



Issue Date: 12 February 2018

BALCA Case No.: 2018-TLN-00038
ETA Case No.: H-400-17303-220775

In the Matter of:

GRASS WORKS LAWN CARE, LLC,
Employer

Appearance: Sam Haddad, Esquire
Austin, Texas
For the Employer

Katherine Zhao , Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Scott R. Morris
Administrative Law Judge

**ORDER GRANTING CERTIFYING OFFICER'S
MOTION FOR RECONSIDERATION**

This case arises from Grass Works Lawn Care's ("Employer") request for review of the Certifying Officer's ("CO") decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, Division A, § 101 (2017).

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following a CO’s denial of an 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).

BACKGROUND

On October 4, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 140-150.³ Therein, Employer requested for certification forty landscape laborers, alleging that it had been unable to hire sufficient U.S. workers during its peak load seasonal period. AF 140. Employer listed the period of intended employment as January 23, 2017 to November 23, 2017. AF 140.

By letter dated December 20, 2017, the CO ultimately denied certification. AF 18-24. The CO reviewed Employer’s submissions and determined that Employer had failed to demonstrate sufficient need for a total of forty workers under 20 C.F.R. § 655.11(e)(3) and (4), and also found that Employer failed to substantiate its requested peakload period of employment under 20 C.F.R. § 655.6(a) and (b). AF 18-24.

On December 22, 2017, Employer appealed the CO’s denial of its application for temporary employment certification. AF 1, 15-16.

By Decision and Order dated January 23, 2018, this Tribunal affirmed in part and reversed in part the CO’s determination. Essentially, the Tribunal determined that the CO erroneously failed to grant a partial acceptance because—based on the undersigned’s reading of the CO’s decision—the CO did not dispute that Employer’s documentation would have supported a grant of certification for the amount of workers and the peakload season granted in Employer’s 2017 application. And despite the CO’s misconstruction of certain pieces of Employer’s evidence, the Tribunal affirmed the CO’s denial of certification for 10 additional Landscape Laborers for the extended period of January 23, 2018 through November, 23, 2018. Accordingly, this Tribunal remanded the matter to the CO for partial acceptance under 20 C.F.R. § 655.33 and recruitment under 20 C.F.R. §§ 655.40 through 655.46.

On February 1, 2018, the CO submitted a Motion for Reconsideration. It argued that—contrary to this Tribunal’s reading of the CO’s Non-Acceptance Denial—the CO had denied

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 rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

³ References to the appeal file will be abbreviated with an “AF” followed by the page number.

Employer's request completely with respect to both the number of workers requested and period of need alleged. The CO acknowledged that various passages of its Non-Acceptance Denial did discuss the increased number of workers and period of need for Employer's 2018 application vis-à-vis its 2017 application, but argued that other passages showed that the CO considered Employer's documentation in relation to the entirety of its 2018 application and denied it *in toto*. The CO noted that there is no presumption or baseline from one certification to the next, and argued that the CO correctly determined that Employer's documentation did not meet the temporary need requirement for even partial acceptance. Accordingly, the CO requested that this Tribunal reconsider its decision and affirm the CO's determination in its entirety.

The Employer filed an Objection and Response to the Certifying Officer's Motion for Reconsideration on February 6, 2018, arguing that this Tribunal correctly construed the CO's determination and issued a proper Decision and Order.

DISCUSSION

Upon review of its January 23, 2018 Decision and Order, the Appeal File, the CO's attestation, and the parties' arguments, this Tribunal grants the CO's Motion for Reconsideration. For the reasons explained below, if the CO takes the position that Employer's application did not substantiate any degree of temporary need under the regulations, then the record supports that determination.

At the outset, however, this Tribunal notes that it is troubled by the ambiguity in the CO's determination. While the CO correctly notes that some of the language in its Notice of Deficiency and Non-Acceptance Denial can be interpreted as completely denying Employer's request for certification, this Tribunal still reads other passages as contradicting such an interpretation.⁴ Nevertheless, a discussion of these conflicting passages is unnecessary. The CO has indicated that it intended to deny Employer's application *in toto*, and this attestation resolves any ambiguity present in the CO's determination. Thus, the Tribunal reviews Employer's appeal anew in light of the CO's attestation.

