



Issue Date: 16 October 2009

BALCA Case No.: 2009-TLN-00105
ETA Case No.: C-09211-45990

In the Matter of:

REALTY LANDSCAPING CORPORATION,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Wesley Mathis, Esquire
Federation of Employers & Workers of America (FEWA)
Bay City, Texas
For the Employer

Gary M. Buff, Associate Solicitor
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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the

United States on a one-time occurrence, seasonal, peakload, or intermittent basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009). Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). § 655.33. The administrative review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and "such evidence as was actually submitted to the CO in support of the application." § 655.33(a), (e).

STATEMENT OF THE CASE

On June 2, 2009, the Employer, a company located in Newtown, Pennsylvania, submitted a Form 9142 application requesting temporary labor certification for 20 Landscaping and Groundskeeping Workers from November 2, 2009, through March 1, 2010. (AF 135-154). The Employer indicated that the nature of its temporary need was seasonal. The application contained the following statement of temporary need:

Realty Landscaping Corporation was founded in 1985. Our company provides groundskeeping services during the winter months. We shovel snow from walks and drives, and spread salt before, during and after snow. When there is no snow on the ground, we remove litter and debris, repair equipment, sharpen tools, repair drives, and perform other groundskeeping tasks. Our contracts keep us very busy and laborers are needed to fulfill our obligations. The temporary need we are experiencing is traditionally tied to the winter season by recurring pattern of nature/weather. We only have contracts to perform groundskeeping services for the winter months and only need temporary workers from November 2, 2009 through March 1, 2010. The specific period of time in which we do not need workers is March 2, 2010 through October 31, 2010.

(AF 135).

Upon preliminary review of the application, on August 5, 2009, the CO issued a *Request for Further Information* ("RFI") regarding three deficiencies with the application, only one of which is presented on appeal. (AF 130-134). That issue is whether the Employer failed to establish that its need for nonagricultural services or labor

is temporary in nature because when the CO found that the Employer's "requested dates of need in the current application create overlapping dates of need in combination with the employer's previous application history" The CO found that upon review of the Employer's application history, it had previously received certification for 150 Landscaping and Groundskeeping Workers in the same area of intended employment for the dates February 13, 2009, through December 13, 2009. Thus, the Employer's combined requested dates of need exceeded 10 months. Moreover, in regard to the Employer's statement that it only had contracts for temporary workers for winter months, the CO analyzed the job requirements of both sets of applications and found that they were normal duties for Landscaping and Groundskeeping Workers. Thus, the CO found that the Employer had not shown how the two job opportunities were different. The CO directed the Employer to submit evidence that established that the nature of its need was temporary. The CO directed the Employer to submit a detailed statement of temporary need containing: a description of the Employer's business history, activities, and annual schedule of operations; an explanation regarding why the nature of the job opportunity and number of workers requested reflect a temporary need; and an explanation regarding how the certification request meets one of the aforementioned regulatory standards of temporary need. Additionally, the CO instructed the Employer to submit supporting evidence and documentation justifying the chosen standard of temporary need, specifically requesting: signed work contracts; letters of intent from clients or previous monthly invoices showing work will be performed for each month during the requested period of need; annualized or multi-year work contracts or agreements, specifying the actual dates of work; and summarized and signed monthly payroll reports for a minimum of one previous calendar year, which indicate the total number of workers employed, the hours worked, and the total earnings received.

The Employer responded to the RFI by letter dated August 10, 2009. (AF 34-129). The letter containing the Employer's argument was signed by Wendy Brusca, the Employer's Human Resources Manager. (AF 34). Ms. Brusca wrote:

In your RFI, you indicate that our requested dates of need in the current application create overlapping dates of need in combination with our previous application history, and that we have not adequately

