



Issue Date: 04 March 2015

**BALCA Case No.:** 2015-TLN-00023  
**ETA Case Nos.:** H-400-14365-396739

*In the Matter of:*

**GROUNDTEK OF CENTRAL FLORIDA, INC.,**  
*Employer.*

## **DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

The above captioned matter arises under the H-2B nonimmigrant provisions of the Immigration and Nationality Act (“INA”), 8 USC § 1101(a)(15)(H)(ii)(b), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A (2009)<sup>1</sup> (collectively, “H-2B program”). It is before the Board of Alien Labor Certification Appeals (“BALCA” or the “Board”) pursuant to the Employer’s request for administrative review of the Certifying Officer’s *Final Determination* denying temporary labor certification under the H-2B non-immigrant program. For the reasons set forth below, the Certifying Officer’s denial in this matter is AFFIRMED.

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<sup>1</sup> All citations to 20 C.F.R. Part 655, Subpart A refer to the final rule published in the Federal Register on December 19, 2008 (“2008 Rule”), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the “2013 Interim Final Rule,” 78 Fed. Reg. 24047 (Apr. 24, 2013), and the order issued by the U.S. Court of Appeals for the Third Circuit in *Comité de Apoyo a Los Trabajadores Agrícolas v. Perez* (“CATA”), No. 14-3557 (3d Cir., Dec. 5, 2014). The Department has not yet implemented the Final Rule published in the Federal Register on February 21, 2012 (“2012 Rule”), 77 Fed. Reg. 10038, due to a Federal district court order enjoining the Department from implementing or enforcing it. *See Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (Apr. 26, 2012) (issuing a preliminary injunction enjoining the Department from implementing or enforcing the 2012 Rule) *affirmed* by 713 F.3d 1080 (11<sup>th</sup> Cir. 2013); 77 Fed. Reg. 28764 (May 16, 2012) (announcing “the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation”); *Bayou Lawn & Landscape Services v. Secretary of Labor*, Case No. 3:12-cv-00183-MCR-CJK, 2014 U.S. Dist. LEXIS 180137 (N.D. Fl. Dec 18, 2014) (vacating the 2012 Rule and permanently enjoining the Department from implementing or enforcing it). Nor has the Department implemented the Final Rule published in the Federal Register on January 19, 2011 (“2011 Wage Rule”), 76 Fed. Reg. 3452. *See* 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying the effective date of the 2011 Wage Rule “in order to comply with recurrent legislation that prohibits [the Department] from using any funds to implement it, and to permit time for consideration of public comments sought in conjunction with the [2013 IFR]”); 79 Fed. Reg. 11450 (Mar. 14, 2014) (announcing that the legislation prohibiting the Department from using funds to implement the 2011 wage rule had expired, but that the Department would continue to rely on the wage methodology in the 2013 Interim Final Rule until such time as a new Final Rule was promulgated).

## **BACKGROUND**

### *H-2B Program*

The H-2B program permits employers to bring foreign nationals to the United States on a temporary basis to perform temporary, nonagricultural services or labor “if unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). An employer seeking to hire foreign workers under this program must apply for and receive a “temporary labor certification” from the U.S. Department of Labor (“DOL”), Employment and Training Administration (“ETA”) prior to filing an H-2B nonimmigrant petition with the Department of Homeland Security (“DHS”). See 8 C.F.R. § 214.2(h)(6)(iii). To apply for such certification, an employer must file an *Application for Temporary Employment Certification* (ETA Form 9142) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. Applications for temporary labor certification are reviewed by a Certifying Officer (“CO”), who will either request additional information or issue a determination granting or denying the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, then the employer may seek expedited administrative review before BALCA. 20 CFR § 655.33(a).

