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Issue Date: 14 March 2017

BALCA Case No.: 2017-TLN-00024
ETA Case No.: H-400-16350-569933

In the Matter of:

The Yard Experts, Inc.,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Juan Luis Zacarias (Sales & Marketing Support), The Yard Experts, Inc.,
Pro Se
For the Employer

Jeffrey L. Nesvett, Associate Solicitor and
Sarah J. Starrett, Attorney
U.S. Dept. of Labor, Office of the Solicitor, Division of Employment and
Training Legal Services
For the Certifying Officer

Before: Richard A. Morgan
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from the request for administrative review filed by The Yard Experts, Inc. (“Employer”) in regard to the Certifying Officer’s (“CO”) decision to deny the Employer’s application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security,¹ “if unemployed persons capable of performing such service or labor cannot be found in [the United States].”

¹ The definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. §214.2(h)(6)(ii) pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015). See also 20 C.F.R. §655.6(b).

See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655.² Employers seeking to utilize this program must apply for and receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE
H-2B Application

On December 19, 2016, The Yard Experts, Inc. (“Employer”) filed an H-2B Application for Temporary Employment Certification for the job title of “Landscaping Laborer.” (AF 115-139).³ Employer requested 10 full time workers from January 9, 2017 to December 29, 2017. Employer indicated that the nature of its temporary need is “seasonal.” Employer’s statement of temporary need states the following:

In need of laborers to perform job task for pre-scheduled recurring maintenance jobs for 2017 calendar year. This is a result to (sic) the high increase in acquiring new clients with scheduled maintenance, there has been a decrease in available laborers in work site area and/or not willing to maintain a stable employment status.

(AF 115).

Employer’s application also includes the following statement regarding its employment need:

We are in high demand of laborers to perform job task for pre-scheduled recurring maintenance jobs for 2017 calendar year. We have had a 10% increase per year of new clients with scheduled maintenance, there has been a decrease in available laborers in our work site area and/or not willing to maintain a stable employment status which hurts our company in many ways. Our company’s busiest timeframe is in the beginning of every calendar year thru the end of November.

(AF 131).

² On April 29, 2015, the Department of Labor (“DOL”) and the 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. See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The IFR applies to applications “submitted on or after April 29, 2015, and that have a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). As the application in this case meets these conditions, the IFR applies to this case. All citations to 20 C.F.R. Part 655 in this order are to the IFR.

³For purposes of this opinion, “AF” refers to “Appeal File.”

Notice of Deficiency

By letter dated December 28, 2016, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) for the following five deficiencies:

- 1) Failure to justify nature of temporary need per 20 C.F.R. §655.6 (a) and (b);
- 2) Failure to establish the job opportunity as temporary in nature;
- 3) Offered wage (Wage was not listed and offered to all workers at a wage equal to the highest of the prevailing wage and applicable minimum wages, which is \$13.04);
- 4) Failure to submit a complete and accurate ETA Form 9142 (Incomplete Field items Section G Item 2) Overtime rate must be at least 1.5 times the basic rate of pay; and
- 5) Failure to submit a complete and accurate ETA Form 9142 (Wrong version of ETA form 9142B, Appendix B was submitted).

In regard to Deficiency 1, the Employer’s failure to justify nature of its temporary need, the CO stated that in accordance with the regulations employer must establish that its need for non-agricultural services of labor is temporary regardless of whether the underlying job is permanent or temporary. A temporary need must be one of the following: a one-time occurrence; a seasonal need; a peakload need or an intermittent need as defined by the applicable DHS regulation. The CO pointed out that under the regulations the employer must establish that the need for the employee will end in the near definable future. Further, the Department of Labor has consistently viewed temporary need as lasting no more than ten months except in cases of a one-time occurrence. The CO further stated that the Department continues to view ten months as the appropriate threshold for assessing temporary need and that it finds it to be consistent with the applicable DHS regulation which states the period of time will be limited to one year or less, except in the case of a one-time event. (AF 110).

Employer was instructed to provide an additional detailed statement of temporary need including a description of the business history, activities and schedule of operations through the year, as well as an explanation regarding why the requested job opportunity and requested number of workers being requested reflect a temporary need. (AF 110). Employer was also instructed to supply additional documentation including summarized monthly payroll reports for a minimum of one previous calendar year that identify for each month, full time permanent and temporary employees with total hours worked and total earnings received, as well as any other evidence and documentation that similarly serves to justify the requested dates of need. If the employer is able to demonstrate a temporary need with the additional evidence it would then also need to amend its application to show a period of need that does not exceed ten months in duration. (AF 111).

In regard to Deficiency 2, failure to establish the job opportunity as temporary in nature, the CO stated that the employer had not established its standard of need as one of the following: 1) one-time occurrence, 2) a seasonal need, 3) a peakload need or 4) an intermittent need. The

CO further stated, in order to establish a seasonal need, the petitioner must establish that employer's need for the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer was directed to specify the period of time during each year in which it does not need the services or labor. The CO pointed out that the employment is not considered seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the employer's permanent employees. (AF 111-112).

The CO determined that the employer's statement indicating that it has had a 'high increase in acquiring new clients with scheduled maintenance,' and that "there has been a decrease in available laborers" is insufficient to establish a temporary need on a seasonal basis. Therefore the employer was instructed to supply additional information including a description of the employer's business and schedule of operations through the year and an explanation as to why the nature of the employer's job opportunity reflects a temporary and seasonal need. Employer was also instructed to supply supporting information including monthly invoices from previous calendar years showing the work performed for each month as well as signed service contracts for the previous calendar year and summarized monthly payroll reports for a minimum of one calendar year that identify full time permanent and temporary employment. (AF 112-113).

Employer's Response and CO's Non-Acceptance Denial

The Employer attempted to respond to the deficiencies by filing a new application. (AF 83-106). The CO notified the employer that only one application could be processed at a time and the employer indicated its intention to withdraw the new application. Employer then requested that its response be considered regarding its original application. (AF 80-82). Employer's response corrected the errors regarding the incomplete form and incorrect form that had been previously submitted which had been listed as Deficiencies 4 and 5 above.

The CO issued a Non-Acceptance Denial on February 13, 2017. The CO stated that "the employer did not demonstrate how its need is temporary based on seasonal need and has not explained what events cause the seasonal need and the specific period of time in which the employer will not need temporary labor. Also, the employer has not provided sufficient documentation to substantiate its temporary need for the requested period of employment." (AF 65).

The CO also noted that the Employer had failed to amend its application to indicate the correct wage equal to at least the prevailing wage or failed to provide written permission allowing the CO to amend its application to reflect the appropriate wage. Although Employer did not supply the requested permission to amend the wage information in its application and job order causing Deficiency 3, Employer's request for review indicated its intention to do so. Accordingly as Deficiencies 3-5 have been adequately addressed they will not be discussed in this decision, which will be limited to the first two deficiencies regarding the employer's failure to demonstrate its temporary need.

In an email dated February 20, 2017 to the Chicago National Processing Center, Employer indicated it wished to appeal the February 13, 2017 Non-Acceptance Denial determination. (AF 39). By email dated February 21, 2017 the Chicago National Processing Center notified Employer that it could not accept his appeal because Employer needed to mail it to BALCA by sending the request for review to the Chief Administrative Law Judge. (AF 37).

Administrative Review

The Employer mailed its request for administrative review of the CO's Non-Acceptance Denial to the Chief Administrative Law Judge which was received on February 24, 2017. (AF 1-36). Employer states in its request for administrative review that it is appealing the CO's denial. In regard to its failure to establish the job opportunity as temporary, Employer states:

Our company has been growing since 2004 by 5% or more per year and we have been acquiring new clients. This success is due to our continuous investment in marketing campaigns thru (sic) website hosting, flyers, magazine publishing sponsorship programs and more. ...we also spend most of our time keeping employees with our company, less than half of our employees have been with us for more than two years, but the rest come aboard for a very short time and it is a constant battle throughout the year. We need to maintain 12-15 laborers per day to work on an average of 40-45 hours per week. Our company has been struggling with keeping dependable workers when hiring from our local cities thru (sic) Indeed job seeking website, Craigslist, word of mouth and the local State of Arizona work force. This is due to many reasons including no show, no call, late, overslept, irresponsible, lack of interest of keeping a stable job. The reason we are requesting foreign laborers is so we can fill our positions with dependable and stable workers for a long period. This will help the company in many ways including the completion of all scheduled maintenance jobs for the calendar year of 2017. Our busiest months are February thru December and to keep our clients happy we must have a full staff of laborers to perform the jobs.

In regard to the second deficiency noted as employer's failure to establish a temporary seasonal need, the Employer indicated it was attaching job invoices for the calendar year as well as payroll hours for calendar year 2016, showing the hours worked for each employee per their employment status. As this information was not previously provided to the CO it cannot be considered by the undersigned. *See* 20 C.F.R. §655.61(e). Employer stated in support of its seasonal need:

Our employee turnover is high and we need to get stable employees in our company. The foreign laborers treat these types of jobs as second nature to them and will be very valuable to our organization due to the dependability and stability they will provide.

(AF 1).

Attorney Sarah J. Starrett of the office of the U.S. Department of Labor Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a brief in this matter on March 9, 2017, on behalf of the Certifying Officer, urging affirmance of the CO’s denial of Employer’s H-2B application. In her very limited brief the Solicitor states the position that an arbitrary and capricious standard should apply in the review of this case. The Solicitor further states that “other than a review of the file to determine whether the CO’s decision was arbitrary or capricious, no other issues of law or fact are presented in this case.” This statement which offers no useful analysis begs the question of whether the CO acted properly and within her discretion in denying the Employer’s H-2B application. Despite the Solicitor’s assertion to the contrary, a consideration of the facts and the law as applied to this matter will be undertaken to determine whether the CO properly denied the Employer’s H-2B application in this case.

No brief or additional position statement was received from the Employer on or before the deadline of March 10, 2017.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO’s determination; or
- (2) Reverse or modify the CO’s determination; or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.61(e).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard⁴ to its review of the CO’s determination in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUE

Whether the Certifying Officer properly denied the Employer’s H-2B application due to Employer’s failure to meet its burden of establishing that its request for ten landscaping laborers for the period of January 9, 2017 to December 29, 2017 is based upon a “temporary” employment need, according to the Employer’s stated standard of a “seasonal” need?

⁴Similarly, judicial review under the Administrative Procedure Act provides that an agency’s actions, findings and conclusions shall be set aside that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C § 706(2).

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii).⁵ This regulation states:

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

(8 C.F.R. §214.2(h)(6)(ii)(A)).

The DHS regulation further states in regard to the nature of petitioner’s need:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The DOL regulation addressing temporary need in H2-B cases also states:

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.

(20 C.F.R. §655.6).

The DOL regulation also specifies that certification will be denied if the “employer has a need lasting more than 9 months” while the DHS regulation only indicates that the need will generally “be limited to one year or less” except in cases of a “one time event” which “could last up to 3 years.” See 20 C.F.R. § 655.6(b) and 8 C.F.F. §214.2(h)(6)(ii)(B).

In the current case the Employer is applying for temporary labor certification for ten landscaping laborers on the basis of a “seasonal need.” To establish a seasonal need according to the DHS regulation:

⁵ Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. §214.2(h)(6)(ii). See also 20 C.F.R. §655.6(b).

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

(8 C.F.R. §214.2(h)(6)(ii)(B)(2)).

In this case the Employer's need for workers as stated in its application is based upon the continued growth of its company and its difficulty in finding available and reliable workers. In its H-2B application the Employer, in regard to its statement of temporary need, stated:

In need of laborers to perform job task for pre-scheduled recurring maintenance jobs for 2017 calendar year. This is a result to (sic) the high increase in acquiring new clients with scheduled maintenance, there has been a decrease in available laborers in work site area and/or not willing to maintain a stable employment status.

(AF 115).

Employer also points out in its appeal letter that its company has grown by 5% or more per year since 2004 and that it has a great deal of difficulty in finding and keeping workers. These statements by the Employer do not establish a temporary need. To the contrary it appears that the Employer is attempting to create a permanent workforce through use of the H-2B program rather than supplementing its permanent workforce due to an increased need for workers caused by a seasonal occurrence.

Employer's requested dates of need as stated in its application are between January 9, 2017 and December 29, 2017 covering eleven months and twenty days. These dates of need reflect a year round need rather than a seasonal need.

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. *See, e.g. Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

It has been determined that an employer cannot establish a temporary seasonal need if its need for the labor or services is present year-round. *See Marco LLC d/b/a Evergreen Lawn Care & Rainmaker Irrigation*, 2009-TLN-00043 (Apr. 9, 2009) (analyzing whether a landscaping business has permanent employees year-round in order to determine whether it established a seasonal need). *See also Fegley Grain Cleaning*, 2015-TLC-00067 (Oct. 5, 2015) ("[i]n determining whether the employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the need for labor or services during this time of the year

differs from other times of the year”). *See also Larry Ulmer*, 2015-TLC-00003, at *3 (Nov. 4, 2014).

To the extent that Employer’s need covers nearly twelve months it is no longer consistent with a “seasonal” need or a temporary need as defined by the DHS and DOL regulations which implement the H-2B program. As previously pointed out, the DHS regulation specifies that “[e]mployment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. §214.2(h)(6)(ii)(B). Employer’s statement of its employment need indicates that its employment need is continuous and is not based on seasonal occurrences.

It is clear that the H-2B program regulations do not contemplate certification of workers for a permanent rather than a temporary employment need.

The DHS and DOL jointly issued preamble to the most recently passed H-2B regulations, applicable to this H-2B application, also known as the Interim Final Rule (“IFR”), makes it clear that the purpose of the H-2B program is to address temporary and not permanent employment needs.

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position ... Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate.

(82 Fed. Reg. 24056 (April 29, 2015)).

CONCLUSION

For the reasons stated above, Employer has failed to meet its burden of showing how its employment need for ten workers covering nearly 12 consecutive months is temporary or seasonal, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii). The CO’s determination is neither arbitrary nor capricious. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is affirmed.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's Decision is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge