U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 June 2016

BALCA Case No.: 2016-TLN-00045
ETA Case Nos.: H-400-15336-418408

In the Matter of:

THREE SEASONS LANDSCAPE CONTRACTING SERVICES, INC. DBA THREE SEASONS LANDSCAPE,

Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: R. Wayne Pierce, Esq.
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For the Employer

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Office of the Solicitor of Labor
Division of Employment and Training Legal Services
For the Certifying Officer

Before: DANA ROSEN
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to Three Seasons Landscape Contracting Services, Inc., dba Three Seasons Landscape's, ("Employer") request for review of the Certifying Office's Final Determination in the above-captioned H-2B temporary labor certification matters.[1] The H-2B program permits employers to

[1] On April 29, 2015, the U.S. Department of Labor and the U.S. Department of Homeland Security jointly published an Interim Final Rule ("IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655 and 29 C.F.R. Part 503). Pursuant to

hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time, seasonal, peakload, or intermittent basis, as defined by U.S. Department of Homeland Security regulations. 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). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor. 8 C.F.R. §214.2(h)(6)(iii). A Certifying Officer ("CO") in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. §655.61(a).

SUMMARY OF FINDINGS

Based on the evidence in the record, the statute, the regulations, the case law, and the Parties' briefs, the undersigned affirms the Certifying Officer's Denial of Temporary Labor Certification. Employer is a job contractor under the regulations. 20 C.F.R. § 655.5. The evidence in the record established that Employer was a job contractor because it "will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers." 20 C.F.R. § 655.5; see also MJC Labor Solutions, LLC, 2011-TLN-00006 (February 1, 2011). Therefore, Employer should have filed a separate Application for Temporary Employment Certification (ETA Form 9142B) for each employer-client with which it entered into a contract for labor and services. The Certifying Officer did not act in an arbitrary or capricious manner in denying Employer's Application for Temporary Employment Certification.

STATEMENT OF THE CASE

On January 11, 2016, Employer submitted its Application for Temporary Employment Certification (ETA Form 9142B). AF (330-376).[2] Employer requested to hire 45 "Landscaping Laborers" for the period of April 1, 2016 to December 17, 2016. (AF 330). The "Nature of Temporary Need" was seasonal. (AF 330). Employer filed its application as an "Individual Employer." (AF 331). Employer provided the following job duties for the aliens it was seeking to hire:

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

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this rule, the U.S. Department of Labor will process an Application for Temporary Employment Certification filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR. Id. at 24,110. The Employer filed two Applications for Temporary Employment Certification on January 8, 2016, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

[2] In this decision, AF is an abbreviation for Appeal File.

> Work will be supervised by TSL roving bilingual supervisor or another authorized company representative. Work will be done for residential and commercial customers.
> (AF 332).

The intended work was to be performed in the Pennsylvania counties of Chester, Delaware, Montgomery, and Philadelphia, as well as New Castle County in Delaware. (AF 333, AF 337).

On March 2, 2016, the CO issued the first Notice of Deficiency (NOD), which contained three deficiencies. (AF 315-322). For Deficiency #1, the CO stated that Employer failed to comply with 20 C.F.R. § 655.18(a)(1)[3] because Employer's job order contained components that were not listed on or consistent with its ETA Form 9142. (AF 319). For Deficiency #2, the CO stated that Employer's "job order included a statement regarding inbound and outbound transportation; however, it did not include the minimum and maximum amounts provided for daily travel subsistence." (AF 320). The CO cited to 20 C.F.R. § 655.18(b)(12).[4] For Deficiency #3, the CO stated that Employer failed to submit a complete and accurate ETA Form 9142 pursuant to 20 C.F.R. § 655.15(a). (AF 322). Specifically, Employer listed two different Federal Employer Identification Numbers (FEIN) on its ETA Form 9142 and its Prevailing Wage Determination (PWD). Employer also listed two different zip codes on its ETA Form 9142B. (AF 322).

On March 2, 2016, Employer responded to the first NOD. Employer made the necessary modifications to its job order and ETA Form 9142 to comply with the NOD.[5] (AF 293-314).

On March 8, 2016,[6] the CO issued a second NOD. (AF 286-292). The CO determined that Employer was actually a job contractor and therefore incorrectly completed its ETA Form 9142. The CO cited to 20 C.F.R. § 655.5[7] and 20 C.F.R. §655.19(a),(b).[8] The CO stated that the

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[3] 20 C.F.R. § 655.18(a)(1) states:

> Prohibition against preferential treatment. The employer's job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

[4] An employer's job order must "[d]etail how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, if the worker completes 50 percent of the period of employment covered by the job order, consistent with § 655.20(j)(1)(i)." 20 C.F.R. § 655.18(b)(12).

[5] The undersigned infers that the CO found that Employer successfully complied with the first NOD as the deficiencies listed in the first NOD were not contained in the second NOD.

[6] NOTE: The Table of Contents of the Appeal File incorrectly stated that the date of the second NOD was March 2, 2016.

[7] 20 C.F.R. § 655.5 states, in part:

"Chicago NPC has reason to believe that employer may be acting as a job contractor (along with employer MJC Labor Solutions, LLC) but, is filing a single application for multiple employer-clients. Per the above regulation, a different *Application for Temporary Employment Certification* must be filed for each employer-client job opportunity and each area of intended employment." (AF 290). The CO ordered that Employer must answer the following questions and provide the additional information requested so that the CO could make the determination as to whether Employer was a job contractor:

1. Does the applicant intend to have an employer relationship with respect to H-2B employees or related U.S. workers hired pursuant to this *Application for Temporary Employment Certification*? An Employer, as defined in the Department's regulations at 20 CFR 655.5, is an entity that meets the following criteria:
    a. Has a place of business (physical location) in the U.S. and a means by which it may be contracted;
    b. Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and
    c. Possesses, for purposes of filing an application, a valid Federal Employer Identification Number (FEIN).
2. Has the applicant contracted or does it intend to contract on a temporary basis to one or more employers the services or labor of the H-2B workers covered by this *Application for Temporary Employment Certification*?
3. Will the owner, Mr. Carl Hemphill, or a direct employee on Mr. Hemphill's payroll, supervise each temporary worker and each worksite on a daily basis?
4. If the applicant responded yes to question 2, the applicant must provide the following information for each client employer:
    a. Name and business location;

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

[8] 20 C.F.R. § 655.19 states:

(a) Provided that a job contractor and any employer-client are joint employers, a job contractor may submit an Application for Temporary Employment Certification on behalf of itself and that employer-client.
(b) A job contractor must have separate contracts with each different employer-client. Each contract or agreement may support only one Application for Temporary Employment Certification for each employer-client job opportunity within a single area of intended employment.

b. Indication as to whether the employer client is an affiliate, branch, or subsidiary of your business (Yes/No);
c. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control or supervise the manner and means by which the work will be performed (Yes/No);
d. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any responsibility for determining the skills and/or training required to perform the activities in the job opportunity (Yes/No);
e. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control the source of the instrumentalities and tools required for accomplishing the work (Yes/No);
f. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control the location of the work to be performed (Yes/No);
g. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority over when and how long to perform the work (Yes/No); and
h. Indication as to whether the work to be performed is a part of the regular business of the client employer or any person employed by the client employer who is not your employee (Yes/No).

(AF 290-291).

In the second NOD, the CO stated:

> For each client employer where the applicant responded yes to any one of the questions listed [4]c through [4]h, the applicant must explain: 1) the terms, conditions, and extent of such authority, power or control, including whether such authority, power or control is contractual; and 2) whether the client employer has also filed a separate Application for Temporary Employment Certification for the same job opportunities and time period as the instant *Application for Temporary Employment Certification*.
>
> If, based on the responses to the above questions the applicant believes that it has incorrectly chosen the type of employer in Section C., Item 17., the applicant must amend that item to correctly describe its employer type.

> AND
>
> If the employer meets the above definition of a job contractor, the employer must amend the current application so that the filing consists of a single joint employer relationship with one employer-client in a single area of intended employment.
> (AF 291-292) (emphasis in original).

On March 9, 2016, Employer responded to the second NOD. (AF 234-285). Employer responded to the CO's question number 1 by listing its address, phone number, and fax number. Employer stated that it had an employer-employee relationship with respect to the H-2B workers and the U.S. workers in corresponding employment, including the ability to hire, pay, fire, supervise or otherwise control the work of employees. Employer stated that it possessed a valid FEIN. (AF 242).

To support its response to the CO's question 1b, Employer submitted several documents in order to establish that it was an Employer under the H-2B regulations. Employer submitted its Supervised Landscape Order Form, which had the following "Important Reminders to Customers":

> - "Please fill out this form and submit it to the Roving Supervisor or TSL Management prior to work commencement. Please do not give any orders to our worker.
> - Any requests or orders should be made directly to TSL's Supervisor or Management Staff who will in turn supervise TSL's workers and instruct them on what tasks need to be performed.
> - The Roving Supervisor will be making site visits for supervision purposes, quality control, translations, change orders, training purposes or any other work.
> - TSL alone is responsible for the supervision of all H-2B employees. If any issues or problems arise, please deal directly with TSL Roving Supervisor or other TSL Management, who will in turn supervise the worker and if necessary, discipline the worker."
>
> (AF 247; see also AF 243).

Employer submitted a Supervisor Site Visit Control Form, an Employee Evaluation Report, and a Job Offer Letter as further evidence that it controls, supervises, and evaluates its H-2B employees. (AF 243, AF 248-251). Employer emphasized that the Job Offer Letter for the roving supervisor specifically stated, "The customers are not allowed to supervise our employees." (AF 250). Finally, Employer submitted a sample contract titled Agreement for Supervised Seasonal Landscaping Labor Services, which stated:

> As the employer, Three Seasons Landscape has the right to control the manner and means by which the work is accomplished. Three Seasons Landscape has the sole authority to supervise and

> discipline all employees. Three Seasons Landscape will exercise the sole right to discipline, suspend or terminate their employees who do not perform their job duties or do not represent their company in the best possible manner.
> (AF 252; see also AF 244).

In response to the CO's second question in the second NOD, Employer stated:

> No. The Applicant has signed written contracts with both residential and commercial customers. But, in all cases, Three Seasons Landscaping has contractually provided that it is the sole employer of any workers, whether H-2B or US workers, who are involved in performing the landscaping services to any residential or commercial customers. The Applicant owns both trucks and landscaping equipment, and i[t] also leases equipment when necessary. But, with respect to its employees, Three Seasons is a sole and individual employer and has been from the time of its incorporation. Our contract speaks for itself. . . . Furthermore, we bid on jobs and perform them for both residential and commercial customers with our own employees. We bid on jobs during the Spring, Summer and Fall.
> (AF 244).

In response to the CO's third question in the second NOD, Employer stated:

> The owner, Mr. Carl Hemphill, or a direct employee on Mr. Hemphill's payroll will be involved in supervising each temporary worker and each worksite. Because there may be many worksites, Three Seasons Landscape cannot guarantee that Mr. Hemphill or a direct employee of his will be *physically present* at each and every worksite on a daily basis, but weekly instructions to the employees will be given, in accordance with the Supervised Landscape Labor Order Form, the Roving Supervisor will be [sic] regular visits during the week, and either Mr. Hemphill or a direct employee of his will be available by telephone at all times, in the event a problem were to occur. Three Seasons is involved in every facet of the employment of both its H-2B and domestic workers.
> (AF 244) (emphasis in original).

In response to the CO's fourth question in the second NOD, Employer stated, "Because the answer to Question 2 was 'No', there is no response required to this section." (AF 244). Employer concluded that it was not a job contractor and that there was "no need to amend the application so that the filing consists of a single joint employer relationship." (AF 245).

Employer stated that MJC Labor Solutions "assists companies who seek legal, seasonal, immigrant workers. This assistance is strictly limited to the H-2B Application Process. The . . .

workers, when hired, become employees exclusively of the assisted companies, and are not employed by MJC." (AF 91). Employer stated that MJC Labor Solutions LLC also "has a small engine repair shop for landscaping equipment." (AF 91). In its Non-Acceptance Denial Letter, the CO determined that MJC Labor Solutions was a Foreign Labor Recruiter. (AF 135). Between February 1, 2016 and April 25, 2016, Gabriela Orozco of MJC Labor Solutions, on behalf of Employer, sent case status emails to the Chicago National Processing Center. (AF 186-233).

On May 2, 2016, the CO issued its Non-Acceptance Denial Letter. (AF 167-185). The CO determined that the Chicago NPC still had reason to believe that Employer "may have been acting as a job contractor (along with employer MJC Labor Solutions, LLC) but was filing a single application for multiple employer-clients." (AF 171). The CO stated that based on the answers, evidence, and documentation submitted in response to the second NOD, "the Department has determined that the employer meets the definition of a job contractor and, thus, must adhere to the filing requirements at 20 C.F.R. § 655.19. We base this determination on the totality of the circumstances and evidence presented by Three Seasons Landscaping in its application for temporary labor certification." (AF 173).

The CO stated that "[j]oint employment is defined as circumstances in which two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, in which case the employers may be considered to jointly employ that employee." (AF 173-174). The CO explained that "[a]n employer may be considered a joint employer if it has an employment relationship with an individual, even if the individual may be considered the employee of another employer." (AF 174). The CO cited to 20 C.F.R. § 655.5[9] for the factors relevant to employment status that it would consider in determining whether Three Trees Landscaping was a joint employer/job contractor. (AF 174).

The CO determined that the clients of Three Seasons Landscaping "exert control and discretion in the work activities . . . including the dates and chronological order of services, which worker is to perform the tasks, how many hours of work will be required to complete the tasks, and where the work will be performed." (AF 174).

The CO stated that the fact that Employer only provides safety equipment but not landscaping equipment to its employees is evidence that Employer is a job contractor and that its clients are joint employers/employer-clients.[10] (AF 174). The CO cited to Employer's Job Offer Letter for

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[9] Pursuant to 20 C.F.R. § 655.5:

> Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms employee and worker are used interchangeably in this subpart.

[10] Pursuant to 20 C.F.R. § 655.5:

the Roving Bilingual Supervisor, which stated under bullet point number three that Employer "provides only safety equipment to our employees, but does not provide other landscaping equipment. Our customers provide the equipment necessary to complete the work that is requested." (AF 250, AF 174). The CO also cited to Employer's Agreement for Supervised Seasonal Landscaping Labor Services and Employer's Financial Cost Obligations of Client, which included language that the clients can lease the necessary tools to Employer in order to complete the services being requested. (AF 174, AF 253).

The CO determined that the commercial clients of Employer are actually employer-clients because Employer required them to attest that they had not laid off U.S. workers, that the job opportunity was open to U.S. workers, and that the landscaping jobs would be performed in specific areas within Philadelphia and Delaware. The CO stated that "[t]hese types of attestations are indicative of the job contractors and their employer-client relationships. An individual Employer should not require its customers to make such attestations." (AF 174-175).

