BALCA CASE NO.: 2022-TLN-00002

ETA CASE NO.: H-400-21001-990216

In the Matter of:

RUSS AMUSEMENTS, INC.,
Employer.

DECISION AND ORDER

The decision of the Certifying Officer (“CO”) to deny the application for extension of certification period by Russ Amusements, Inc. (the “Employer”) under the H-2B non-immigrant program was not arbitrary or capricious. I affirm the denial.

1. Procedural History

On September 22, 2021, the Board of Alien Labor Certification Appeals (“BALCA”) received a letter from the Employer requesting administrative review of the CO’s final determination. BALCA docketed the appeal and transferred the case to the San Francisco District Office, where it was assigned to me on October 4, 2021.

By regulation, the Employer was not allowed a brief in addition to its request for review. See 20 C.F.R. § 655.61(a, c). The Solicitor had seven business days from receiving the Appeal File to file a brief on behalf of the Certifying Officer. Id. No brief was filed. I am charged with issuing a decision “within 7 business days of the submission of the Certifying Officer’s brief or 10 business days after receipt of the Appeal File, whichever is later.” 20 C.F.R. § 655.61(f). As the Appeal File was filed with OALJ on October 5, this decision is timely.

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2. **Background**

Employers who want to hire foreign workers under the H-2B program must get a labor certification from the Department of Labor. A CO in the Office of Foreign Labor Certification (“OFLC”) reviews each Application for Temporary Employment Certification (“Form 9142”). Following a 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 judges review the CO’s determination in an H-2B applications under the deferential “arbitrary and capricious” standard. *Jose Uribe Concrete Const.* 2019-TLN-00025 (Feb. 21, 2019); *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape,* 2016-TLN-00045, *19 (Jun. 15, 2016); *Brook Ledge, Inc.,* 2016-TLN-00033, *4-5 (May 10, 2016); see also *J and V Farms, LLC,* 2016-TLC-00022 (Mar. 4, 2016). Under the “arbitrary and capricious” standard, the reviewing judge or panel looks to see if the initial decision maker 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.” *Three Seasons,* 2016-TLN-00045, *19 (quoting 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)). “If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious.” *Id.* 2


After considering the evidence of record, I 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. 20 C.F.R. § 655.61(e).

3. **Analysis**

My findings here are based on a review of the Employer’s filing and the Appeal File. Critically, by regulation, in my review I may only consider the Appeal File prepared by the CO;

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2 At least one judge has recently concluded that de novo, rather than arbitrary and capricious, is the correct standard to apply in an administrative review of an H-2B determination. *Best Solutions USA, LLC, 2018-TLN-117, *3 n.2 (ALJ May 22, 2018). However, the weight of the case law, as well as a close reading of the H-2B regulations and the H-2A regulations next door in 20 C.F.R., favor arbitrary and capricious review. In the H-2A program, in which the rules predate the current H-2B rules, an employer may elect either an administrative review or a de novo hearing following a denial of certification by a CO. 20 C.F.R. § 655.171. In adopting the current H-2B rules, DHS and DOL stated that the new 20 C.F.R. § 655.61 “does not provide for de novo review.” 80 Fed. Reg. 24042, 24081. Whether that was meant to either set a standard of review or simply to state the obvious, that the new rule did not allow for hearings as the H-2A rules do, is not clear. Therefore, I read the plain language and the case law to mean both: there are no de novo hearings, nor do CO determinations get reviewed de novo under administrative review.
any legal briefs submitted by the parties; and the Employer’s request for administrative review, which may only contain legal arguments and evidence that were actually submitted to the CO before the date the CO issued a Final Determination.3

Here, the Employer through counsel filed a single-page letter as its request for review, and as noted the CO did not file a brief. In the application for extension filed on September 15, 2021, however, Employer’s immigration consultant explained as follows:

Russ Amusements, Inc was certified for 8 Amusement and Recreation Attendants for the period April 1, 2021 through September 25, 2021. Due to the covid-19 pandemic several of their events were cancelled in the spring and early summer. In an attempt to make up for the financial damage to the company and the local community service sponsors, Mr. Harrison has either signed contracts or is able to sign contracts for the period September 26, 2021 through November 10, 2021, to allow the employer to complete the events captioned below, close out their season, and provide the workers transportation home. He requested that I send in the request for extensions on August 20, 2021 but I have had six employees in my office with covid (three had been vaccinated prior to testing positive so it makes absolutely no sense to me) in the last month, four are currently in quarantine at home. It has been chaos as we try to work with the various agencies, working with clients on the USDOL and USCIS supplemental visa audits, consulate appointments, travel, dealing with delays in the Northern Triangle.

