

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

Issue Date: 22 March 2023

BALCA No.: 2023-TLC-00019

ETA No.: H-300-23036-750961

In the Matter of:

PINKSTON BROTHERS,

Employer.

**DECISION AND ORDER DENYING MOTION TO DISMISS AND
REVERSING DENIAL OF CERTIFICATION**

This proceeding arises out of Pinkston Brothers' (Employer) request for administrative review of the Certifying Officer's (CO) final determination denying its application for temporary alien labor certification under the H-2A nonimmigrant visa program. The H-2A program permits employers to hire foreign workers to perform agricultural work on a temporary basis. See 8 U.S.C. 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B. For the reasons set forth below, the CO's motion to dismiss is denied, the final determination denying the application is reversed, and the case is remanded to the CO for further processing.

Statement of the Case

On February 7, 2023, Employer filed an H-2A Application for Temporary Employment Certification, requesting certification for one agricultural equipment operator for the period of April 20, 2023 through November 30, 2023. Administrative File (AF) 20-40.

On February 9, 2023, the CO issued a Notice of Deficiency. AF 10-13. The CO stated the ETA Form 790A, submitted with Employer's application, was signed May 19, 2021, therefore the document was not considered current. AF 13. The CO requested Employer modify its application by providing "a signature declaring under penalty of perjury that it has read the clearance order, including every page of the ETA Form 790A and all supporting addendums, and that to the best of its knowledge the information contained therein is true and accurate." *Id.*

On February 23, 2023, the CO issued a Final Determination denying the application as abandoned, citing 20 C.F.R. § 655.142(a). AF 7-9. On the same day, Employer's agent filed a request for administrative review with the Board of Alien Labor Certification Appeals (BALCA). Employer's agent represented the agency did not receive the Notice of Deficiency due to an ice storm that caused several power and internet outages in early February. Employer's agent also disputed the CO's statement regarding the date on the ETA Form 790A.

On March 7, 2023, the CO submitted the Administrative File to BALCA. On March 8, 2023, the Solicitor filed a motion to dismiss for lack of jurisdiction.

Legal Analysis

I. Motion to Dismiss

The Solicitor filed a motion to dismiss for lack of jurisdiction. The Solicitor argues BALCA lacks subject-matter jurisdiction because Employer failed to serve the CO with the request for administrative review. The Solicitor did not cite any precedent in support of this argument. Although Employer *should have* served its request for administrative review on the CO, *see* 20 C.F.R. § 655.171(a)(1), this failure does not deprive this tribunal of subject-matter jurisdiction to decide the underlying case. *See, e.g., Howell v. PPL Services, Inc.*, ARB No. 05-094, OALJ No. 2005-ERA-14, slip op. at 3-4 (Feb. 28, 2007); *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, OALJ No. 2004-ERA-9, slip op. at 9 (Oct. 31, 2005). Accordingly, the Solicitor's argument is rejected and the motion to dismiss will be denied.

II. Request for Administrative Review

Employer has requested administrative review of the CO's Final Determination denying its application for temporary labor certification under the H-2A program. Under the applicable regulations, BALCA "must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 20 C.F.R. § 655.171(d)(2).

Upon review of the case file, I conclude the CO acted arbitrarily and capriciously and abused his discretion by issuing the Notice of Deficiency. Ordinarily, the failure to respond

to a Notice of Deficiency will result in the denial of the application. 20 C.F.R. §§ 655.141(b)(4), 655.142(a). In this case, however, it is clear the CO should have never issued the Notice of Deficiency in the first place. The CO's only reason for finding the application deficient, and thus requiring modification, is unsupported by the record. The CO stated the ETA Form 790A was signed and dated May 19, 2021. AF 13. Upon review of the ETA Form 790A, it was actually signed and dated February 7, 2023. AF 34. An updated attestation was unnecessary, so requiring modification on such basis was arbitrary, capricious, and an abuse of discretion. The CO should have, instead, accepted the application and directed Employer to engage in the recruitment of American workers. 20 C.F.R. § 655.143. Accordingly, the CO's decision will be reversed and the case will be remanded for additional processing consistent with this decision.

ORDER

Based on the foregoing, IT IS ORDERED:

1. The Certifying Officer's motion to dismiss is DENIED;
2. The Certifying Officer's Final Determination denying Pinkston Brothers' H-2A Application for Temporary Employment Certification is REVERSED; and
3. The above-captioned matter is REMANDED to the Certifying Officer for additional processing consistent with this decision.

SO ORDERED.

PAMELA A. KULTGEN
Administrative Law Judge

PAK/PML/jcb
Newport News, Virginia