

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

Issue Date: 27 March 2023

BALCA No.: 2023-TLC-00019

ETA No.: H-300-23036-750961

In the Matter of:

PINKSTON BROTHERS,

Employer.

ORDER DENYING RECONSIDERATION

On March 22, 2023, I issued a Decision and Order denying the Certifying Officer's motion to dismiss and reversing the denial of certification. I concluded that: 1) Employer's failure to serve the Certifying Officer with the request for review did not deprive BALCA of subject-matter jurisdiction to decide the case; and 2) the Certifying Officer erroneously issued a Notice of Deficiency. The Certifying Officer's error was arbitrary and capricious and constituted an abuse of discretion. The Notice of Deficiency required Employer to provide an updated attestation because the signature it submitted was not current. The Certifying Officer asserted the Form ETA-790A was signed and dated May 19, 2021. A review of the form in question, however, revealed it was signed and dated February 7, 2023. Although Employer neglected to timely respond to the Notice of Deficiency, which will ordinarily result in the automatic denial of an application, I concluded the Certifying Officer should not have issued the Notice of Deficiency in the first place and

that modification was unnecessary. Therefore, I reversed the denial of Employer's application and remanded the case back to the Certifying Officer for additional processing.

On March 24, 2023, counsel for the Certifying Officer, the Solicitor, filed a motion for reconsideration. The Solicitor reiterates its position that Employer's failure to serve the Certifying Officer with the request for administrative review precluded BALCA from accepting the appeal.¹ Next, citing the Preamble to the amended regulations, the Solicitor argues the regulations do not allow BALCA to scrutinize the Notice of Deficiency. Finally, the Solicitor posits I overlooked the fact that Employer's agents admitted that they submitted an incorrect signature in the request for administrative review and that it was actually the Certifying Officer who signed and dated the form on February 7, 2023.

The Solicitor's motion for reconsideration will be denied. With respect to the motion to dismiss, I remain unconvinced 20 C.F.R. § 655.171(a)(1) is a jurisdictional rule, and to that end, I respectfully disagree with my colleague, Judge Bell. *See Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022); *Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 82, (2009). I affirm my conclusion that the failure to serve the Certifying Officer with the request for administrative review does not deprive BALCA of jurisdiction to decide the case.

¹ The Solicitor cites Administrative Law Judge Steven D. Bell's decision in *Martin Torres*, BALCA No. 2023-TLN-00046 (March 20, 2023). Judge Bell ostensibly agreed the service requirements contained in 20 C.F.R. § 655.61(a) were jurisdictional in nature, as he granted a similar motion to dismiss.

The Solicitor's arguments respecting the merits of the case are also rejected. The regulations do not prohibit me from reviewing or scrutinizing a Notice of Deficiency. Although Employer does not have the option to request administrative review in response to a Notice of Deficiency, see 20 C.F.R. § 655.141, when an employer requests administrative review of an unfavorable determination, BALCA possesses the power and authority to review the entire administrative file to ascertain the basis for the Certifying Officer's determination.² Otherwise, it would be impossible to figure out whether the determination was arbitrary, capricious, an abuse of discretion, or not in accordance with law. As the Notice of Deficiency was integral to the Certifying Officer's final determination, it is properly subject to review and scrutiny.

Next, I am not persuaded by Employer's agent's admission about submitting an incorrect signature. Upon careful examination of the administrative file for a second time, I cannot locate any document signed and dated May 19, 2021. An admission, without record support, is unconvincing, especially when the admission is made by a non-lawyer in a document attempting to strike a conciliatory and apologetic tone. Although the Solicitor points to the admission as conclusive proof of the error, tellingly, he has failed to point to

² “[T]he removal of the ability to appeal a NOD better conforms with the statutory requirements under the INA. This change also helps to promote efficiency by providing that all possible grounds for denial are appealed at once, rather than allowing for separate appeals of multiple issues. The appeal process continues to include an expedited administrative review procedure, or an expedited de novo hearing at the employer's request, in recognition of the INA's concern for prompt processing of H-2A applications. Further, it is not true that an employer's application has to be denied based on a factor other than the wage in order for the employer to challenge a wage rate required by the CO. An employer that does not correct a wage deficiency—or any other deficiency—noted in a NOD, may appeal a denial on that basis (and any other bases noted in the denial, as applicable).” 87 Fed. Reg. 61,660, 61,704 (Oct. 12, 2022) (emphasis added).

where this out-of-date signature is located in the administrative file. This brings me to his final argument.

The Solicitor asserts the Certifying Officer, not Employer, signed and dated the Form ETA-790A, on February 7, 2023. At the very end of the Form ETA-790A is an attestation, declaring under penalty of perjury, that the clearance order is true and accurate. AF 33. Directly below are six boxes. AF 33-34. Boxes 1-4 identify the declarant as Nicholas Pinkston, the owner of Employer. AF 33. Boxes 5 and 6 are the declarant's signature and the date the declarant signed the attestation. AF 34. Box 5 states: "Digital Signature Verified and Retained by Certifying Officer³." *Id.* Box 6 states the attestation was signed "2/7/2023." *Id.* Box 6 is specifically labeled "Date signed;" it does not indicate that it was the date the signature was "[v]erified by the Certifying Officer. *Id.* Assuming the Solicitor is correct as a factual matter, it is unclear why the Certifying Officer signed or dated the attestation, and why February 7, 2023 was included as the "[d]ate signed." Boxes 5 and 6 are unambiguously for the declarant, not the Certifying Officer, to complete, and the date in Box 6 is to be the date it is signed, not the date of any action by the Certifying Officer. The Certifying Officer is not the one who is supposed to declare under penalty of perjury that the clearance order is true and correct. Based on the record before me, it appears Employer signed and dated the Form ETA-790A on February 7, 2023. Any confusion engendered here was caused by the Certifying Officer himself. Reconsideration is therefore unwarranted.

³ "Certifying Officer" is in type-written cursive, indicative of a digital signature.

Based on the foregoing, IT IS ORDERED that the Certifying Officer's motion for reconsideration is DENIED.

SO ORDERED.

PAMELA A. KULTGEN
Administrative Law Judge

PAK/PML/jcb
Newport News, Virginia