The CO determined:

> Regarding the provision that a job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring paying and firing the workers, the department's experience is that some job contractors do exercise minimal levels of supervision and control, for example, by sending a foreman to check that a crew is working, the regulations define a job contractor as one who does not exercise <u>substantial, direct day-to-day</u> supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.
> (AF 175) (emphasis in original).

The CO determined that Employer supplied landscaping workers to residential and commercial clients and that the clients were the ones to exercise substantial, direct day-to-day control and supervision of the activities of the workers. (AF 175). The CO stated that while Employer "regularly refers to having the 'right' to control the manner and means by which work is performed and to supervise and discipline all employees," the Roving Bilingual Field Supervisor is insufficient to exercise this supervision and control. (AF 175-176). The CO stated that Employer provided no evidence that it regularly employed a Roving Supervisor and that the position would only be filled once the H-2B workers were hired. (AF 176). The CO determined that Mr. Hemphill would also not be an adequate supervisor because he "is not only the owner of

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Employer-client means an employer that has entered into an agreement with a job contractor and that is not an affiliate, branch or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Three Seasons Landscaping but is also an employee of MJC Labor Solutions that engages in the international recruitment of workers to the United States." (AF 176). The CO stated:

> Therefore, the Department is not convinced that even Mr. Hemphill will be fully employed in exercising substantial, direct day-to-day supervision and control over its landscaping workers. Indeed, in its response to the Department's NOD, [Employer] stated, "because there may be many worksites, [Employer] cannot guarantee that Mr. Hemphill or a direct employee of his will be *physically present* at each and every worksite on a daily basis, but weekly instructions to the employees will be given, in accordance with the Supervised Landscape Labor Order Form, the Roving Supervisor will be regular visits [sic] during the week." [emphasis added in original] The fact that a Roving Supervisor provides weekly summary instructions to Three Seasons Landscaping employees, which is based on a labor order form that is completed entirely by the employer's clients, is not sufficient to demonstrate substantial and direct day-to-day supervision.
> (AF 176).

The CO determined that the fact that Mr. Hemphill or a direct employee will be available by telephone at all times; the fact that Employer agrees to take full responsibility of the H-2B employees; and the fact that Employer states that customers are not allowed to supervise employees are "insufficient in demonstrating that it actually exercises the kind of supervision and control necessary to qualify as an employer-as opposed to an employer who is a job contractor which the Department has determined." (AF 176).

The CO stated that the Agreement for Supervised Seasonal Landscape Service "clearly demonstrates that the client has the discretion and determines, on a day-to-day basis, the work activities to be performed, the dates and chronological order of services, which worker is to perform the tasks, how many hours of work will be required to complete the tasks, and where the work will be performed." The CO concluded that this meant the clients, rather than Employer, exercised substantial supervisory control of the H-2B employees. (AF 176). The CO stated that the Agreement for Supervised Seasonal Landscaping Labor Services focused on the number of workers needed by the client rather than the actual services that would be performed. (AF 177). The CO determined that Employer "merely identifies the broad activities in which the labor suppled to its client can perform." (AF 177). The CO determined that the "fact that Three Seasons Landscaping employs a bilingual Roving Supervisor does not demonstrate that it is controlling the manner and means by which work is being performed at the client-site(s)." (AF 177).

The CO determined that Employer was a job contractor. The CO found that "although [Employer] assists its clients in screening potential employees for skills such as punctuality, reliability, attention to detail, and ability to follow written and/or oral instructions, the client is responsible for the more detailed skills needed to operate and maintain the tools and equipment (except for safety gear) that is necessary to perform the actual work needed." (AF 177) The CO

stated that the client was also required to supply Employer with its insurance policy and to include Employer as an additional insured. (AF 177). The CO determined that per the Agreement for Supervised Seasonal Landscaping Labor Services, Employer was dependent on the client to report the number of hours and overtime hours that each employee worked. The client was also required to guarantee full time work each week. The CO stated, "These are supervisory controls that should be exercised by Three Seasons Landscaping and not the client." (AF 177).

The CO concluded:

> Based on the totality of the employer's response, the Department has determined that the employer, Three Seasons Landscaping, is operating as a job contractor because it (A) meets the regulatory definition of a job contractor and (B) has demonstrated that it is in joint employment with its client(s). The employer has failed to meet the job contractor filing requirements. Therefore, the employer's application has been denied.
> (AF 177).

The CO also included an addendum to its Non-Acceptance Denial Letter. The addendum was not listed as a separate deficiency but requested that Employer "note" the following:

> In response to the NOD, Three Seasons Landscaping provided the Department with a document entitled, "Activities of MJC Labor Solutions LLC", signed by Mr. Carl Hemphill. Mr. Hemphill is not only the owner of Three Seasons Landscaping but is also an employee of MJC Labor Solutions that engages in the international recruitment of workers to the United States. . . . MJC Labor Solutions is the parent company of Latin Labor, of which Mr. Hemphill is listed as the contact person. Based on this information, it appears there may be a relationship between Three Seasons Landscaping and MJC Labor Solutions. Additionally, the response to the NOD was submitted by Gariela [sic] Orozco of MJC Labor Solutions LLC, indicating that a foreign labor recruiter is a participant in this application. Based on the foregoing, the Department has determined that the employer does use the services of a Foreign Labor Recruiter and thus the applicable provisions apply.
> (AF 177).

<u>Employer's Brief</u>

On May 17, 2016, Employer submitted its Request for Administrative Review and an accompanying legal brief outlining its legal position based on the evidence in the record. (AF 1-144).

Employer agreed with the CO that it was an Employer under the Act and regulations and that the H-2B employees were employees under the Act and regulations.

Employer disagreed that it was a "job contractor" pursuant to 20 C.F.R. § 655.5. Employer provided nine main arguments as to why the CO acted in an arbitrary and capricious manner when it determined that Employer was a job contractor.

Employer stated, "First, the Certifying Officer failed to properly apply the DOL regulation" regarding the definition of a job contractor. Employer stated that the "requisite degree of 'supervision and control' is limited by the phrase 'other than hiring, paying and firing workers'" in 20 C.F.R. § 655.5. Employer stated:

> Hiring, paying, and firing are several classic factors for establishing an employer relationship under § 655.5, but the definition of "job contractor" assumes that "hiring, paying and firing" would have qualified as "substantial, direct day-to-day supervision and control," so they were carved out for policy reasons as insufficient in themselves. The CO failed to explain why hiring, paying and firing has characteristic traits to show the requisite supervision and control, yet the evidence that Employer presented is neither quantitative or qualitatively sufficient to attain that same status.
> (AF 18).

Employer's second argument was that the CO did not explain the "inconsistency" that "[g]arden-variety employers are merely obligated to have 'an employer relationship,' and to have sufficient control that the workers are deemed 'employees,' 20 C.F.R. §655.5, yet this is sufficient to qualify as 'substantial, direct day-to-day supervision and control.'" (AF 18-19).

Employer's third argument was that the CO failed to explain who was providing "substantial, direct day-to-day supervision and control." Employer stated, "The commercial clients are contractually prohibited from exercising supervision or control, so that rules them out. Having ruled out Employer as the source of this supervision and control, the CO should have explained who played this role." (AF 19).

Employer's fourth argument was that the "CO failed to consider, much less explain, any accepted meaning of terms such as 'substantial,' 'direct,' or 'day-today.'" Employer argued that it met all of these requirements. (AF 19).

Employer's fifth argument was that the "CO failed to consider the cumulative impact of all of Employer's supervisory and control techniques." Employer stated that it provided supervision and control techniques through "continuous written job descriptions, continuous accessibility via telephone and text," "regular or frequent (although not necessarily every day) on-site supervision by management," "staff meetings at least once per week," work instructions, and "the provision of all necessary training." Employer stated that the "CO never considered the important aspect of

overall impact of these multiple techniques, nor did the CO articulate a standard or explain why these techniques in the aggregate remained deficient." (AF 20).