explained how this job opportunity (snow shoveling and winter grounds maintenance) and the previous job opportunity (landscaping) are different. Although O*NET classifies snow shoveling and landscaping under the same job code (37-3011); that alone does not mean the Jobs are the same. Under the Dictionary of Occupational Titles, which catalogues over 11,000 jobs, the occupations of snow shoveler (955.687-014) and landscape laborer (408.687-014) fall under different titles and headings. Not surprisingly, they are lumped together under O*NET, which catalogues only 1,122. Moreover, the jobs are also typically performed by different workers. Even when a landscaper provides winter grounds maintenance services (and not all do), it is unusual for the same workers to occupy both positions. In our case they do, but that is a function of the labor shortage across both occupations and the fact that we utilize the H-2B program (and thus many of the same workers) to fill both positions. Both positions are temporary and seasonal, being traditionally tied to the recurring pattern of nature. Snowfall occurs in the fall, winter, and spring. Landscaping peaks in the spring, summer, and fall. The periods of time in which the positions are needed do overlap; but, it would be unusual for them not to since the shoulder periods surrounding the peaks in each season tend to be characterized by more diverse weather patterns. In short, both positions meet the criteria established by H-2B regulations for temporary, seasonal work.

(AF 34). Ms. Brusca's letter references attached contacts for winter grounds maintenance and a payroll summation.

On September 14, 2009, the CO issued a *Final Determination* denying certification for the job opportunities. (AF 22-28). Citing 20 C.F.R. § 656.6, the CO found that the Employer's dates of need for the current application create a need beyond 10 months when combined with the Employer's previous application history. Specifically, the CO found that the two applications would aggregate to 12 months and 16 days. The CO stated that "the job requirements for the current and previous applications are all normal duties that could be performed by a Landscaping and Groundskeeping Worker as defined under the Standard Occupational Classification (SOC) code 37-3011.00." (AF 25). The CO noted that the Employer's response to the RFI clearly indicated that the Employer will be using the same workers for both positions and that it has a year-around need. The CO found that merely highlighting the job duties of snow removal on the current application in comparison with those of the previous application (e.g., moving and trimming) did not justify a finding that the applications

presented different job opportunities. Moreover, the CO found that the Employer's payroll summary for 2008 and 2009 failed to support the current requested date of need because it showed a need from September through April each year, whereas the application showed a need from November through March. The CO found that the payroll summary showed a year-round, permanent need.

The Employer requested administrative review by BALCA by letter dated September 24, 2009, and received by the Board on September 25, 2009. (AF 1-21). The argument made in the request for review was from the Employer's attorney.

First, the Employer argued that the CO should have based his analysis of the positions at issue on the job duties and not solely on whether the jobs are classified under the same SOC code. The Employer argued that the job duties for the positions are distinctly different, to a substantial extent are mutually exclusive, and distinctly tied to a season. That the duties fall under the same SOC code, the Employer argued, does not make the jobs the same, and their categorization under that SOC code does not prohibit the Department of Labor ("DOL") from finding that the jobs are different. The Employer argued that the fact that the duties could be performed by the same employee does not make the jobs the same. In support of its argument, the Employer cited a decision of the Administrative Appeals Office ("AAO") in which the AAO found that an employer had established a temporary need for landscape workers despite DOL's finding that overlapping dates of need from a previous certification reflected a permanent, ongoing need for workers. EAC 08-207-51113 (AAO Oct. 21, 2008) (published). The AAO's decision was based on the finding that the Employer was phasing out of landscape maintenance work and would begin specializing in landscape design and installation, and would start having a different period of need for workers. The Employer argued that "Notably, the AAO did not find that since the installation duties could be performed by the maintenance workers (and in fact, would be, since the Petitioner was filing to extend the stay of its current beneficiaries), the Petitioner was offering year-round employment to the beneficiaries. Thus, if landscape maintenance and landscape construction are sufficiently distinct, it follows that landscaping and snow shoveling should be sufficiently distinct for the purpose of determining whether an employer's need for labor is

temporary.” The Employer also cited an unpublished decision, WAC-7-149-50407, in which the AAO considered whether a company had established a temporary need for construction workers when it had previously been certified for temporary workers for snow shovelers. The AAO held for the petitioner, and noted that there is “no statute or regulation that limits a petitioner to one (1) temporary need, if the petitioner can establish that another temporary need exists during the same calendar year.”

The Employer argued that the fact it would fill the snow shovelers position with workers it currently employs under the H-2B program should not have a bearing on DOL’s decision, citing the previously discussed AAO decision, EAC 08-207-51113, and the lack of any regulatory requirement or prohibition on the same employee filling a subsequent position. Moreover, the Employer noted that it did not receive the earlier certification in time to make the cap for the second half of 2009.

The Employer argued that its payroll summary supports its requested need for temporary workers, it showing that it had six employees on staff as a snow shoveler in September and October 2008, 17 to 20 employees from November to March, and only two in April.

Finally, the Employer argued that its need is temporary in nature because, consistent with 8 C.F.R. § 214.2(h)(6)(ii)(B), it is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The Employer pointed to the contracts for snow removal and the payroll summary that it had provided in response to the RFI. The Employer argued:

Thus, Realty established that its need for labor is ‘tied to a season’ (winter) ‘by an event or pattern’ (the changing of the seasons, snowfall, freezing rain) and is ‘of a recurring nature’ (recurring annually). Furthermore, Realty specified when it does not need the labor or services (from March 2, 2010 to October 31, 2010). Finally, Realty indicated that the period of time in which the services are not needed is predictable (the *specific* period of time . . .).

(AF 5).

On October 8, 2009, the CO filed a brief asserting that allowing certification in this case “would eliminate one of the primary factors in distinguishing between temporary and permanent employment.” The CO stressed that the two opportunities fall under the same O*NET code and are “seasonal versions of the same position.” Arguing that the Employer “is essentially splitting one position into two and claiming [a] temporary need for each in order to cover the whole year,” the CO noted that “neither of the two positions Realty petitioned to fill with H-2B workers requires experience” in their substantially similar work. The CO concluded by distinguishing the facts in the instant case from those presented in the AAO decisions cited by the Employer, which he also observed do not bind BALCA. The CO therefore urged affirmance.

DISCUSSION

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b). Absent unusual circumstances, the Secretary will deny an application where the employer has a recurring, seasonal or peakload need lasting more than 10 months. 20 C.F.R. § 655.6(c). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

The Labor Department’s H-2B regulations refer to the Department of Homeland Security regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) for the definition of a seasonal temporary need. 20 C.F.R. § 655.6(b). That regulation provides:

(ii) *Temporary services or labor--(A) Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor

shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need:

* * *

(2) *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

8 C.F.R. § 214.2(h)(6)(ii)(B) (2009).

Taken in isolation, the Employer's application for Landscaping and Groundskeeping Workers easily fits the definition of a seasonal need. The question is whether the fact that the Employer also employs Landscaping and Groundskeeping Workers for a different season means, as the CO found, that when viewed in the context of employment of Landscaping and Groundskeeping Workers throughout the year, the Employer's need for the workers is not actually temporary in nature, even though the duties and tasks are different depending on the season.

As noted, the Employer's first argument on appeal is that the CO should have based his analysis of the positions at issue on the job duties and not solely on whether the jobs are classified under the same SOC code. The O*Net job description for Landscaping and Groundskeeping Workers unambiguously fits laborers who perform a wide variety of landscaping and groundskeeping related functions, and makes no distinction between jobs typically performed in the winter versus summer months. The portion of the description that includes the summary and the tasks performed illustrates the description's lack of discernment between winter and summer work:

Summary Report for: 37-3011.00 - Landscaping and Groundskeeping Workers

Landscape or maintain grounds of property using hand or power tools or equipment. Workers typically perform a variety of tasks, which may include any combination of the following: sod laying, mowing, trimming,

planting, watering, fertilizing, digging, raking, sprinkler installation, and installation of mortarless segmental concrete masonry wall units.

Sample of reported job titles: Groundskeeper, Groundsman, Outside Maintenance Worker, Gardener, Greenskeeper, Grounds Worker, Grounds/Maintenance Specialist, Utility Worker, Grounds Maintenance Worker, Grounds Supervisor

Tasks

- Operate powered equipment such as mowers, tractors, twin-axle vehicles, snow blowers, chain-saws, electric clippers, sod cutters, and pruning saws.
- Mow and edge lawns, using power mowers and edgers.
- Shovel snow from walks, driveways, and parking lots, and spread salt in those areas.
- Care for established lawns by mulching, aerating, weeding, grubbing and removing thatch, and trimming and edging around flower beds, walks, and walls.
- Use hand tools such as shovels, rakes, pruning saws, saws, hedge and brush trimmers, and axes.
- Prune and trim trees, shrubs, and hedges, using shears, pruners, or chain saws.
- Gather and remove litter.
- Maintain and repair tools, equipment, and structures such as buildings, greenhouses, fences, and benches, using hand and power tools.
- Mix and spray or spread fertilizers, herbicides, or insecticides onto grass, shrubs, and trees, using hand or automatic sprayers or spreaders.
- Provide proper upkeep of sidewalks, driveways, parking lots, fountains, planters, burial sites, and other grounds features.