### *Procedural History*

The Employer in this matter, Groundtek of Central Florida, Inc (“Employer”), filed an *Application for Temporary Employment Certification* (ETA Form 9142) with the CNPC on December 31, 2014. Appeal File (“AF”) 133-155. In this application, the Employer requests temporary labor certification for 60 Landscaping & Groundskeeping Workers from January 15, 2015 through October 15, 2015, based on a seasonal standard of temporary need. *Id.* The application includes the following statement of temporary need:

Groundtek of Central Florida, Inc. is a full-service landscape company, that provides services with landscape installation, landscape maintenance, irrigation, pest control and tree services. In order to offer the full scale of landscaping services to our growing clientele, Groundtek of Central Florida requires numerous landscaping laborers throughout Florida's growing season to fulfill our continuing contracts. Therefore, we wish to hire 60 temporary seasonal Landscape Laborers to perform a variety of landscaping services. This includes preparing plants, performing irrigation of plants and shrubbery, mow, rake, plant, prune, install mulch and perform ground preparation. During the season from the month of February through December, there is a higher demand for our services, and to meet each of our customers [sic] contracts, we temporarily require landscape laborers for 10 months. Due to the growth and high demand of our services in the last 7 years, we require more temporary seasonal workers than our last application. We have continuously tried to fill these temporary positions but have not been able to meet our needs.

AF 134.

On January 7, 2014, the CO issued a *Request for Further Information* (RFI) notifying the Employer that its application did not include adequate attestations to justify the dates of temporary need. AF 129-132. “Specifically,” the CO stated, “Section B., Item 9 [of ETA Form 9142] was not sufficient because the Statement of Temporary Need did not include a statement which justifies the change in the employer’s requested dates of need.” AF 131. The CO observed that the Employer had previously sought certification for 55 Landscaping and Groundskeeping Workers from March 11, 2014 through December 24, 2014, and noted that the Employer did not adequately explain the change in its dates of need from this application to the current application. *Id.* To remedy this deficiency, the CO directed the Employer to provide: (1) a detailed statement of temporary need, including an explanation of the chosen standard of temporary need (seasonal) and the proposed change in dates of need from the previous year; and (2) supporting evidence and documentation, such as work contracts/agreements or payroll records, that justified a seasonal standard of temporary need and the dates for which the Employer requested certification. AF 131-132.

The Employer responded to the RFI on January 19, 2015. AF 24-128. In its response, the Employer explained its seasonal need for Landscaping & Groundskeeping Workers as follows:

Groundtek of Central Florida, Inc. provides landscaping and Groundskeeping services throughout the year to clients including Florida Department of Transportation (3 large contracts), Orange County (several contracts), City of Orlando (several contracts), City of Altamonte Springs, Lockheed Martin Corporation and many other municipal, commercial and industrial customers.

Recently, Groundtek of Central Florida, Inc. has been awarded two contracts with The Villages and the Expressway Authority that combined require the hand installation of approximately 500,000 bales of pine straw mulch to hundreds of acres of landscaped beds located on the right-of-ways throughout Sumter, Lake, Orange and Seminole Counties. Contractually, this is done twice a year, from January through April and From June through August. Due to the new contracts, to satisfy all of our clients [sic] needs throughout the season, the dates of temporary employment have now changed to January until October.

AF 26. The Employer also provided the following addendum to its statement of temporary need:

We have recently been awarded two contracts with the Villages and the Expressway Authority that combined require the hand installation of approximately 500,000 bales of pine straw mulch to hundreds of acres of landscaped beds located on the right-of-ways throughout Sumter, Lake, Orange and Seminole Counties. Contractually this is done twice a year, from January through April and from June through August. For this reason our seasonal need for laborers has changed to January 15, 2015 until October 15, 2015.

Additionally, we continue to provide services to our regular clients including Florida Department of Transportation (3 large contracts), Orange County (several contracts), City of Orlando (several contracts), City of Altamonte Springs, Lockheed Martin Corporation and many other municipal, commercial and industrial customers.

In order to suit the needs of our growing clientele, Groundtek of Central Florida, Inc. requires numerous landscape and nursery laborers throughout the Florida's growing season to fulfill our continuing contracts. Previously, Groundtek of Central Florida Inc., required Landscape Laborers from March 11, 2014 until December 24, 2014, however due to the new contacts in place, our needs have changed accordingly.

Groundtek of Central Florida Inc., as in the past, continues to test and solicit the labor market in order to fulfill its labor needs, but does not find willing and qualified local U.S. workers to fill the position of Landscape Laborer. We are confident that we have conducted thorough recruitment for this position and that we have complied with the regulations of the U.S. Department of Labor. We therefore request the Department of Labor to approve our labor certification for sixty (60) H-2B temporary, seasonal Landscaping and Groundskeeping Workers.