Employer's sixth argument was that the CO "failed to consider [that]. . . Employer has a considerable book of business with private, residential owners, a working relationship under which it is not even arguable functioning as a job contractor." (AF 20-21).

Employer's seventh argument was that the CO "seems to have assumed - without stating so - that Employer was obligated by the regulations to guarantee daily, on-site, 'eyeball-to-eyeball' supervision." Employer argued that this was arbitrary and capricious to use this standard because it was not expressly codified in the regulations. (AF 21).

Employer's eighth argument was that the CO "arbitrarily and capriciously failed to consider or explain why the Department has repeatedly certified Employer's business operations." Employer stated that its applications were approved in 2013, 2014, and 2015 using "the exact same business model." (AF 21).

Employer's ninth and final argument was that the CO was "merely speculating" on multiple occasions. Employer stated examples:

- "Commercial clients control the dates and order of services. Appx 105, 107.[11] Not so. Commercial clients make requests, just like private homeowners make requests, but Employer accomplished all supervision and controlled work hours and work methods, and clients are contractually prohibited from controlling workers. Appx 066, 071, 072, 075, 078, 080-82.
- Commercial clients control which worker performs the jobs. Appx 105, 107. Not so. Commercial clients request how many workers they think might be needed, but Employer determines which workers are assigned, and clients are contractually prohibited from controlling workers. Appx 066, 072, 072, 075, 077.
- Commercial clients control how many hours of work are required to complete the job. Appx 105, 107. Not so. Commercial clients make requests, just like private homeowners make requests, but Employer controls work hours and clients are contractually prohibited from controlling workers. Appx 066, 071, 072, 075, 078, 080-82.
- Commercial clients control which work activities are performed. Appx 107. Not so. Commercial clients make requests, just like private homeowners make requests, but Employer controls work activities and clients are contractually prohibited from controlling workers. Appx 066, 071, 075, 077.

[11] "Appx" stands for the appendix pages attached to Employer's brief. All of these pages are in the Appeal File. However, the copy of the Appeal File cuts off the appendix numbers on some of the pages. The undersigned has attempted to cite to the Appeal File whenever possible, but it is not possible in this instance where the appendix numbers are cut off.

- Commercial clients control the necessary tools and equipment. Appx 105. Not so. Although Employer has the option of leasing tools and equipment, it is merely an option and not a requirement, and Employer has its own tools which are used as needed, and provides all personal protective equipment. Appx 067, 075, 078.
- Commercial clients control the work location. Appx 105, 107. Not so. Employer controls the work location. Appx 078.
- Commercial clients are responsible for the 'detailed skills' for employees to operate and maintain tools and equipment. Appx 108. Not so. Employer is responsible for all training, and clients are contractually prohibited from determining skills or training. Appx 071, 075, 077, 080-82, 085.
- Residential clients control the workers. Appx 105. Not so. The special forms are for the use of commercial clients only. Appx 071, 077.
- Employer has only a single supervisor. Appx 107. Not so. Supervision is provided by the roving supervisor, owner, office manager, and the owner's wife. Appx 067, 075.
- The roving supervisor is responsible for 'eastern Pennsylvania and Delaware.' Appx 107. Not so. All jobs are within the greater Philadelphia metropolitan area, Appx 075, and 85% of them are within 20 miles of the office, a fact that is readily verifiable via the business addresses, Appx 075.
- The owner's supervision would be diverted because of working for MJC. Appx 107. Not so. MJC is an H-2B agent, the busy season for which occurs during the landscaping off-season. Appx 064." (AF 23-24).

Certifying Officer's Brief

On June 6, 2016, the undersigned received the Solicitor's Brief on behalf of the Certifying Officer requesting that the Board of Alien Labor Certification Appeals (BALCA) affirm the Certifying Officer's determination to deny the application of Employer.

a. Part 1

The Solicitor, on behalf of the Certifying Officer, stated that the CO correctly determined that Employer was a Job Contractor under the Act and regulations and that Employer failed to meet its burden of proof that it exercised "substantial, direct day-to-day supervision and control" over the H-2B workers. (CO br. 13-21).

The Solicitor stated that per Black's Law Dictionary, "supervision" is defined as "[t]he series of acts involved in managing, directing, or overseeing persons or projects." The Solicitor stated that per Merriam Webster's Dictionary, "day-to-day" is defined as "done or happening everyday."

The Solicitor stated that per Black's Law Dictionary, "direct" is defined as "[f]ree from extraneous influence; immediate." The Solicitor stated that per Black's Law Dictionary, "substantial" is defined as "[r]eal and not imaginary; having actual, not fictitious, existence." (CO br. 16, note 5).

The Solicitor stated that the three supervision techniques that Employer planned to use were insufficient to meet this supervision and control standard.[12] (CO br. 13-14).

The Solicitor stated that "[l]ooking past the 'buzz words' in Three Seasons' contract 'to determine the actual extent of the alleged supervision' reveals that Three Seasons provides minimal control and supervision and thus meets the definition of a job contractor." The Solicitor stated that "[s]imply being available by phone does not constitute 'a series of acts . . . involved in . . . directing persons or projects.'" The Solicitor stated that being "passively available would not allow Three Seasons to perform key supervisory functions such as stopping and restarting the work, addressing site specific work details, providing site-specific training, or verifying the number of hours worked." (CO br. 18) (Internal citations omitted). The Solicitor argued that holding weekly meetings is insufficient to determine the actual extent of supervision. "Although Three Seasons refers to the instructions as 'continuous,' Three Seasons does not argue that the instructions will actually be updated and provided to workers on a day-to-day basis." (CO br. 18) (citing AF 18, 20). The Solicitor stated:

> Rather, Three Seasons itself receives weekly instructions from its clients and it appears that the weekly meetings with the Roving Supervisor primarily serve to repeat this same client-provided information. Even though the Roving Supervisor is providing the written instructions to the workers, the instructions are not "free from extraneous influence" because they originate with the client and are subject to the changing needs of the client. By providing the client's written instructions during a meeting, the Roving Supervisor is acting as "a mere conduit" for the control actually exercised by the clients.
> (CO br. 18-19) (citing Faush v. Tuesday Morning, 808 F.3d 208, 218 (3rd Cir. 2015))[13] (some internal citations omitted).

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[12] Per the CO, the three techniques were:

1. Employer provides the H-2B workers with a copy of the client's Order Form and holds a weekly meeting "so that [the workers] will have [an] idea what they will be doing." (AF 105).
2. Employer requires that a Roving Bilingual Supervisor visits "each worksite on a regular basis." (AF 102).
3. Employer ensures "continuous accessibility via telephone and text." (AF 20).

[13] Faush v. Tuesday Morning, 808 F.3d 208 (3rd Cir. 2015), dealt with the issue of whether the supervision and control exercised by Tuesday Morning over a worker placed by Labor Ready was sufficient to establish an employment relationship between the worker and the retailer. Although it is not a TLN case, it discusses the relationship between a job contractor and an employer-client. In declining to grant summary judgement for the retailer, the court considered the following factors, among others, as indicative of an employment relationship between the worker and the retailer: the worker's payment by hour rather than by discrete task, the retailer's responsibility for paying overtime, its assignment of work and the details of the work, and the tools and training provided by the retailer. Id. at 216-218. The court also stated that the supervisor rarely visited the store and she "acted as a mere conduit for instructions from the Tuesday Morning manager." Id. at 218.