The delay in requesting the extension was my fault entirely. Not enough hours in the day or days in the week. Please do not penalize the employer striving to recoup losses, the workers working legally to support their families and communities, or the local community service sponsors utilizing the services of the employer/workers to raise funds for their organizations, due to my error.

AF at P6.

Employers may request an extension of the period of employment for a labor certification previously certified. See 20 C.F.R. § 655.60. The extension request “must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the Employer.” Id.

For extension purposes, foreseeability is judged from the applying employer’s perspective, at the time the employer’s initial application was filed. AC Construction, 2017-TLN-00072 (Oct. 17, 2017) (citing 80 Fed. Reg. 24042, 24081 (Apr. 29, 2015) (“There may be instances when an

3 Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. The Employer’s request for review must set forth “the grounds for the request” and is by regulation the Employer’s sole opportunity to make “legal argument.” 20 C.F.R. § 655.61(a)(3), (5). Pursuant to 20 C.F.R. § 655.61(f), the assigned BALCA judge should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO’s brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.
employer will have a reasonable need for an extension of the time period that was not foreseen at the time the employer originally filed the Application . . . .”). A classic example of unforeseeability is higher-than-normal rainfall, even where the recent regional trend had been for higher-than-normal rainfall for the two prior years in a row. See Corporate Green LLC, 2019-TLN-00003 (Nov. 07, 2018). But damage caused by hurricanes is not sufficiently unforeseeable, where the hurricanes had taken place prior to the application date. See Super Bob’s Lawn and Landscaping, LLC, 2021-TLN-00060 (Aug. 27, 2021). In Super Bob’s, Judge Applewhite observed that the employer did actually foresee an increase in work.

[T]he Employer’s assertion that it could not predict the number of projects resulting from the damage caused by Hurricanes Laura and Delta conflicts with its Initial Application. Specifically, in its January 2021 Initial Application, the Employer requested two additional workers for “the damage caused by Hurricanes Laura and Delta and additional landscaping work to be done in the area.” (Id. at 323). Thus, the Employer was aware of the resulting damage, and requested additional workers to perform the additional, an increase from past years, work to be done.

2021-TLN-00060 at 4. She found that it was not arbitrary or capricious for the CO to deny an extension where the employer wanted to add new business, i.e., additional hurricane damage cleanup projects beyond the end of the certification period. See generally id. But see M&M Lawn and Irrigation, LLC, 2021-TLN-00061 (Aug. 26, 2021) (Berlin, ALJ) (finding damage cleanup from Hurricane Laura and Delta sufficiently unforeseen by employer).

Here, unfortunately, by the date of the Employer’s initial application on December 17, 2020, the COVID-19 pandemic was well established. At least some of the additional events in the fall that Employer proposed to add at the time of its extension application, such as the Capital Plaza Extravaganza and the Manassas Mall Extravaganza, see AF at P11-P14, appear to be new business scheduled to occur outside the initial period of certification. The key here is foreseeability, and the standard is whether it was arbitrary or capricious for the CO to deny the extension, not whether I might have made a different decision. Like the hurricanes in Super Bob’s, cancellations of public events due to the pandemic was foreseeable by December 2020, the time of the initial application, and I cannot say it was arbitrary to deny the extension so the Employer could obtain new business without re-testing the market for qualified available U.S. workers. See 20 C.F.R. § 655.50(b), .51(b); see also generally 20 C.F.R. § 655.15-.48.

I affirm the CO’s denial. SO ORDERED.

For the Board:

EVAN H. NORDBY
Administrative Law Judge