

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 March 2009

BALCA Case No.: 2009-TLN-00004
ETA Case No.: C-08333-42536

In the Matter of:

ROTH LANDSCAPE & DESIGN,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **JOHN M. VITTONI**
Chief Administrative Law Judge

DECISION AND ORDER

On March 2, 2009, the Board of Alien Labor Certification Appeals (“BALCA”) received a letter from Roth Landscape & Design (“the Employer”) requesting review of the Certifying Officer’s (“the CO”) February 19, 2009, denial of the Employer’s application for temporary alien labor certification. On the evening of March 10, 2009, the CO submitted the Appeal File to BALCA. In H-2B cases, the BALCA member or panel assigned to conduct the review may only consider the Appeal File and any legal briefs submitted by the parties. 20 C.F.R. § 655.33(e).¹

Statement of the Case

On September 26, 2008, the Utah Department of Workforce Services (“UDWS”) received the Employer’s application requesting temporary labor certification for 60 landscape contractors. *See* AF 36-68.² Therein, the Employer included the following statement:

This letter is to describe the temporary *peak load* nature of our landscaping business. During the warmer months lawns and properties require constant maintenance. The

¹ The H-2B regulations were recently published at 73 Fed. Reg. 78,052-78,069 (Dec. 19, 2008). I will cite the provisions as they will appear when codified.

² Citations to the 68-page Appeal File will be abbreviated as “AF” followed by the page number.

temporary need we are experiencing is traditionally tied to the recurring pattern of nature/weather. We will need temporary laborers from February 1, 2009 through November 30, 2009 to supplement our permanent staff. When our business slows it is extremely difficult to find enough workers that are willing to accept temporary employment. Therefore, the specific period of time in which we do not need temporary laborers is from December 1, 2009 through January 31, 2010.

AF 38 (emphasis added). The Employer also included 30 pages of customer price quotations, letters from previous customers stating intentions to use the Employer's services during the stated period of need, and various monthly invoices issued during 2007 and 2008. *See* AF 39-68. Thereafter, the Employer underwent supervised recruitment of U.S. workers, and UDWS transmitted the application to the Department of Labor's Employment and Training Administration ("ETA"). *See* AF 17-35.

On December 11, 2008, the CO issued a Request for Information informing the Employer that ETA had initially determined that the application "appears to be ineligible for temporary labor certification." AF 14-16. Relying on Training and Employment Guidance Letter ["TEGL"] No. 21-06, Change 1, Attachment A, Section III.D.3, the CO found the application deficient in that the Employer's statement of need failed to adequately explain "why it has a peakload need" between February 1, 2009, and November 30, 2009. AF 16.³ The CO requested that the Employer submit a statement explaining "(a) why the job opportunity and number of workers being requested reflect a temporary need, and (b) how the employer's request for the services or labor [meets] *the chosen standard of a peak load need* as defined by TEGL 21-06, Change 1." AF 16 (emphasis added). The CO added that the statement "must also include a detailed explanation of the business activities and duties to be performed by workers in the occupation identified in Item 9 of the submitted ETA 750 application during each calendar month for which workers have been requested." AF 16.

On December 22, 2008, the Employer filed a response to the CO's request. AF 10. In its response, the Employer stated that it needs to supplement its permanent staff of landscape laborers "due to a seasonal demand." AF 10. The Employer noted "an increased demand for landscaping services beginning the first week of February." AF 10. The Employer observed that, despite the month's cold temperatures, "many customers begin requesting services in February because they want their properties to be ready for spring." AF 10. The Employer also referenced the fact that, in 2007, the Department of Labor granted certification for three Utah landscaping companies with periods of need beginning in February. AF 10.⁴ On February 19, 2009, the CO informed the Employer that he could not certify the application. AF 7-9. The CO stated that the Employer did not adequately respond to the Request for Information in that it did not provide "a detailed explanation of the business activities and duties to be performed by workers in the occupation identified in Item 9 of the ETA 750 application during each calendar month for which workers have been requested." AF 9. The Employer's appeal followed.

³ The RFI and the CO's February 19, 2009, final determination letter identified a second deficiency upon which the CO no longer relies. *See* Certifying Officer's March 17, 2009, Brief at 2 n.1. Accordingly, I will not address this second ground in reviewing the CO's determination.

⁴ The Employer's letter contains a reference to attached documentation that does not appear in the Appeal File.

Discussion

TEGL No. 21-06, Change 1, Attachment A, Section III.D, provides that “[t]he employer’s need for temporary non-agricultural services or labor must be justified to the NPC Certifying Officer under one of the following standards: (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need.” In its original temporary need statement filed with UDWS, the Employer stated that it has a “peak load” temporary need for workers. The application was thereafter processed based on the “peakload” criteria for establishing the application’s eligibility for the H-2B non-immigrant program. However, upon reviewing the record, I find the Employer’s use of the phrase “peak load” in its original temporary need statement was a misstatement of the Employer’s circumstances.

To establish a peakload need, the Employer must show that

(1) it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and (2) the temporary additions to staff will not become a part of the petitioner’s regular operation.

TEGL No. 21-06, Change 1, Attachment A, Section II.D.3 (June 25, 2007) (emphasis in original). Although the Employer’s business need for temporary workers might meet the first requirement, it clearly does not meet the second requirement that the temporary staff additions are not to become part of the petitioner’s regular operation. The record before me indicates that the Employer uses H-2A workers regularly in its landscaping operations. Rather, it appears obvious that the Employer’s temporary need would be better analyzed under the criteria for a seasonal need.

Upon review of the record, I find that the Employer’s use of the phrase “peak load” set the stage for a confused and possibly misdirected review of application. Consequently, on appeal it is difficult to make sense of the processing of the application. Likewise, it is difficult to understand whether the CO’s questions about the application stemmed from the fact that the Employer referred to a peakload need, or whether, if the application had been viewed as presenting a seasonal need, the questions asked, and the CO’s decision on the application would have been different.

In view of this uncertainty, I will remand for the CO to review the Employer’s documentation to determine whether it is acceptable under the seasonal need criteria. In making this determination, the CO is free to request additional information from the Employer.

Finally, I note that the precise reason the CO denied the application was a failure of the Employer to respond in a thorough fashion to the CO’s Request for Information. On appeal, the Employer stated that it did not feel it necessary to strictly comply with the CO’s information request, essentially because it believed that the information requested was already in the record and that the CO should have been able to infer the nature of its temporary need from that information.

Because I have concluded that the application was mischaracterized from the outset, I decline to affirm the denial based on the Employer’s lack of cooperation with the information request. However, the Employer is cautioned on remand that it should not expect the CO to infer the meaning of its

submissions, and that a lack of cooperation with the CO's information requests is misguided and sets up the application for a denial.

Accordingly, it is hereby **ORDERED** that this case is **REMANDED** to the Certifying Officer for additional proceedings consistent with this order.

For the Board:

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JOHN M. VITTON

Chief Administrative Law Judge