UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, DC

Issue Date: 22 February 2023

BALCA Case No.: 2023-TLC-00018
ETA Case No.: H-300-22349-642838

In the Matter of:

OFFICE SERVICES OF COLUMBIA, LLC,
Employer.

Appearance: Lesli Downs, President
Southern Impact, LLC
Tulsa, Oklahoma
For the Employer

Before: Theresa C. Timlin
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, 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 February 1, 2023, Office Services of Columbia, LLC ("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. The undersigned received the Administrative File ("AF") from the Employment and Training Administration ("ETA") on February 10, 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.

BACKGROUND

H-2B Application and Notices of Deficiency

Employer submitted their initial H-2A application on December 16, 2022. (AF 72-76).[1] Employer seeks to hire six Agricultural Equipment Operators from February 15, 2023 through December 15, 2023. (AF 79). As part of this application, Employer submitted Forms ETA-790 & 790A. On these forms, Employer listed an address in Columbia, South Carolina (Richland County) as the place of employment in Section C (1-5) but stated that there were "[v]arious [other] worksites…located in Charleston, Kershaw, Lee, and Richland counties…owned/controlled by the employer," in Section C.6 ("Additional Places of Employment Information") of the forms. In accordance with form instructions, Employer submitted an Addendum B to provide information regarding the additional places of employment listed in Section C.6; however, Employer only included one additional place of employment (an address in Adams Run, South Carolina, Charleston County) on Addendum B. (AF 80-87).

On December 23, 2022, the CO issued a Notice of Deficiency ("NOD") outlining seven deficiencies in Employer's application, only one of which remains in issue here. (AF 58-66). As the basis for the only remaining deficiency, the CO cited 20 C.F.R. § 655.141(a), which requires the CO to notify an Employer that their application or job order is incomplete within seven calendar days. (AF 66). In the NOD, the CO explained that the four counties listed in Section C.6 indicated that Employer may utilize workers for worksites other than those listed in the application and directed Employer to include full addresses of each work location and written permission for their application materials to be amended. *Id.*

On December 28, 2022, Employer responded to the NOD, remedying six of the seven deficiencies but declining to provide more specific information about the additional worksites. (AF 53). Instead, Employer asserted that the additional worksites were "field locations" without physical addresses. *Id.* The CO issued a second NOD on January 18, 2023, finding Employer's response to the only remaining deficiency "insufficient". (AF 26-30). Specifically, the CO asked Employer to identify the worksites "with as much specificity as possible" such that potential workers are properly appraised of "the demands of the job opportunity." *Id*. The CO also elaborated on what specific modifications would overcome the deficiency, like including the general road names, town names, and counties associated with each site, or providing the worksites' coordinates with town names and counties included. *Id.*

Employer responded to the second NOD on January 19, 2023, outlining three reasons why it believed that its application materials were not deficient. (AF 21-22). First, Employer stated that their initial disclosure of only county names on Section C.6 was proper because that information had "historically been accepted" as adequately apprising workers of the job opportunity. *Id.* Second, Employer argued that the deficiency had been remedied because the CO's list of examples of information that would properly appraise workers of the demands of the job opportunity included, among other things, county names. Since Employer had provided county names in its original application, it believed that there was no deficiency. *Id.* Finally, Employer stated that the CO did not provide an "accurate regulatory citation" for the deficiency, saying that the 2022 regulations do not

[1] For purposes of this opinion, "AF" stands for "Appeal File".

require employers to disclose all field locations on Form ETA-790, so the CO could not "legally require this information for processing." *Id.*

Final Determination and Appeal

On January 30, 2023, the CO issued a Final Determination denying Employer's application based on its failure to provide additional information about the jobsites. (AF 14-20). In the decision, the CO addressed each of Employer's arguments. In response to Employer's assertion that the worksite information provided had historically been accepted, the CO stated that "erroneous acceptances of previously filed applications do not dismiss deficiencies in the current one." (AF 18). The CO also elaborated on the Form 790 instructions, noting that, in addition to county names, Employer was required to add as much information as possible where a worksite had no street address. Finally, the CO stated that, although the regulations do not specify what information must be included on the ETA Form-790A, they do require the CO to find a job order deficient when they determine that it is incomplete, which they did here.

