



**Issue Date: 23 February 2017**

BALCA NO.: 2017-TLN-00020

ETA CASE NO.: H-400-16323-550863

*In the Matter of:*

**ROLLINS SPRINKLER & LANDSCAPE,  
LLC,**

*Employer.*

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF TEMPORARY LABOR CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) on the Employer’s request for review of the Certifying Officer’s denial in this H-2B temporary labor certification matter.

Under the H-2B program, employers may hire foreign workers to perform temporary nonagricultural work within the United States, either *ad hoc*, seasonally, or intermittently (as defined by the Department of Homeland Security), “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor”. 8 C.F.R. §214.2(h)(1)(ii)(D); *see also* 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(ii)(B); 20 C.F.R. §655.1(a).<sup>1</sup> Employers wishing to hire foreign workers under this program must apply for a “labor certification” from the U.S. Department of Labor (“DOL”). 8 C.F.R. §214.2(h)(6)(iii). A Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) reviews the employer’s application. 20 C.F.R. §655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. §655.53.

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<sup>1</sup> The Interim Final Rule revising federal regulations related to the H-2B program, 20 C.F.R. Part 655, Subpart A, was published in Vol. 80 Fed.Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and is effective as of April 29, 2015.

In this case, the Employer applied for a labor certification to hire twenty foreign workers. The CO reviewed the Employer's application and asked the Employer to provide specific information calculated, in the CO's judgment, to show 1) that Employer's need for foreign workers was temporary in nature, and 2) that it required twenty temporary employees to meet that need. The Employer provided information in response to the request, but the CO considered Employer's response insufficient, and ultimately denied the application. This appeal followed.

For the reasons set forth below, I affirm the CO's denial of the Temporary Labor Certification.

### Statement of the Case

The Employer, Rollins Sprinkler & Landscape, LLC, filed an H-2B Application for Temporary Employment Certification (Form ETA-9142B) on or about November 18, 2016 (AF<sup>2</sup> pp. 143-159). Its "Statement of Temporary Need" recites "In need of 20 landscaping duties during the season months of February 01, 2017 to November 01, 2017" (AF p. 143).

On November 30, 2016, the CO issued a Notice of Deficiency (AF pp. 133-142). As relevant here, the CO notified Employer of two concerns about the pending application. First (AF, p. 136),

In accordance with Departmental regulations at 20 CFR 655.6(a) and (b), an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

The employer did not submit sufficient information in its *Application for Temporary Employment Certification* to establish its requested standard of need or period of intended employment.

The employer is requesting 20 Landscaping and Groundskeeping Workers under a seasonal need from February 1, 2017 through November 1, 2017. The employer states in ETA Form 9142, Section B., Item 9:

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<sup>2</sup> "AF" refers to the Appeal File.

In need of 20 landscaping duties during the season months of February 01, 2017 to November 01, 2017.

*The employer did not provide any information on its business including a description of its business history and activities and schedule of operations throughout the year. The employer also did not indicate how it determined it had a need for temporary workers during the dates of need requested (emphasis added).*

Second (AF p. 137),

In accordance with Departmental regulations at 20 CFR 655.11(e)(3) and (4), an employer must establish that the number of worker positions and period of need are justified and that the request represents a bona fide job opportunity.

*The employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.*

*The employer did not include adequate attestations to justify the number of workers in the employer's current application which requests 20 Landscaping and Groundskeeping Workers from February 1, 2017 through November 1, 2017.*

Further explanation and documentation is required in order to establish the employer's need for a total of 20 workers (emphasis added).

In each case, the CO asked Employer to submit specific information to address these deficiencies (AF pp. 136-137, 137-138), including

Summarized monthly payroll reports for 2015 calendar year and up-to-date for 2016 that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system (AF p. 138).

On December 19, 2016, Employer's counsel responded to the Notice of Deficiency (AF pp. 100-132). With respect to the CO's first concern, Employer provided a brief statement about the nature of its business, emphasizing that landscaping

work could not be performed in the winter; and copies of payroll records (AF p. 101). With respect to the second concern, Employer responded

In the past, Rollins Sprinkler and Landscape, LLC, has been forced to turn down prospective job contacts due to the lack of available employees needed to accomplish the work. Adding an additional twenty (20) employees will ensure that the company will no longer be forced to turn away prospective job contracts.

Attached are the payroll documentation (Attached as Exh. 2) and the attestation that the documentation provided was compiled from the employer's actual accounting records or system. (Attached as Exhibit 3.) (AF p. 102).

In reply to this submission, the CO complained that the payroll records were not summarized by month, and did not distinguish between permanent and temporary workers. The CO asked Employer to re-submit the payroll records in the desired format (AF, p. 99). In response, on December 22, 2016, Employer faxed records of payments to its employees in 2015 and 2016 grouped by month (AF pp. 27-98).

On January 4, 2017, the CO denied the application (AF pp. 11-15). The CO faulted Employer for submitting, in response to the CO's request for a summary of payroll information, "a list of individual employees noting their status as temporary or permanent" together with "a list, in check date order, with worker's names, and their gross and net pay noted. The report did not summarize the monthly number of workers or pay, and did not include hours worked . . . to help in determining if the employer has a need for its requested workers." Furthermore, "[t]he employer did not explain how the submitted lists support its requested number of workers and it did not submit any other supporting documentation. Further, the employer did not explain how it determined its need for 20 workers" (AF, p. 15).

### Discussion

I review the CO's determination "only on the basis of the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. §655.61, subsection (e). But both in its Request for Administrative Review (AF pp. 6-9) and in its brief filed on February 21, 2017, Employer urges me to overturn the CO's determination for one reason, and one reason only: because of the ETA's approval of an entirely *different* application from a different employer.<sup>3</sup>

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<sup>3</sup> Employer avers that in Case #H-400-16319-515113, the un-named different employer, whose business is allegedly "nearly identical . . . in nature" to Rollins Sprinkler & Landscape, LLC's, gave the "exact same response" to one of the CO's questions, and an even less-sufficient response to the other;

The regulations do not allow me to compare the CO's determination in this case with the CO's determination in another case. Even if they did, I would need more facts about the second case than counsel's unvarnished conclusion that it is factually indistinguishable and that any certifying officer would have been compelled to decide it identically to this one. And even if I were to accept counsel's conclusion on those points, I could not say, as a matter of law, that the *other* case was decided *correctly*, while *this* case was decided *incorrectly*. For all Employer's counsel has told me, perhaps *both* applications ought to have been denied. In that circumstance, as the schoolyard saying goes, two wrongs would not make a right. Significantly, Employer does not argue the merits of its own application. It does not contend its answers to the CO were adequate or complete, or that the CO's inquiries were unreasonable to begin with. Employer simply tells the court that somebody else got away with it, in consequence of which Employer should be allowed to get away with it, too. That is not the proper standard for administrative review.

The court affirms the Certifying Officer's denial of the Temporary Labor Certification.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge

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yet the CO granted the un-named different employer's application, while denying this one (Employer's Brief, pp. 3-4).