UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
Cherry Hill, NJ

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Issue Date: 20 April 2023

BALCA Case No.: 2023-TLC-00032
ETA Case No.: H-300-23004-681399

In the Matter of:

C.R. NELSON WHOLESALE PLANT SUPPLY,

Employer.

Appearance: Charles H. Cui, Esq.
Immigration Lawyers, PC
4901 W Irving Park Rd
Chicago, IL 60641
For the Employer

Before: Lystra A. Harris
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188, and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary agricultural labor certification ("H-2A") program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On March 15, 2023, C.R. Nelson Wholesale Plant Supply ("Employer") filed a request for expedited administrative review of the Final Determination issued by the Certifying Officer ("CO") in the above-captioned H-2A temporary labor certification application. I received the Administrative File ("AF") from the Employment and Training Administration ("ETA") on April 3, 2023. The CO thereafter timely submitted a brief. Pursuant to 20 C.F.R. §§ 655.171(d)(3)–(4), this decision and order is based on the written record and is issued within seven business days of the submission of the CO's brief or ten business days after receipt of the AF, whichever is later.

I. BACKGROUND

H-2B Application and Notice of Acceptance

Employer submitted their initial H-2A application on January 6, 2022. (AF 94-110).[1] Employer seeks to hire one Nursery Farmworker from March 5, 2023 through December 1, 2023. (AF 101). As part of this application, Employer submitted Form ETA-790A. On Section D of the Form ETA-790A, Employer listed an employee housing location of 908 E Burnett Rd, Island Lake, IL 60042, indicating that it was "Employer-provided (including mobile or range)".

On January 12, 2023, the CO issued a Notice of Deficiency ("NOD") outlining five deficiencies in Employer's application. (AF 76-88). After Employer remedied all five, the CO issued a Notice of Acceptance ("NOA") on January 23, 2023. (AF 30-34). The NOA advised Employer that all housing to be used for workers must comply with the regulations at 20 C.F.R. § 655.122(d) prior to the issuance of a temporary labor certification. *Id.*

In correspondence dated February 2, 2023, the Illinois State Workforce Agency ("SWA") informed the Chicago National Processing Center ("NPC") that Employer's housing had been denied, citing an inability to schedule a housing inspection due to Employer's lack of response. (AF 15). Subsequently, the Chicago NPC contacted Employer by e-mail on February 13, 2023 and February 27, 2023, requesting that it contact the local SWA in order to schedule a housing inspection. (AF 15-18). As of March 3, 2023, SWA officials had not been able to get in contact with Employer. *Id.*

Final Determination and Appeal

On March 13 2023, the CO issued a Final Determination denying Employer's application based on its failure to provide approved housing pursuant to 20 C.F.R. § 655.122(d). In the decision, the CO noted that all employer-provided housing must be inspected and certified by the serving SWA before it can fulfill the requirements of the applicable regulations. Because the SWA never performed an inspection, the CO determined that Employer's application was deficient, and denied it.

On March 15, 2023, Employer moved for expedited review of the CO denial. (AF 1-2). In its request, Employer asked that the case be "reopened" because they had never received any calls from the SWA about an inspection. Employer's request included a signed affidavit from Employer's owner attesting to the fact that he did not receive any emails or calls from "the state" to set up the housing inspection. (AF 2).

II. SCOPE AND STANDARD OF REVIEW

[1] For purposes of this opinion, "AF" denotes the Appeal File.

BALCA ("the Board") has a limited standard of review in H-2A 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 only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.171(d)(3). After considering the evidence, BALCA must take one of the following actions in deciding the case:

(1) Affirm the CO's denial of temporary labor certification, or
(2) Direct the CO to grant temporary labor certification, or
(3) Remand to the CO for further action.

20 C.F.R. § 655.171(d))(1)-(3).

While neither the INA, 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 ALJ must uphold the CO's decision unless an employer demonstrates that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id*. § 655.171(d)(2). The ALJ will consider the documents in the administrative file that were before the CO at the time of the CO's decision and any written submissions from the parties or amici curiae that do not contain new evidence. *Id*. § 655.171(d)(3). The ALJ may not consider evidence not before the CO at the time of the CO's decision, even if such evidence is in the administrative file, and the ALJ will affirm, reverse, or modify the CO's decision, or remand to the CO for further action, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 C.F.R. § 18.95. *Id*.

III. DISCUSSION

Employer is not entitled to a reopening of the record, and the CO's denial of their application was not arbitrary or capricious. In support of its request for administrative review of the CO's denial in this matter, Employer attached a signed affidavit attesting to the fact that Employer did not receive any calls or emails from the SWA about setting up a housing inspection. (AF 2).

According to 20 C.F.R. § 655.171(a)(7) and (d)(3), the Board may only consider evidence that was before the CO at the time of the CO's decision, and the Employer's request for review is limited to the aforementioned evidence. This affidavit was signed and attested to on March 16, 2023, three days after the CO issued its Final Determination. (AF 1-3). Because the affidavit did not exist and thus was not before the CO at the time the CO issued the decision denying certification, the Board cannot consider it here.

Notwithstanding the affidavit, Employer makes no other argument that the CO's decision to deny their application under 20 C.F.R. § 655.122(d) was in error. The regulations at § 655.122(d)(6) require employers to obtain certification of employer-provided housing via an SWA inspection no later than 30 calendar days before the first

date of need identified in Employer's Form ETA-9142A. 20 C.F.R. §655.122(d)(i)-(ii). Because Employer's first date of need was March 5, 2023, the deadline to obtain a housing inspection was February 3, 2023. Even though Employer did not have a housing inspection on record as of that date, the CO afforded Employer ample time in excess of the deadline to obtain one, only issuing a Final Determination on March 13, 2023, 38 calendar days after the deadline to obtain a housing inspection had passed.

Failing to obtain a housing inspection from the local SWA within the requisite amount of time is a valid basis for a deficiency determination under the Act. 20 C.F.R. § 655.122(d)(6). The CO found that Employer did not obtain a housing inspection from the SWA, and eventually denied their H-2A application on that basis. Employer did not provide any evidence at the CO-level demonstrating good cause for the delay in obtaining a housing inspection, even despite the fact that the CO gave Employer the opportunity to obtain an inspection even after the deadline had passed. In light of the evidence, the Board finds that the CO's denial of certification was not arbitrary or capricious, and therefore must be affirmed.

IV. ORDER

The CO's Final Determination Denying Employer's ETA Form 9142, H-2B Application for Temporary Certification is AFFIRMED.

SO ORDERED.

For the Board:

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey