



Issue Date: 28 February 2012

BALCA Case No.: 2012-TLN-00019

ETA Case No.: C-11346-56213

In the Matter of:

NATURE'S WAY LANDSCAPING, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Ramon Cervantes
Agent, Alternative Labor Services
Lexington, Kentucky
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
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
REVERSING AND REMANDING IN PART
AND
AFFIRMING IN PART

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the 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, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On December 12, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from Nature's Way Landscaping, Inc. ("the Employer"). AF 76-194.¹ The Employer requested certification for eight landscaping and groundskeeping workers from February 15, 2012 to December 15, 2012. AF 76. The Employer's statement of temporary need provided that "[t]he jobs are seasonal because they take place [during a] specific period of time every year, where weather plays a big role." *Id.* The Employer added that groundskeeping help is not needed from the middle of December through the middle of February. *Id.*

With the Employer's application, it submitted copies of its 2011 and 2010 payroll records. AF 88-89. The Employer's records show that it had four permanent workers from March to November, 2011, and one permanent worker between December and February, 2011. AF 88. The four permanent workers worked between 35-40 hours per month during the months of April and November, 2011 and earned a total of \$5,600. *Id.* In 2011, the Employer had four temporary workers from April to November, 2011, and three temporary workers during March, 2011. The Employer had zero temporary workers from December through February 2011. *Id.* The four temporary workers worked between 35-40 hours per month during the months of April and November 2011 and earned a total of \$5,600. *Id.* The Employer's 2010 payroll report is identical to its 2011 payroll report. AF 89.

¹ Citations to the 194-page appeal file will be abbreviated "AF" followed by the page number.

On December 19, 2011, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer failed to establish that its need for nonagricultural services or labor is temporary in nature, as required by 20 C.F.R. § 655.21(a). AF 71-75. The CO found that the Employer’s payroll records showed that the Employer’s workers did not work more than 40 hours per month, and questioned whether the Employer has a full-time need for eight landscape laborers. AF 73-74. The CO required the Employer to submit a detailed statement of temporary need containing a description of the Employer’s business history and schedule of operations through the year, an explanation regarding why the nature of the Employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need, and an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need. *Id.*

The CO also required the Employer to submit supporting evidence and documentation to justify the chosen standard of temporary need. *Id.* The CO informed the Employer to include the following with its RFI response: 1) signed work contracts and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need; 2) annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need; 3) summarized monthly payroll reports for a minimum of one previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received, signed by the employer; and 4) other evidence and documentation that justifies the chosen standard of temporary need. *Id.*

The Employer responded to the RFI on December 28, 2011. AF 17-70. The Employer stated that its work recurs annually and is tied to a specific time of the year with a clearly established pattern based on the weather. AF 32. The Employer stated that

its workers remove winter debris from lawn areas and plant, prune, and fertilize lawns. *Id.* The Employer stated that the other duties during the growing season are mowing lawns, raking, blowing leaves, and trimming plants, and noted that it does not need workers between mid-December to mid-February. *Id.*

The Employer stated that it was requesting eight workers this year because it has an increase in customer contracts. AF 33. The Employer stated that “although our contracts read from March 1 [2012] [through] November 30, 2012, Nature’s Way requires employees to transfer the business from snow removal to landscape and then back from landscape to snow removal. Therefore, February 15 [2012] [through] December 15 [2012] is when the employees will be utilized, to assist the transition from season-to-season.” *Id.* The Employer also submitted proposed work contracts with its RFI response materials. Of these, only one was a signed contract. AF 39, 65, 105. This contract was signed “3/06” and was for work to be performed between April through November. AF 39, 65, 105.²

On January 25, 2012, the CO denied the Employer’s application, finding that the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.21(a). AF 11-16. The CO found that the Employer’s 2011 payroll report showed that the Employer had three to four temporary workers between March 2011 and November 2011, and zero temporary workers during the remainder of the year. AF 13-14. The CO found that the Employer failed to address the inconsistency between its payroll reports and its requested number of workers, and failed to explain why its temporary landscape laborers and permanent landscape laborers did not work more than 35 to 40 hours total per month. *Id.* As such, the CO found that the Employer’s full-time need could not be verified. *Id.* Additionally, the CO found that the contracts that the Employer submitted with its RFI response do not provide sufficient information to confirm that the Employer has a full-time need for eight workers. AF 15. Specifically, the CO found that of the 35 contracts submitted with the Employer’s application, and the eight contracts submitted with the Employer’s RFI response, only nine contracts indicate 2012 dates. Therefore, the CO found that the Employer failed to demonstrate that it has a

² The copy of the contract at AF 105 shows the date signed as “3/11,” rather than “3/06.” It appears that someone wrote “11” on top of “06.” Other than the date, the contract at AF 105 is identical to the contracts at AF 39 and 65.

full-time need for eight temporary landscaping and groundskeeping workers from February 15, 2012 to December 15, 2012. AF 16.

On February 7, 2012, the Employer requested BALCA review. The Employer stated that the CO misinterpreted the Employer's payroll records, and that the Employer intended to indicate that the permanent and temporary employees worked between 35-40 hours each per week, rather than per month. AF 7. The Employer stated that the reported total earnings per month is consistent with the laborers working between 35-40 hours per week, or 140 and 160 hours per month. *Id.* The Employer also argued that it did not submit contracts for 2012 because it does not require its customers to sign for a renewal of their contracts. *Id.*

The Board received the appeal file on February 14, 2012, and the CO filed a brief on February 21, 2012, arguing that the CO properly denied certification because the Employer failed to adequately address the concerns raised by the CO regarding the nature and scope of the Employer's need.

DISCUSSION

Temporary Need

The applicable H-2B regulation at 20 C.F.R. § 655.6(a) provides:

To use the H-2B program, the employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

The regulations require an employer asserting a seasonal temporary need to "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(h)(6)(ii)(B)(2).

In this case, the Employer stated that its work recurs annually, is tied to a specific time of the year with a clearly established pattern based on the weather, and indicated that it does not need workers between mid-December to mid-February. The Employer stated

that its workers remove winter debris from lawn areas and in the spring, the workers plant, prune, and fertilize lawns. The Employer stated that the other duties during the growing season are mowing lawns, raking, blowing, and trimming plants.

The Employer's 2011 and 2010 payroll records support its assertion that the nature of its need is temporary and seasonal. Although the CO found that the Employer failed to demonstrate that the Employer's need was full-time, it is clear that the Employer intended to convey that its workers each worked 35-40 hours per week, rather than per month. The earnings summary supports the Employer's position that its temporary and permanent employees worked between 35-40 hours per week, rather than per month. The Employer indicated that the total earnings received by its four temporary workers between April and November was \$5,600, which, if corresponded to laborers only working 35-40 hours per month, would reflect an hourly wage of \$35 - \$40 per hour. It is highly probably that the workers worked 35-40 hours a week at an hourly wage of \$8.75 - \$10 per hour.

Based on the foregoing, I find that the Employer has demonstrated that it has a temporary seasonal need for full-time H-2B workers. The Employer's statement and supporting evidence demonstrates that it has an increased need for workers between March and December based on weather patterns, and that it does not need additional workers between December and February.

Justification of Number of H-2B Workers Requested

The H-2B regulations require an employer to justify any increase or decrease in the number of H-2B positions being requested for certification from the previous year. 20 C.F.R. § 655.21(a)(4).

In this case, the Employer received certification for four H-2B workers in 2010 and 2011. This year, the Employer has requested certification for eight H-2B workers. Although the CO required the Employer to submit, among other things, evidence to support its need for eight workers, the Employer failed to submit this evidence. The CO requested that the Employer submit annualized and/or multi-year work contracts or work agreements with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each

month during the requested period of need. The Employer's RFI response only included one actual contract, which was signed in 2006. The other "contracts" submitted by the Employer are landscaping proposals that are only signed by the Employer. As such, they are not contracts and do not demonstrate that the Employer will have an increase in business this year. The Employer's argument that its increase in the number of H-2B workers requested is due to its additional 2012 contracts is not supported by any evidence in the record.

Based on the foregoing, I find that the CO properly determined that the Employer failed to justify its increase in the number of H-2B positions from the previous year.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's determination is **REVERSED** and **REMANDED** in part and **AFFIRMED** in part. The Employer's application is **REMANDED** for further processing on behalf of four H-2B workers.

For the Board:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge