this requirement.

Based on the information included in Employer’s August 31, 2021 recruitment report and the information provided by the SWA, the CO determined that Employer did not met the requirements of § 655.50(b) because it “failed to reasonably and appropriately” engage with potential candidates. (AF at 18.) Employers seeking labor certification must test the labor market to determine if eligible U.S. workers are available. See 20 C.F.R. § 655.50(b). As the CO explained in the Notice of Acceptance, an employer can satisfy this requirement by engaging in recruiting efforts; accepting referrals from the SWA; interviewing eligible candidates; and hiring qualified U.S. workers. See 20 C.F.R. § 655.40. Although not expressly stated in the regulations, the Board has consistently held that, to satisfy the regulatory requirements, an employer must act in good faith. See, e.g., Three Seasons Landscape Contracting Services, Inc., 2017-TLN-00039 (Apr. 28, 2017); Jensen Tuna, Inc., 2016-TLN-00064 (Aug. 26, 2016); Michelle Perez, 2011-TLN-00017 (Apr. 29, 2011).4

In determining that Employer had “failed to reasonably and appropriately contact,” the CO reasonably concluded Employer had not engaged in a good faith effort to evaluate and hire the eligible applicants referred by the SWA. The SWA provided Employer with a list of 34 potential candidates on July 15, 2021. (AF at 17.) However, without explanation, Employer waited until August 23, 2021 –just eight days before the end of the recruitment period— to contact these candidates. (AF at 23-29.) The SWA also referred Leila’s application to Employer on August 13, 2021. (AF at 17.) Here again, Employer waited until August 24, 2021 to contact her. (AF at 23.)

Although just days remained the recruitment period and Employer had the opportunity to contact all of these candidates via phone or email, Employer elected to use certified mail—a much less expeditious method of communication. (AF at 17, 23-29.) In this communication, Employer instructed interested candidates to respond within seven days. (AF at 23-29.) Because Employer received no responses, Employer assumed that no candidates were interested. (AF at 23-30.)

4 The Board has similarly held that employers seeking H-2A non-immigrant visas must endeavor to satisfy the regulatory requirements in good faith. See, e.g., Keller Farms, Inc., 2009-TLC-00008 (Nov. 21, 2008); Mountain Plains Agricultural Services, 1995-TLC-00003 (Feb. 8, 1995).
Crucially, although presumably available to Employer, it did not provide any documentation to show any of the applicants actually received the certified mail or, if they had, when they received it. Had Employer provided as much, the CO may have been able to reach several factual conclusions. The CO would have been able to determine that potential candidates had received Employer’s communication and acquiesced to not respond within the seven-day period. Alternatively, the CO could have been able to determine if an interested candidate received Employer’s communication at some point after August 24, 2021. If this were the case, the CO may have extended the recruitment period to allow these candidates to respond with Employer’s seven-day window. See 20 C.F.R. § 655.46 (allowing the CO to require additional recruitment).

Moreover, both Leila and Hoa appear to have applied for the live-in nanny position through the SWA on August 13, 2021 and August 31, 2021, respectively. (AF at 17.) Because they applied for the position, logic dictates that both applicants were interested in the position. It is not clear why Employer sent a certified letter to Leila to determine if she was still interested in the position or why Employer waited until August 24, 2021 (seven days before the end of the recruitment period) to do so. And, Employer did not include any reference to Hoa’s application in its recruitment report.

Employer could have contacted the potential candidates as early as July 15, 2021, but chose to wait until August 23, 2021. Employer could have telephoned or emailed the candidates to gauge their interest. Instead, Employer chose to use certified mail. Employer also did not provide documentation establishing that any of the candidates actually received its certified letter. Because of this, it was not possible for the CO to if any potential candidates actually received the letter and if they did not respond to Employer within seven days of receipt. At every turn, Employer chose the option that was least likely to result in hiring a qualified U.S. worker.

Based on these facts, the CO reasonably concluded that Employer had not attempted, in good faith, to contact the candidates referred by the SWA. Because Employer had not made a good faith attempt to contact potential candidates, the CO determined that Employer had not attempted to ascertain the availability of U.S. workers. Thus, Employer could not have established that there was an insufficient number of qualified U.S. workers available to fill its live-in nanny position. See 20 C.F.R. § 655.50(b).

After reviewing the evidence in the Appeal File and the CO’s denial, the undersigned finds that the CO’s decision was not arbitrary and capricious. The CO reviewed the evidence submitted by Employer, the information provided by the SWA, considered all relevant factors, and her denial letter displayed a rational connection between the facts found and the choices made. See Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Therefore, it must be concluded that the CO’s determination denying Employer’s request for temporary labor certification was not arbitrary and capricious and must be affirmed.

CONCLUSION

For the foregoing reasons, the evidence reviewed by the CO fails to establish that there is an insufficient number of U.S. workers who are qualified and who will be available to serve as a live-in nanny. The CO’s denial of Employer’s application was not arbitrary and capricious.
ORDER

The Certifying Officer’s denial of Employer’s Application for Temporary Employment Certification is AFFIRMED.

For the Board:

LYSTRA A. HARRIS
Administrative Law Judge