I recognize that other job description schemes, such as the Dictionary of Occupational Titles, may separately describe a snow removal job from a landscaping position.¹ But

¹ The Employer expressly pointed to the Dictionary of Occupational Titles' job descriptions for Snow Shoveler and Landscape Laborer:

merely because the O*Net is not as discerning as other job description schemes does not mean that it was wrong for the CO to view this Employer's workers as fitting the generic O*Net description.

Neither of the AAO rulings relied upon by the Employer supports reversing the CO's denial of certification. In discussing the AAO's ruling in EAC 08-207-51113, *supra*, the Employer focused on the result rather than the reasoning relied upon by the AAO in finding that the employer had a temporary need for workers despite the period of need's overlap with a previous application's. In that case, the AAO based its decision on the employer's change in business model rather than on whether the duties could be performed by the workers employed under the previous application. The AAO found this change in business model significant because it established that the employer would no longer require the workers whose services the DOL found created the overlap. I therefore find that the decision in EAC 08-207-5113 does not stand for the proposition asserted or prove instructive for deciding this appeal.

I agree that the AAO ruling in WAC 07-149-50407 could reasonably be read as supporting the contention that an employer can have two seasonal needs with overlapping dates of need.² In WAC 07-149-50407, however, the employer presented two different jobs: construction worker and snow remover. In the instant case, the CO found that the Employer presented one job and did not accept that, since the occupation involves

955.687-014 SNOW SHOVELER (government ser.) alternate titles: snow remover

Shovels snow into truck or open sewer from streets and other public thoroughfares. Chops ice and packed snow, using pick or ice-chopper, to clear area around catch basins, fire hydrants, and street corners. May spread salt or thawing chemicals onto roadway from rear of moving truck, using shovel.

408.687-014 LABORER, LANDSCAPE (agriculture)

Moves soil, equipment, and materials, digs holes, and performs related duties to assist LANDSCAPE GARDENER (agriculture) 408.161-010 in landscaping grounds: Digs holes for plants and trees, using pick and shovel. Mixes fertilizer or lime with dirt in bottom of holes to enrich soil, places plants or trees in holes, and adds dirt to fill holes. Attaches wires from planted trees to stakes to support trees. Hauls or spreads topsoil, using wheelbarrow and rake. Waters lawns, trees, and plants, using portable sprinkler system, hose, or watering can. Spreads straw over seeded soil to prevent movement of seed and soil. Builds forms for concrete borders, using lumber, hammer, and nails. Mixes and pours cement for garden borders. Places decorative stones and plants flowers in garden areas. Mows lawns, using power mower.

² The AAO's ruling is not actually that clear, but it is certainly implied.

different tasks and duties depending on the season, the two types of temporary positions offered are different jobs and that the Employer therefore has two temporary needs.

I agree with the CO that the Employer has not established that its need for Landscaping and Groundskeeping Workers is so different in the winter and summer seasons that the CO must certify them as different jobs to be separate filled. A farmer, for example, does very different things in the winter and the summer, but the farmer is still a farmer regardless.

The Employer's second argument—that the CO could not base the denial on the fact that the same workers would be engaged for the second season of work—might be effective had the *Final Determination* contained such a finding. However, the CO did not base his denial on this ground. It instead appears that the CO merely observed this fact to underscore his finding that, despite the seasonal differences in their duties, the positions are the same.

The Employer's third argument—that the payroll summary actually supported its dates of need—becomes immaterial after concluding that the two seasonal positions are actually part-and-parcel of the same job.

The Employer's final argument on appeal is essentially that its winter season job as described fits the regulatory definition of seasonal work. As noted above, viewed in isolation, the application establishes a seasonal need as defined by the regulation. However, the CO properly considered the Employer's overall history of certification and found that the Employer's need for Landscaping and Groundskeeping Workers actually lasts for the entire year and therefore does not qualify as temporary. *See* 20 C.F.R. § 655.6(c).

Based on the foregoing, I find that the CO properly denied certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO's denial of certification is **AFFIRMED**.

For the Board:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, DC
WSC/TS