In the prior Decision and Order, the undersigned found that Employer's submitted documentation did not comply with the CO's instructions in the Notice of Deficiency. Specifically, despite instruction to submit a detailed monthly payroll report (separating temporary and permanent employees, providing total hours worked and total earnings received for both groups (AF 137, 139)), Employer only submitted a payroll chart that showed Employer's total payroll expenditures for January through September 2017. AF 22, 23, 124-127. The chart did not differentiate between temporary and permanent labor, nor detail hours worked or wages earned for either group. As noted in the prior Decision and Order, the regulations require Employer to keep detailed records of its temporary workers' hours and wages, *see* 20 C.F.R. § 655.20(i)(1); thus, Employer's intimation that it does not keep these kinds of detailed

⁴ The Tribunal recognizes that the regulations and case law do not recognize a presumption or baseline from one certification to the next. *See Titus Works, LLC*, 2018-TLN-00045, slip op. at 7 (Jan. 30, 2018). The undersigned based the prior Decision and Order on the language employed by the CO in the its Notice of Deficiency and Non-Acceptance Denial—not an assumption that Employer should be granted at least the same number of workers and peakload season as the prior year.

records is either specious or indicative of regulatory noncompliance. In either case, Employer's failure to provide the requested payroll records to the CO is unexcused. Noncompliance with a CO's request for supporting documentation is sufficient grounds to warrant denial on review. *See* 20 C.F.R. § 655.32(a); *Deboer Brothers Landscaping, Inc.*, 2009-TLN-00018, slip op. at 5 (Apr. 3, 2009). Therefore, Employer's failure to comply with the CO's directives constitutes an independent ground to affirm the CO's denial of certification.

Notwithstanding this flaw, the documentation that Employer did submit also fails to independently substantiate its attestations of a need for 40 workers and a 2018 peakload period from January 23 through November 23. As this Tribunal previously explained, such documentation did not possess sufficient information to permit the CO to quantify Employer's labor needs in terms of number of workers or a peakload season. *See* Decision and Order at 8-9. For this reason, the Tribunal found that Employer had not met its burden to prove a 2018 need for 10 additional workers and an extended peakload season. Given the CO's attestation in its Motion for Reconsideration, this Tribunal must now review Employer's entire 2018 application as denied. The shortcomings of Employer's documentation—its inability to yield any quantification of Employer's 2018 temporary labor needs—are as fatal to Employer's entire 2018 application as they were to the alleged increased degree of need from 2017 to 2018. For the same reasons described in the prior Decision and Order, this Tribunal affirms the CO's determination that Employer did not meet its burden to substantiate its alleged 2018 temporary employment needs. Without more detailed payroll records, neither this Tribunal nor the CO could perform a meaningful analysis of Employer's 2018 labor needs. Accordingly, the CO properly denied Employer's application *in toto*.⁵

This Tribunal is mindful that ambiguities in a CO's Notice of Deficiency could in some cases result in a lack of due process; however, the Notice of Deficiency in this case gave Employer fair notice of its submission requirements. *See* AF 137-139. The documents sought by the CO would have been required to substantiate both portions of the Employer's 2018 application: the degree of temporary need affirmed in 2017 (30 Landscape Laborers from February 15, 2017 through November 15, 2017) and the increased amount alleged for 2018 (10 additional Landscape Laborers and an extended period of need from January 23, 2018 through November 23, 2018). Thus, even assuming that Employer did not comprehend the CO's purpose in requesting these documents, its failure to appreciate the scope of the CO's underlying concern is of no consequence. Employer had a fair opportunity to submit detailed payroll records upon the CO's instructions, yet failed to do so. Failure to submit these documents is a ground for affirming the CO's complete denial, and Employer's other submitted documentation does not independently prove its alleged 2018 temporary need.

For these reasons, upon reconsideration of the parties' arguments, the CO's attestations, and the Appeal File, this Tribunal **GRANTS** the CO's Motion for Reconsideration and **AFFIRMS** the CO's denial of certification in its entirety.

⁵ This Tribunal has considered remanding the matter to the CO for consideration of partial acceptance in light of the CO's misconstruction of some of Employer's submitted contracts; however, such a remand would be futile. Employer's submitted evidence permits no quantification of its 2018 temporary labor needs whatsoever, as Employer failed to submit detailed payroll records necessary to make such a calculation.

SO ORDERED.

For the Board:

SCOTT R. MORRIS