The Solicitor stated that the Roving Supervisor was insufficient to establish supervision and control. The Solicitor stated that the "supervisor's control is indirect and depends on the client accurately 'overseeing' the workers." (CO br. 19). The Solicitor stated that "the Agreement requires the client 'to meet with the roving field supervisor to get feedback about the workers punctuality, work ethic, reliability, attitude, safety awareness . . . and any other pertinent work related matters.'" (CO br. 19) (citing AF 104). The Solicitor stated that Three Seasons Landscaping also depended on the clients to report the number of hours that each employee worked. (CO br. 19).

The Solicitor argued that the Employer is not a "garden-variety employer" as discussed in Employer's brief and that the terms "substantial," "direct" and "day-to-day" are "straightforward and the Preamble to the IFR included easy-to-follow examples." (CO br. 20). The Solicitor also responded to Employer's argument that the CO did not account for the overall effect of Employer's supervisory techniques. The Solicitor argued that "[e]ven when aggregated, however, Three Seasons' supervisory techniques do not occur on a day-to-day basis. Moreover, the techniques used by Three Seasons underscore its need for Three Seasons to rely on its clients to perform routine supervisory tasks, such as providing the tools with which to work and determining that workers are being properly paid." (CO br. 21).

b. Part 2

The second part of the Solicitor's brief, on behalf of the CO, is that the CO correctly determined that Three Seasons Landscaping and its clients are joint employers. Therefore, the Solicitor stated that "Three Seasons could only obtain certification by filing an application jointly with its contract clients." (CO br. 21) (citing 20 C.F.R. § 655.19). The Solicitor stated that Employer did not fully answer questions 2 and 4 of the second NOD and expected the Certifying Officer and BALCA to "draw numerous inferences in its favor on" these issues. (CO br. 21-22).

The Solicitor stated that applying the regulatory elements of what constitutes an employee pursuant to 20 C.F.R. §655.5[14] "reveals that the H-2B workers would enter into a joint relationship with both Three Seasons and its contract clients," thereby creating a joint employer relationship. (CO br. 23). The Solicitor presented seven arguments as to why the H-2B employees were in a joint employment relationship with Employer and the employer-clients. (CX br. 23-26).

[14] Pursuant to 20 C.F.R. §655.5:

> Employee means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

First, the Solicitor argued that "the clients would control the means and manner by which the work is accomplished." The Solicitor stated:

> The Agreement places on clients the burden "to meet with the roving field supervisor to get feedback about the workers punctuality, work ethic, reliability, attitude, safety awareness . . . and any other pertinent work related matters." AF at 104. In other words, the clients are required to oversee the manner in which the workers are accomplishing the work, and then provide their observations to the Roving Supervisor who merely acts as an intermediary. Many of the supervisory burdens placed on the clients could not be observed by visiting the worksites on a routine basis. For example, the Roving Supervisor could not spend the start of every workday at every worksite in order to determine the punctuality of the workers. The Job Offer Letter also tasks the Roving Supervisor with the responsibility for ensuring that "all workers only work within the area allowed by the labor certification." AF at 105. However, the record fails to elaborate as to how a single supervisor could possibly accomplish this task without relying on the clients and the workers to self-supervise and self-report.
> (CR br. 23-24).

Second, the Solicitor argued that "the method of payment strongly indicates that Three Seasons' clients act as employers" because the clients pay by the hour rather than by each discrete landscaping task. "By controlling the number of discrete assignments, controlling the hours required to complete each assignment, and assuming responsibility for paying overtime, the clients are 'indirectly pay[ing] the employees' wages' and thus acting as employers." (CO br. 24) (citing Faush, 808 F.3d at 216).

Third, the Solicitor argued that the clients provide the landscaping equipment to the employees through a leasing system. This showed that the commercial clients are joint employers. (CO br. 24).

Fourth, the Solicitor argued that the client controls the location of the work. The Solicitor stated:

> As determined by the CO, the client requests a specific number of workers, a specific number of hours, and a specific location when it fills out the Order Form. Three Seasons then repeats this information on a weekly basis to provide the workers with an "idea what they will be doing" (AF at 105). The Agreement states that Three Seasons "will have the authority to control the location of the work to be performed so that all workers only work within the area allowed by the labor certification." (AF at 105). Ensuring that the workers are working within the area of employment included in the job order is a requirement to participate in the H-2B program

> and is not indicative of an employer controlling the location of the work. 20 C.F.R. § 655.16.
> (CO br. 25).

Fifth, the Solicitor argued that the client controls the length of employment. The Solicitor stated that the "workers' schedules are subject to fluctuation at the client's discretion [as] reflected in that clients initially request a number of hours in the Order Form, but the Agreement requires clients to accurately report all hours worked, including overtime, and makes clients 'liable for any actual or alleged Violation by Client of . . . Wage and Hour Laws.'" (CO br. 25) (citing AF 108-109).

Sixth, the Solicitor argued that there is no functional difference between the commercial clients' own employees and the employees that Three Seasons Landscaping plans to provide to the commercial clients. The CO stated:

> Other than Three Seasons' Order Form and Agreement "employ[ing] the 'buzz words' necessary to escape the definition of a 'job contractor'" there would seem to be no functional deference [sic] between any regular employees of the contractor and the workers provided by Three Seasons.
> (CO br. 26) (citing International Plant Services, LLC, 2013-TLN-00015, *7; Faush, 808 F.3d at 217).

Seventh, the Solicitor argued:

> Three Seasons argues that the CO erred in denying the application because the Department had approved prior applications using the same business model, pointing to two applications filed in 2013, and one filed in 2014. AF 21-22. Of course, Three Seasons' previous applications were also certified under the less stringent 2008 definition of a job contractor. In addition, BALCA case law provides: Because an "[e]mployer received certification for the same application last year is not a basis to reverse the denial. That the CO did not enforce a regulatory requirement in the past does not prevent the CO from doing so now." Southern Refractories, Inc., at 5, 2012-TLN-20 (Mar. 20, 2012). "[A] certifying officer's decision to grant certification is not binding on later applications." JCS Carolina Chipping Services, LLC, 2016-TLN-00028, at 5 (Apr. 7, 2016).

On June 6, 2016, Employer submitted an Amended Request for an Administrative Review with an attached 31 page brief. In addition to the arguments presented in Employer's original brief, Employer submitted additional examples of how Employer believed that the CO acted in an arbitrary and capricious manner. Employer stated:

- "Instructions are not 'continuous' because they are not updated and provided day-to-day. CO's Brief at 18. Not so. Instructions remain valid and in place until modified.

- Instructions are not 'direct' because they originate from clients. CO's Brief at 19. Not so. All instructions are provided by Employer directly to the workers, and the origin of the job has no bearing on directness of those instructions.

- Clients control the means and manner of work because they provide feedback on employee performance. CO's Brief at 23. Not so. Clients provide feedback just like a homeowner provides feedback.

- Clients 'oversee' work performance. CO's brief at 23. Not so. Clients are not required to provide any feedback whatsoever, but they do have the option to do so, just like any homeowner might.

- Clients control the work assignments and work hours. CO's Brief at 24. Not so. Clients make requests, just like any homeowner, but it is up to Employer to determine how the work will be accomplished.

- Clients control the length of employment. CO's Brief at 25. Not so. Clients are free to enter into a contract for as long as choose up to 9 months, even if the master contract has a default of 9 months."

(Emp. Amended Br. 28-29).

DISCUSSION

A. Standard Of Review

The Board of Alien Labor Certification Appeals (BALCA) has adopted the position that review of the U.S. Department of Labor's determination of H-2B applications is governed by the "arbitrary and capricious" standard. Brooks Ledge, Inc., 2016-TLN-00033, *5 (May 10, 2016); see also J and V Farms, LLC, 2016-TLC-00022 (Mar. 4, 2016).[15] Upon appeal to BALCA, only

[15] In Brooks Ledge, Inc., BALCA stated:

> According to the CO, BALCA has a limited scope of review in H-2B matters and should defer to the OFLC"s interpretation of a regulation unless it is arbitrary, capricious, an abuse of discretion or not in accordance with law. (CO Brf. 8). The CO asserts that BALCA rejected the "Agency's longstanding and reasoned interpretation of its regulation" and the "Agency's longstanding definition of 'worksite.'" (CO Brf. 14). In GT Trans, BALCA looked to the H-1B definition of "place of employment" because it is interchangeable with "worksite." The definition reflects that "place of employment means the

that documentation upon which the CO's final determination was made (the AF), the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration in the underlying determination) and submitted legal briefs, may be considered. 20 CFR §655.61(e); see also Bassett Construction, Inc., 2016-TLN-00023, *4 (April 1, 2016).

Employer argued that the proponent of an order, i.e. the Certifying Officer, has the burden of proof pursuant to 5 U.S.C. § 566(d).[16] Employer's brief cited to no case law for its position on this matter. However, BALCA has consistently held that an employer bears the burden of proof to establish its eligibility for employing foreign workers under the H-2B program pursuant to 8 U.S.C. § 1361.[17] D & R Supply, 2013-TLN-00029 (February 22, 2013). Employer incorrectly asserted that a U.S. Department of Labor Certification is not a document "required for entry" into the United States pursuant to 8 U.S.C. § 1184(c). (AF 14). A labor certification is required for an alien to enter the U.S. as an H-2B nonimmigrant. As the Solicitor stated in its brief on behalf of the CO, "the Secretary is constrained from certifying an application unless the applicant demonstrates that these conditions are satisfied, placing the burden squarely on the shoulders of the applicant." (CO br. 13).

As noted above, BALCA has adopted the position that review of U.S. Department of Labor's determination of H-2B applications is governed by the "arbitrary and capricious" standard. Brook Ledge, Inc., 2016-TLN-00033, at 5 (BALCA May 10, 2016). Under this standard of

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> worksite . . . ." 20 C.F.R. § 655.715. The CO rejects our use of this definition without explanation and argues that "[a] reviewing body must defer to the program agency where its actions, interpretative or otherwise, are reasonable and consistent with law, even where its choice is not compelled by law or regulation, and its choice may not be the best one among reasonable alternatives." (CO Brf. 15) (citing Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). Furthermore, "[i]n exercising its narrowly defined role, the BALCA is to consider, whether the agency acted within its authority, whether the agency provided a reasoned explanation, whether the decision was based on the facts in the record, and whether the relevant factors were considered." Id. at 16 (quoting American Rivers v. U.S. Army Corps of Engineers, 271 F. Supp. 2d 230 (D.D.C. 2003)). According to the CO, "[t]he Department has issued a regulation through notice and comment rulemaking, has interpreted the regulations, and has provided a rational basis for its determination to routinely deny employers H-2B certification for multiple positions where they are to be performed across the United States outside the area of intended employment," and as such, the OFLC is entitled to deference. Id. at 17. Also, the CO contends that where there is an ambiguity, OFLC should address the ambiguity, not BALCA. Id.
>
> Generally speaking we do not disagree with the CO's characterization of its role vis a vis OFLC.

Brooks Ledge, Inc., 2016-TLN-00033, *4, *5 (May 10, 2016) (emphasis added) (some internal citations omitted).

[16] "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 566(d)

[17] "Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be." 8 U.S.C. § 1361

review, courts "retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." Judulang v. Holder, 132 S. Ct. 476, 483-84 (2011). Thus, courts must satisfy themselves that the agency has examined "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). In reviewing the agency's explanation, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. (citations and internal quotation marks omitted). If the agency has

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,

then it is arbitrary and capricious. Id. An agency's decision is also arbitrary and capricious when it fails to "cogently explain why it has exercised its discretion in a given manner." Id. at 48. Inquiry into these factual issues "is to be searching and careful …." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

Based on the facts, statute, regulations, case law, and Parties' briefs, the undersigned finds that the CO did not act in an arbitrary or capricious manner in denying Employer's Application for Temporary Employment Certification (ETA Form 9142B) for the following reasons.

B. The Undersigned Finds That Employer Failed To Adequately Respond To The Second Notice Of Deficiency.

Employer did not adequately respond to the second Notice of Deficiency, specifically questions two and four. "The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification." 20 C.F.R. § 655.32(a). In the second NOD, the CO asked, "Has the applicant contracted or does it intend to contract on a temporary basis to one or more employers the services or labor of the H-2B workers covered by this *Application for Temporary Employment Certification*?" (AF 290-291). Employer responded, "No. The Applicant has signed written contracts with both residential and commercial customers." (AF 244). Employer's answer should have been yes, because in the very next sentence Employer stated that it did intend to enter into written contracts. Because Employer should have answered yes to question number 2, it should have responded to the CO's question number four, which asked, "If the applicant responded yes to question 2, the applicant must provide [additional information] for each client employer. . . ." (AF 290-291). In response to the CO's fourth question in the second NOD, Employer stated, "Because the answer to Question 2 was 'No', there is no response required to this section." (AF 244). The undersigned finds that based on the Employer's own admissions in its response to the second NOD, Employer should have fully responded to question number four. The undersigned finds that Employer failed to

comply with the second Notice of Deficiency. It did not fully answer the CO's questions and did not provide the necessary information for the CO to fully determine whether Employer intended to act as a job contractor and a joint employer with employer-clients. Therefore, the CO could have denied Employer's Application for Temporary Employment Certification pursuant to 20 C.F.R. § 655.32(a).

C. The Certifying Officer Was Not Arbitrary Or Capricious In Determining That Three Seasons Was An Employer Under The H-2B Regulations.

The undersigned finds that Three Seasons Landscaping was an employer under the H-2B regulations. Only an employer may be certified to employ H-2B workers. 20 C.F.R. § 655.7(b). Under the applicable regulations:

> Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:
> (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;
> (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and
> (3) Possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).
> 20 C.F.R. 655.5.

The evidence shows, and the Parties agree, that Three Seasons Landscaping meets all of these requirements to be considered an employer under the TLN regulations.

D. The Certifying Officer's Determination Was Not Arbitrary Or Capricious In Determining That Employer Acted As A Job Contractor.

A job contractor is:

> a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.
> 20 C.F.R. § 655.5 (emphasis added).

The undersigned finds that Employer was a job contractor pursuant to 20 C.F.R. § 655.5. It did not "exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers." In its response to the second NOD, Three Seasons Landscaping claimed that it does not provide temporary labor to other employers pursuant to a contract and therefore was not a job contractor under the regulations. However, the evidence submitted by Employer, specifically the Agreement for Supervised Seasonal Landscaping Labor Services (AF 104-112), shows that it contracts with other employers for temporary labor and services. The burden of proof is on Employer to establish that it did "exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers." Employer did not meet this burden.

Employer stated that it planned to use three techniques to supervise its H-2B workers. The Board summarizes them as:

1. It planned to provide the H-2B workers with a copy of the client's Order Form and hold a weekly meeting with the workers "so that they will have [an] idea what they will be doing and will be able to prepare accordingly for the week." (AF 105).
2. The Roving Supervisor "will be required to visit each worksite on a regular basis to supervise the employee, and to meet with the customer to see if the work has been satisfactory." (AF 102). Employer could not "guarantee that Mr. Hemphill or a direct employee of his will be physically present at each and every worksite on a daily basis." (AF 244).
3. "Mr. Hemphill or a direct employee of his will be available by telephone at all times, in the event a problem were to occur." (AF 244). A representative of Employer would also be available by text. (AF 10).

The case at bar is very similar to the case of MJC Labor Solutions, LLC, 2011-TLN-00006. MJC was decided under the old, less stringent definition of a job contractor pursuant to the 2008 regulations. Under the U.S. Department of Labor 2008 Final Rule, a job contractor was defined as "a person, association, or firm . . . who contracts services or labor on a temporary basis to one or more employers . . . where the job contractor will not exercise any supervision or control in the performance of the service of labor. . ." 20 C.F.R. § 655.4 (2008) (emphasis added). The U.S. Department of Labor Interim Final Rule, published April 29, 2015, increased the degree of supervision required. The IFR defines a job contractor as:

> a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.
> 20 C.F.R. §655.5 (emphasis added).

The first major change between the 2008 regulations and the 2015 Interim Final Rule is that the 2015 IFR requires both "supervision" and "control." The second major change between the

regulations is that "any supervision" is no longer sufficient. Instead, pursuant to the 2015 IFR, the supervision and control must be "substantial," "direct," and "day-to-day."

The Board of Alien Labor Certification Appeals held in MJC Labor Solutions that the employer MJC Labor Solutions was a job contractor because it did not provide "any" supervision or control to its contracted employees. MJC Labor Solutions, LLC, 2011-TLN-00006 (February 1, 2011). BALCA held that MJC Labor Solutions was a job contractor rather than an individual employer because it did not control or supervise its H-2B employees. In MJC Labor Solutions, LLC, MJC Labor Solutions relied solely on its roaming bilingual supervisor to assert that it supervised the H-2B employees. BALCA held that this supervisory technique was insufficient to establish "any supervision or control in the performance of the service of labor." BALCA also gave substantial weight to MJC Labor Solution's previous attestation, prior to the NOD, stating that it did not control the H-2B workers' work schedules or the clients' landscaping projects. MJC Labor Solutions, LLC, 2011-TLN-00006, *9.[18] In the case at bar, MJC Labor Solutions, according to the CO and Employer, was involved with Three Seasons in the filing of Three Seasons' Application for Temporary Employment Certification.

In the case at bar, Employer planned to use additional supervisory methods that were not discussed in MJC Labor Solutions, LLC. They are the roving supervisor's availability by telephone/text and the holding of weekly meetings with the employees. Pursuant to the holding in MJC Labor Solutions, LLC, the use of the roving supervisor employed by Three Seasons is insufficient to establish "any" supervision or control under the old regulations. It is therefore insufficient to establish "substantial, direct day-to-day supervision and control" under the current regulations. The roving supervisor's control is indirect and not "day-to-day." As discussed below, the additional supervisory controls are insufficient to rise to the level of "substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed. . . ." 20 C.F.R. § 655.5.

The undersigned finds that being available by telephone does not constitute "substantial, direct day-to-day supervision and control." Being available by telephone is a passive act, rather than an active act. As stated by the Solicitor, it does not "allow Three Seasons to perform key supervisory functions such as stopping and restarting the work, addressing site specific work

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[18] In MJC Labor Solutions, LLC, BALCA stated:

> Although the Employer attempts to show that it exercises supervision and control over the workers because it has "a roaming field supervisor," the Employer's description of this supervisor demonstrates that the supervisor's primary purpose is to ensure the workers' safety. The description of the roaming field supervisor does not give any indication that this supervisor would control or supervise the employees on any type of regular basis. Indeed, it is difficult to imagine that this single, roaming field supervisor could maintain daily supervision and control over the 47 workers at 28 different work sites throughout Pennsylvania. Even more difficult to imagine is that the 28 golf courses, lawn care, and landscaping companies with whom the Employer contracts would relinquish control over their own operations to the Employer's roaming supervisor.

MJC Labor Solutions, LLC, 2011-TLN-00006, *8.

details, providing site-specific training, or verifying the number of hours worked." (CO br. 18) (citing Williamson, 926 F.2d at 1352; Faush, 808 F.3d at 216). The Solicitor stated, "In sum, simply being available by phone for issues that workers decide to self-report does not meet the definition of supervision, and whatever control it exhibits is not . . . 'real', 'direct,' or occurring 'everyday.'" (CO br. at 18). The undersigned agrees with the CO and finds, based on the evidence in the record, that being available by telephone does not constitute "substantial, direct day-to-day supervision and control."

The undersigned finds that providing written instructions to the H-2B employees and holding weekly meetings so that the workers will have an idea as to what they will be doing for the week, do not constitute "substantial, direct day-to-day supervision and control." Weekly meetings and instructions are not day-to-day supervision. The Solicitor argued that:

> Three Seasons itself receives weekly instructions from its clients and it appears that the weekly meetings with the Roving Supervisor primarily serves to repeat this same client-provided information. Even though the Roving Supervisor is providing the written instructions to the workers, the instructions are not "free from extraneous influence" because they originate with the client and are subject to the changing needs of the client. By providing the client's written instructions during a meeting, the Roving Supervisor is acting as "a mere conduit" for the control actually exercised by the clients.
> (CO br. 18-19) (citing Faush, 808 F.3d at 218) (some internal citations omitted).

The undersigned agrees with the CO and finds, based on the evidence in the record, that weekly meetings and written instructions do not constitute "substantial, direct day-to-day supervision and control."

Based on the foregoing, the undersigned finds that Employer is a job contractor. It is an employer, it contracts services or labor on a temporary basis to one or more employers, and it would not have exercised substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers. The undersigned finds that the CO did not act in an arbitrary or capricious manner in determining that Employer was a job contractor under the H-2B regulations.

E. The Certifying Officer's Determination Was Not Arbitrary Or Capricious In Determining That Employer Was A Joint-Employer With Its Employer-Clients.

The undersigned finds that Employer's commercial clients with whom it entered into contracts for temporary labor and services are actually employer-clients. The H-2B employees will enter into an employer-employee relationship with both Employer and its employer-clients. Therefore, Three Seasons could only obtain certification for its application by filing jointly with its contract clients. 20 C.F.R. §655.19. Employer did not do this. Therefore, the CO did not act arbitrarily or

capriciously in determining that the commercial clients of Employer were employer-clients and in denying Employer's Application for Temporary Employment Certification.

Pursuant to 20 C.F.R. § 655.5:

> Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

. . .

> Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms employee and worker are used interchangeably in this subpart.

. . .

> Employer-client means an employer that has entered into an agreement with a job contractor and that is not an affiliate, branch or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.
> 20 C.F.R. §655.5 (emphasis added).

Therefore, the CO was required to determine whether there were significant indicia that the H-2B workers would have entered into an employer-employee relationship with both Employer and its employer-clients. As discussed below, the CO accurately analyzed the facts and therefore did not act in an arbitrary or capricious manner.

The undersigned finds that employing the indicia as to what constitutes an employee establishes that the H-2B workers would have been employees of both Three Seasons Landscaping and the contractual employer-clients.

First, the undersigned finds that the employer-client would have been primarily responsible for "control[ing] the manner and means by which the work is accomplished." 20 C.F.R. § 655.5. The employer-client would have been the entity that decided what work needed to be done, how much work needed to be done, and how many H-2B employees it would require. As stated by the Solicitor, the "Agreement places on clients the burden 'to meet with the roving field supervisor to get feedback about the workers punctuality, work ethic, reliability, attitude, safety awareness . . . and any other pertinent work related matters.' In other words, the clients are required to oversee the manner in which the workers are accomplishing the work, and then provide their observations to the Roving Supervisor who merely acts as an intermediary." (CO br. 23-24) (citing AF 104).