AF 34. As evidence to justify its purported seasonal need for the workers, the Employer provided a copy of its contract with the Expressway Authority (AF 36-126) and summarized payroll information for 2014 (AF 128).

The CO reviewed the documentation in the Employer's response to the RFI and determined that the Employer had a year-round, continuous need for Landscaping & Groundskeeping workers because the Employer's contract with the Expressway Authority ran for a continuous three year period of time, and the "Annual Landscape Maintenance Schedule" attached to the application "lay[ed] out the [E]mployer's required work schedule for the entire year." AF 23. Accordingly, on January 28, 2015, the CO issued a *Final Determination* denying certification on the ground 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 19-23.

By letter dated February 5, 2015, and received by BALCA on February 9, 2015, the Employer requested expedited administrative review pursuant to 20 C.F.R. § 655.33(a). AF 1-18. Shortly thereafter, BALCA issued a Notice of Docketing and Expedited Briefing Order providing both parties the opportunity to submit a brief on an expedited basis. The CO timely filed a brief; the Employer did not submit additional argument.

## **DISCUSSION**

An employer seeking temporary labor certification under the H-2B program must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying position is temporary. 20 C.F.R. § 655.6(a), citing 8 C.F.R. § 214(h)(6)(ii); *see also* 8 U.S.C. §1101(a)(15)(H)(ii)(b). The employer must justify its job opportunity to DOL

under one of the following four standards of temporary need, as defined by the Department of Homeland Security (“DHS”): a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 20 C.F.R. § 655.6(b), citing 8 CFR 214.2(h)(6)(ii)(B).

In the instant case, the CO denied certification because the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.21 (a). AF 19-23. The Employer asserts that it has a seasonal need for 60 Landscaping & Groundskeeping workers from January 15, 2015 through October 15, 2015. To qualify for the H-2B program under a “seasonal” standard of temporary need, the Employer “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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). A job opportunity “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)(2). Absent unusual circumstances, DOL will deny temporary labor certification when an employer has a recurring seasonal need lasting more than 10 months. 20 C.F.R. § 655.6(c).

The Employer’s application history indicates that its need for Landscaping & Groundskeeping workers is not tied to a season of the year by an event or pattern but, rather, is year-round, or at the very least, unpredictable and subject to change. In its prior application, the Employer reported a seasonal need for Landscaping & Groundskeeping workers from March 11, 2014 through December 24, 2014. AF 131.<sup>2</sup> The period of need in its current application began almost two months earlier, on January 15, 2014, and ended over two months earlier, on October 15, 2014. AF 135. The Employer’s “seasonal” need for Landscaping & Groundskeeping workers therefore appears to span all 12 months of the year. The months within this “season” are further blurred by the statement of temporary need in the Employer’s current application, which reports that the Employer experiences a higher demand for Landscaping & Groundskeeping workers from February through December, despite the fact that the period of need in this application runs from January through October. AF 135. The Employer relies on new contracts to justify the change in its seasonal need from last year’s application. But this justification only confirms that the Employer’s need for Landscaping & Groundskeeping workers is subject to change and unpredictable, which, by definition, cannot be classified as a seasonal need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). Neither the contract with Expressway Authority nor the summarized payroll records rebut this finding.

In sum, the record does not support that the Employer’s need for Landscaping & Groundskeeping workers is tied to a season of the year by an event or pattern. I find that the Employer has failed to demonstrate that its need for H-2B workers is temporary as is required under 20 C.F.R. § 655.6, and that the CO correctly found that the Employer did not establish a seasonal need for Landscaping & Groundskeeping workers. I therefore affirm the CO’s denial of the Employer’s application on this basis.

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<sup>2</sup> The CO clearly raised this issue in the RFI and the Employer has never disputed this fact.

**ORDER**

In light of the foregoing, the Certifying Officer's decision denying certification is **AFFIRMED.**

**SO ORDERED.**

For the Board:

**STEPHEN R. HENLEY**  
Acting Chief Administrative Law Judge