

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, DC**

Issue Date: 20 March 2023

BALCA CASE NO.: 2023-TLC-00021; 2023-TLC-00022; 2023-TLC-00023;
2023-TLC-00024; 2023-TLC-00025; 2023-TLC-00026

ETA Case No.: H-300-23007-688002; H-300-23007-687978;
H-300-23007-688017; H-300-23007-688035;
H-300-23007-688044; H-300-23007-688056

In the Matter of:

BUY SOD USA, LLC,
Employer.

**ORDER ADDRESSING RESPONSE TO SHOW CAUSE AND REMANDING
CASE**

Buy Sod USA, LLC (“Employer”) submitted applications for temporary labor certification pursuant to the H-2A temporary agricultural worker program. The Certifying Officer denied Employer’s applications. Employer submitted a request for *de novo* review of the denial of the applications on March 1, 2023.

The Chief Administrative Law Judge assigned all six of the above matters to the undersigned for hearings and decisions on March 3, 2023. The undersigned subsequently entered an Order consolidating the six cases for hearing. (Notice of Assignment & Order Consolidating Cases, Mar. 3, 2023.) The undersigned noted in the prior Order that “[t]he undersigned has not yet received the administrative file in this matter.” (Notice of Assignment & Order Consolidating Cases at 2.) Because the undersigned never received the administrative file, the undersigned entered an Order to Show Cause on March 16, 2023, over two weeks after Employer filed the appeal, and well after the undersigned had notified the Certifying Officer and counsel for the Certifying Officer that BALCA did not have the administrative file.

(Order Show Cause Why Certifying Officer’s Decision Should Not Be Reversed (“Order Show Cause”), March 16, 2023.)

The Order interpreted 20 C.F.R § 655.181(b) to require the Certifying Officer to:

provide a copy of the administrative file to BALCA within a time period that would typically correspond to next day delivery, or, put another way, that does not take more than a day or two. The undersigned, however, need not determine whether this would require an exact time frame for delivery under the regulations such as the ones imposed on BALCA because it is clear that the Certifying Officer has failed to comply with the regulations in this case by taking over two weeks to deliver the administrative file. There is simply no reasonable interpretation of the phrase “normally assuring next-day delivery” that would allow the Certifying Officer to take over two weeks to provide the administrative file to BALCA.

(Order Show Cause, at 2-3.) In response to the undersigned’s Show Cause Order the Certifying Officer objects to the undersigned’s interpretation of the regulation that delivery must be made in a time that would typically correspond with next day delivery.¹ However, the parties also agree to remand the matter.

As an initial matter, the undersigned agrees with the Certifying Office that the undersigned’s prior Order failed to address the inclusion of the additional language to the recently amended regulation.² As the Certifying Officer correctly points out, the recent amendments added the phrase “as soon as practicable” to Section 655.171. 20 C.F.R. § 655.171(b). Under the amended regulations the Certifying Officer will send a copy of the administrative file to the Chief ALJ (and others) “as soon as practicable by means normally assuring next-day delivery.” 20 C.F.R. § 655.171(b). Again, the undersigned agrees with the Certifying Officer that

¹ Again, the undersigned did not interpret the regulation in the prior Order to specifically require transmittal in an exact number of days because the undersigned did not need to reach that issue, only holding that a delay of over two weeks in this case was a violation barring a showing otherwise in response to the Show Cause Order.

² Although without the administrative file the undersigned cannot conclusively confirm which version of the regulation applies, it appears that the new version would apply. As such, the undersigned erred by not considering this case under the new regulations.

the prior Order failed to consider the recent amendment and the inclusion of this language in the prior Order.

In addition, the Certifying Officer points to the preamble to 20 C.F.R. § 655.171(b) related to the revisions to the regulations as not requiring a specific time period consistent with next day delivery. The preamble provides:

The Department proposed paragraph (b) to specify that the CO would send a copy of the OFLC administrative file to the Chief ALJ as soon as practicable. One commenter approved of this additional language but suggested that the regulations go further and require that the administrative file be transmitted within a specific timeframe. This commenter also suggested that because applications are filed electronically, a 48- or 72-hour deadline for transmittal should be feasible. Another commenter suggested that compiling the administrative file was simply a matter of printing it. The Department understands the concern for expediency and the sensitive timing of these cases, but compiling the administrative file is not as simple as suggested. As with any type of government or court record, the administrative file must be assembled and reviewed for accuracy and completeness. Because the length of this process is dependent on a variety of factors, including the length of the record, the Department has determined that a specific timeframe is not practicable. The Department believes adding the language that the CO will send the administrative file as soon as practicable balances expediency with the realities of agency resources and therefore has adopted the proposed language that the file must be sent as soon as practicable.

Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61760-61 (Oct. 12, 2022). However, the preamble says little more than that there is no precise date for transmittal in every case, i.e., every case does not have to be submitted in 48 or 72 hours because such a rigid process was not workable. And this is consistent with a plain reading of the amended regulation, which added the term “as soon as practicable” to the regulation. 20 C.F.R. § 655.171(b). Yet, this does not mean that there is *no* deadline whatsoever for a Certifying Officer to transmit the administrative file, or that a Certifying Officer can never violate the deadline; it simply provides more flexibility than was

suggested by the undersigned's prior Order interpreting the pre-amended regulation.³

As the amended regulation states, the Certifying Officer must provide the Chief ALJ (BALCA) with the administrative file “as soon as practicable by means normally assuring next-day delivery.” 20 C.F.R. § 655.171(b).⁴ The dictionary defines practicable as “capable of being put into practice or of being done or accomplished” *Practicable, Merriam-Webster's Collegiate Dictionary* (11th ed. 2020). Thus, the Certifying Officer must transmit the administrative file as soon as he or she is capable of doing so. Even the preamble recognizes that the Certifying Officer must send the file in an expeditious manner as soon as he or she capable or as soon as it is practicable. *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61760-61 (Oct. 12, 2022). The inclusion of the phrase “as soon as practicable” and the decision not to include a specific 48- or 72-hour deadline for transmittal does not mean that a Certifying Officer may dawdle and transmit the file at his or her own convenience. It means that whether the actions of the Certifying Officer are timely may depend on “a variety of factors, including the length of the record” *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61760-61 (Oct. 12, 2022).

The inclusion of the language “as soon as practicable” introduces a component of case-by-case fact finding by BALCA to determine whether the delay by the Certifying Officer was practicable or reasonable under the circumstances. An administrative law judge would need to determine when it was practicable for a Certifying Officer to transmit an administrative file to determine if a violation of the regulation occurred. And, again, this would depend on the specific facts of each

³ In contrast, 20 C.F.R. § 655.61(b), which applies to appeals of temporary non-agricultural workers, requires that the Certifying Officer transmit the “appeal file” within seven business days, regardless of the size or any other factors.

⁴ Under the amended regulation, “normally” modifies the method of delivery to provide flexibility as to the method of delivery (i.e., the Certifying Officer needs to send it to all the required parties in a manner like next-day delivery), while the time frame for delivery is controlled by the phrase “as soon as practicable.” See 20 C.F.R. § 655.171(b).

case, as the plain language of the regulation and the preamble provide. For example, if a case involved a 10,000-page administrative file, a two-week delay would likely be reasonable because the Certifying Officer could demonstrate that he or she could not practicably transmit it sooner. That same two-week delay, however, would likely be unreasonable in a case involving the standard 150-page file that typically only takes a day or two to transmit and was delayed due to inaction for weeks on the part of the Certifying Officer.⁵ In such a situation it would be practicable for the Certifying Officer to transmit the file weeks earlier. Like other aspects of the law, the parameters of what constitutes timely transmittal would be left to the future development of caselaw before BALCA according to the facts of each case; such is the nature of a regulatory requirement that contains no set parameters on either end.⁶ In fact, the preamble itself recognizes the length of the file as the one stated example of a factor that could impact the length of time to transmit the file. *See Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61760-61 (Oct. 12, 2022).

The term “as soon as practicable” is not an excuse to stop treating the electronic transmittal of the administrative file with the same sense of expediency that the regulations expect of BALCA. In fact, both the preamble and the regulation recognize the necessary expediency of the transmittal. *See* 20 C.F.R. § 655.171(b); *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61760-61 (Oct. 12, 2022). While the regulations do not require transmittal by the same exact date certain in every case, Section 655.171(b) still requires practicable expediency, i.e., expediency that can differ based on the factual context of each case. As the undersigned stated in the prior Order, some limitations on the Certifying Officer are necessary because of the time-

⁵ Even though these cases have now been pending on appeal for three weeks, the undersigned was never provided the administrative file, so the undersigned does not know how large or small the file was in these cases.

⁶ The regulation could have provided a safe harbor for the transmittal. For example, the regulation could have provided that any transmittal within a certain number of business days is deemed to be provided as soon as practicable in all situations, but the regulation contains nothing of the sort.

sensitive nature of the temporary need for agricultural work. “For example, an appeal could involve a situation involving the need for laborers to harvest crops that are sitting on the vine or tree and a ruling from BALCA is needed in an expeditious manner before [a] window to harvest closes. But BALCA’s role cannot begin until the administrative task of the Certifying Officer is complete.” (Order Show Cause, at 3.) And the regulations must have some bounds and avenue of enforcement by BALCA to prevent the Certifying Officer from sitting on a denied application while the time runs for Employer as to the need for the temporary workers.⁷

On its face, the length of the delay in this case seems unreasonable, and it appears that the Certifying Officer failed to provide the administrative file as soon as practicable.⁸ This is all the more troubling in this case because the undersigned put the parties on notice on March 3, 2023, in its prior Order that the administrative file had not been submitted and the file was still not uploaded over ten days later. As a result, the undersigned had to enter a Show Cause Order on March 16, 2023. While the undersigned acknowledges that its initial interpretation of the prior regulation was in error because it failed to consider the recently amended regulation that applied to this case, it appears that the Certifying Officer has still violated the regulation by failing to transmit the administrative file after over two weeks. But rather than call the Certifying Officer as a witness at hearing to hear testimony as to why the administrative file was not transmitted in a timely manner and issue a decision as to whether the transmittal was “as soon as practicable” in this case, the undersigned will remand this matter as requested by the parties.⁹ Accordingly, the undersigned, **GRANTS** the parties request and **REMANDS** this matter to the Agency for further processing.

⁷ This is not to suggest that the Certifying Officer in this case was attempting to do so, only that such a possibility exists without enforcement of the regulation requiring transmittal as soon as practicable by a means that normally assures next day delivery.

⁸ Further, this does not appear to be an isolated incident. Other members of BALCA are also experiencing increasing delays in the time it takes to receive the administrative file since the amendment, and these delays are disproportionate to the size of the cases.

⁹ Remand also leaves open the appropriate remedy when a Certifying Officer violates the regulation and fails to transmit the administrative file as soon as practicable.

SO ORDERED.

STEWART F. ALFORD
Administrative Law Judge