Employer moved for expedited review of the denial on January 30, 2023. (AF 1-7). In their request, Employer reiterated that the instructions of Form ETA-790 did not require them to list field locations, because field locations are not "places of employment". Employer also stated that they did not need to provide additional information because the actual addresses of the field locations were not necessary to verify compliance with advertising, positive recruitment, and prevailing wage determination requirements. Finally, Employer argued that the requirement to provide more specific information was not necessary because that requirement applied only to employers who had itinerant workers, which Employer did not.

SCOPE AND STANDARD OF REVIEW

BALCA 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 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 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 ALJ must uphold the CO's decision unless the 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*.

DISCUSSION

Employer's arguments are unavailing, and the CO's decision to deny their application was neither arbitrary nor capricious. In their response to the second NOD, Employer argued that the worksite information they provided was not deficient because that information had previously been accepted in prior applications. As the CO correctly pointed out in their brief, that OFLC accepted previous applications with the same worksite information does not bind OFLC to accept the current application; an employer must file an application eligible on its own merits. *See ATP Agri-Services, Inc.,* 2019-TLC-00050, at 9 (May 17, 2019) ("[T]he fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial.").

Employer's other arguments that no other information was required on Form ETA-790 also lack merit. While they are correct that the regulations do not specifically require that employers list the address of each field location, Employer errs in assuming that this means there is no deficiency. 20 C.F.R. § 655.141(a) allows the CO to reject applications and job orders they deem incomplete; in this case, the job order and its instructions require an employer to identify places of employment with enough specificity to apprise prospective applicants of any travel requirements of the job to be considered complete. In situations where an employer does not complete a job order form, it is proper for the CO to reject their application on that basis. *Bolton Spring Farm,* 2008-TLC-00028, at 12 (May 16, 2008) (CO's refusal to accept H-2A application proper because employer did not comply with Form ETA-790 instructions).

Employer left parts of Form ETA-790 and ETA-790A Addendum B incomplete, and their argument to the contrary merits little weight. Employer argued on appeal that the Appendix B instructions requiring employers to list "additional places of employment" did not apply to the field locations because those locations are simply "[places] where work will be performed in a field," rather than separate places of employment. (AF 4). Contrary to Employer's interpretation, the regulations define a "place of employment" as "a worksite or physical location where work under the job order is actually performed." 20 C.F.R. § 655.103(b). Thus, the field locations for which Employer failed to provide sufficient information are considered "places of employment", even for fixed-site employers. *See Patout Equipment Co.,* 2015-TLC-00063, at 6 (Aug. 17, 2015).

Failing to follow form instructions and consequently submitting an incomplete job order is a valid basis for a deficiency determination under the Act. 20 C.F.R. §655.141(a). The instructions on Forms ETA-790, ETA-790A, and ETA-790A Appendix B together

require employers to list enough information about each physical location where work will be performed to properly appraise potential applicants of the logistical and geographical demands of the job.[2] The CO determined that Employer did not complete the forms with the requisite level of specificity, and rejected Employer's H-2A application on the grounds that it was incomplete.

Considering the evidence, the undersigned finds that the CO's denial of certification was not arbitrary and capricious, and therefore must be affirmed.

ORDER

Considering the foregoing, the undersigned hereby ORDERS that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2B Application for Temporary Certification is AFFIRMED.

SO ORDERED.

For the Board:

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey-District Office

[2] To the extent that Employer argues that the deficiency is not valid because form instructions do not have the force of law, the undersigned finds this argument unpersuasive. Both the Form ETA-790 and its Instructions were duly approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, using administrative procedures designed to give the public notice and opportunity to comment. *See* 44 U.S.C. § 3506, 3507.