U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 August 2022

BALCA Case No.: 2022-TLC-00122

ETA Case No.: H-300-22126-143578

In the Matter of:

WABASH VALLEY GROWERS, LLC

Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding 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), and the associated regulations promulgated by the United States Department of Labor ("DOL" or the "Department") at 20 C.F.R. Part 655. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

I. BACKGROUND

On May 16, 2022, Wabash Valley Growers, LLC ("Employer") submitted an H-2A Application for Temporary Employment Certification (Form ETA-9142A or "Application") for four diversified farmworkers. (AF[1] 78–120.) The nature of temporary need was listed as seasonal (AF 78), and the period of intended employment listed was July 15, 2022, to November 15, 2022. (AF 86.)

On May 19, 2022, the Certifying Officer ("CO") issued a Notice of Acceptance ("NOA"). (AF 24–29.) On May 20, 2022, Employer submitted its recruitment report, including Workers' Compensation Insurance Documentation. (AF 21–23.) On June 6, 2022, the Indiana Department of Workforce Development, i.e., the State Workforce Agency("SWA") issued a letter informing Employer it was initiating the process of discontinuation of employment services under the Wagner-Peyser Act, and it provided Employer with instructions on how to avoid termination of services. (AF 13–20.) On August 3, 2022, the CO issued its Final Determination, wherein the CO denied the Application. (AF 8–12.) On August 10, 2022, Employer submitted a request for *de*

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

novo hearing. (AF 1–7.) On August 18, 2022, the CO, through counsel, submitted a pleading entitled "Certifying Officer's Unopposed Motion to Cancel Hearing and Establish Briefing Schedule." On August 18, 2022, the undersigned issued an Order Granting Certifying Officer's Unopposed Motion to Cancel Scheduled Hearing and Establish Briefing Schedule, setting 12:00 p.m., Eastern Time, August 22, 2022, as the deadline for the parties' briefs. The CO and Employer both timely submitted briefs.

II. STANDARD OF REVIEW

Although neither the INA nor the regulations specify a standard of review in H-2A appeals, the Board has adopted the arbitrary and capricious standard. *Employment and Training Administration v. Altman Specialty Plants, Inc.*, 2019-TLC-00008 (Dec. 20, 2018). *But See Crop Transport, LLC*, 2018-TLC-00027, slip op. at 3 n.4 (Oct. 19, 2018) (concluding that *de novo* review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a)). Thus, the CO's determinations will be upheld unless the Board finds that CO has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted).

Employer bears the burden to show that certification is appropriate. *See* 20 C.F.R. § 655.161(a). In an administrative review of the CO's denial, the ALJ must base his decision on the written record and any written submissions by the parties. *See* § 655.171(a). The ALJ may not consider new evidence that was not submitted to the CO. *Id.*

III. POSITIONS OF THE PARTIES

The CO contends that the SWA's discontinuation of services required denial of Employer's Application where, as here, Employer needed those services to meet the applicable regulatory requirements for certification of its Application under the H-2A program under 20 C.F.R. § 655.161(a). The CO's brief notes that BALCA lacks jurisdiction to review the Indiana SWA's termination of services and is therefore the improper forum to hear appeals arising from the Wagner-Peyser Act, citing 20 C.F.R. §§ 658.502, 504.

Employer in its brief contends that the CO "jumped the gun" in this case, as it had not completed the entire process for appealing the case before the SWA. Employer argues that the CO should not have denied the certification until the entire appeal process was complete.

IV. DISCUSSION

The CO denied Employer's application because the SWA's Discontinuation of Employment Services precluded Employer's ability to "maintain an active job order and determine whether the employer meets the applicable regulatory standards, including but not limited to, housing standards as required by 20 C.F.R.122(d)(1)." AF 12. The CO further noted that,

"[b]ecause these services are needed for the employer to meet regulatory requirements for certification, the Chicago NPC is unable to continue processing the employer's H-2A application." *Id*.

Based on the record before BALCA, the CO did not act in an arbitrary and capricious manner in denying Employer's application. The decision from the SWA precludes Employer from completing requirements to meet the regulatory standards, as the CO noted, and if Employer is unable to meet the proper regulatory requirements within its application, it is a proper basis for the denial. Whether the SWA acted properly has no bearing on the undersigned's decision. Further, nothing in the INA or its implementing regulations requires that the CO hold a labor certification application in abeyance pending an employer's appeal of SWA's determination. Other than its bare assertion, Employer cited no regulation or law to support its position.

The undersigned, as part of BALCA, is tasked solely with review of the CO's decision under the arbitrary and capricious standard: if Employer has issues with the SWA's decision to discontinue its employment services, an appeal of the CO's denial is not the channel through which to have that decision reviewed.

V. ORDER

Based on the foregoing, the CO's decision denying certification is **AFFIRMED**.

SO ORDERED.

For the Board:

Digitally signed by LYSTRA HARRIS
DN: CN=LYSTRA HARRIS, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: Washington DC

LYSTRA A. HARRIS
Administrative Law Judge