Second, the undersigned finds that the employer-client would have been primarily responsible for determining "the skill required to perform the work." Because the employer-client would have determined what work needed to be performed and what machines needed to be used, the employer-client therefore would have determined what skill would have been required to complete the landscaping job.

Third, the undersigned finds that the employer-client would have been the primary "source of the instrumentalities and tools for accomplishing the work." Employer's "Job Offer Letter" specifically stated that "Three Seasons Landscape provides only safety equipment to our employees, but does not provide other landscaping equipment. Our customers provide the equipment necessary to complete the work that is requested." (AF 102). Employer could have leased the necessary landscaping equipment from the employer-clients pursuant to the Agreement for Supervised Seasonal Landscaping Labor Service. (AF 105). However, the client was still the "source of the instrumentalities and tools for accomplishing the work." Even if Employer had furnished some of the necessary landscaping equipment (in addition to the safety equipment), the evidence in the appeal file shows that most of the landscaping equipment used by Employer's H-2B workers is leased from the commercial client itself.

Fourth, the undersigned finds that the employer-client would have controlled the location of the work. As determined by the CO, the employer-client would have requested a specific number of workers, a specific number of hours, and a specific location when it filled out Employer's Order Form. (AF 98). As stated by the Solicitor:

> The Agreement states that Three Seasons "will have the authority to control the location of the work to be performed so that all workers only work within the area allowed by the labor certification." (AF at 105). Ensuring that the workers are working within the area of employment included in the job order is a requirement to participate in the H-2B program and is not indicative of an employer controlling the location of the work. 20 C.F.R. § 655.16.
> (CO br. 25).

Fifth, the undersigned finds that the employer-client would have had "discretion over when and how long to work." The employer-client would have determined when and how long it required

an H-2B employee. The employer-client also would have had the option of allowing an employee to work overtime. The H-2B workers' schedules would have been subject to fluctuation at the client's discretion, so long as the client-employer guaranteed at least 40 hours of work per week.

Sixth, the undersigned finds that the work performed by the H-2B employee for the employer-client is part of the regular business of the employer-client. The CO determined that there is no functional difference between the commercial clients' own employees and the employees that Three Seasons Landscaping planned to provide to the commercial clients. The Solicitor argued:

> Other than Three Seasons' Order Form and Agreement "employ[ing] the 'buzz words' necessary to escape the definition of a 'job contractor'" there would seem to be no functional deference [sic] between any regular employees of the contractor and the workers provided by Three Seasons.
> (CO br. 26) (citing International Plant Services, LLC, 2013-TLN-00015, *7; Faush, 808 F.3d at 217).

There are additional indications of an employment relationship not specifically listed in the regulatory definition of employee that evidence that the H-2B workers were employees of both Employer and the employer-clients. The Board summarizes that they include:

1. The employer-clients paid for the H-2B employees by the hour rather than by a specific task;[19]
2. The employer-clients must fill out an Order Form that requires them to fill-in an entire workweek and to provide a "Check in" time for the workers. (AF 247).
3. The employer-clients are contractually responsible from refraining from assigning the H-2B workers to worksites outside of the counties included in Three Seasons Landscaping's Application for Temporary Employment Certification.[20]
4. The sample contract titled Agreement for Supervised Seasonal Landscaping Labor Services requires clients to accurately report all hours worked, including overtime, and makes clients liable for any actual or alleged Violation by Client of Wage and Hour Laws. (AF 108-109).

F. Other Considerations

Employer consistently stated that the contracts it entered into with commercial clients specifically prevented the employer-clients from engaging in the supervision, control, discipline,

[19] The Solicitor stated, "By controlling the number of discrete assignments, controlling the hours required to complete each assignment, and assuming responsibility for paying overtime, the clients are 'indirectly pay[ing] the employees' wages' and thus acting as employers." (CO br. 24) (citing Faush, 808 F.3d at 216).

[20] The CO determined that the clients of Employer are actually employer-clients because Employer required them to attest that they had not laid off U.S. workers, that the job opportunity was open to U.S. workers, and that the landscaping jobs would be performed in specific areas within Philadelphia and Delaware. The CO stated that "[t]hese types of attestations are indicative of the job contractors and their employer-client relationships. An individual Employer should not require its customers to make such attestations." (AF 174-175).

and training of the H-2B workers. Employer's use of "buzz words" is unpersuasive to support that it provides substantial, direct, and day-to-day supervision of its H-2B employees.

The Board of Alien Labor Certification Appeals discussed "buzz words," supervision, and control in four other cases concerning employer International Plant Services. (International Plant Services, LLC, 2013-TLN-00014, 00015, 00016, 00017). In International Plant Services, LLC, 2013-TLN-00015, BALCA held that it was important to look past "buzz words" in contracts to determine the actual extent of supervision and control. In International Plant Services, the employer applied for 60 temporary workers that were to be divided into groups of 20 each and placed at three worksites. In an attempt to prove that it was not a job contractor, International Plant Services relied on a contract with its client (Chapman Construction), stating that "any temporary workers seconded are deemed employees of IPS, not Wellbores, Chapman Construction's parent company." International Plant Services also provided a letter attesting to its intention to hire three supervisors, to be placed at each worksite "for the entire duration of each workday until the scheduled completion of the project. . . ." In International Plant Services, BALCA held that the evidence

> does not provide the factual background necessary to determine the actual extent of the alleged supervision; Mr. Crawford simply parrots the language necessary to escape classification as a "job contractor" under the section 655.4. In fact, the letter only provides one example of supervision and control that exceeds "hiring, paying, and firing the workers"— IPS' "quality control of the work to be performed." But the letter does not provide any explanation or detail as to how the alleged supervision over quality control will actually play out.
> International Plant Services, LLC, 2013-TLN-00014, 00016, 00017, *7-*8.

In International Plant Services, BALCA held that "the fact that the Support Services Agreement between IPS and Chapman Construction confirms that 'the employees seconded to [Chapman Construction] by IPS are deemed employees of IPS' is irrelevant; labeling workers IPS employees does not address IPS' level of supervision or control." International Plant Services, LLC, 2013-TLN-00014, 00016, 00017, *8.

The undersigned finds that Employer's use of "buzz words" is not persuasive evidence that it exercised "substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers." 20 C.F.R. § 655.5. The actual employment relationship between Employer and the employer-clients shows that Employer was a job contactor and that the commercial clients were actually employer-clients pursuant to the regulations.

CONCLUSION

The undersigned finds that the Certifying Officer did not act in an arbitrary and capricious manner in denying Employer's Application for Temporary Employment Certification (ETA Form 9142B). The undersigned finds that Employer is an employer under the H-2B temporary labor certification regulations. The undersigned finds that Employer is a job contractor because Employer "will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers." 20 C.F.R. § 655.5. The undersigned finds that Employer entered into contracts to provide temporary labor to its commercial clients. The undersigned finds that Employer and its commercial clients were joint employers of the H-2B employees after a review of the indicia of employment listed in 20 C.F.R. §655.5. The undersigned finds that the commercial clients were employer-clients of Employer. The undersigned finds that Employer was required to submit a separate, joint Application for Temporary Employment Certification for each employer-client with which it had contracted or intended to contract. 20 C.F.R. § 655.19. Employer failed to do this. Accordingly, the Certifying Officer's denial of Employer's Application for Temporary Employment Certification is affirmed.

ORDER

It is hereby ordered that the Certifying Officer's Denial of Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

Digitally signed by Dana A. Rosen
DN: CN=Dana A. Rosen,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

DANA ROSEN
Administrative Law Judge

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