



Issue Date: 23 January 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

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION IN PART, REVERSING**  
**DENIAL IN PART, AND REMANDING FOR PARTIAL ACCEPTANCE**

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, peak load, 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this

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<sup>1</sup> 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.<sup>3</sup> 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 November 6, 2017, the CO denied certification on two grounds. First, citing 20 CFR §§ 655.11(e)(3) and (4), CO determined that Employer had not “sufficiently demonstrated that the number of workers requested on the application [forty] is true and accurate and represents bona fide job opportunities.” AF 137. The CO noted that Employer’s application for the previous year had only requested thirty workers, and stated that “[i]t is unclear why the number of workers requested had increased from the previous certification.” AF 137. Second, citing 20 CFR §§ 655.6(a) and (b), the CO concluded that Employer “did not submit sufficient information in its Application for Temporary Employment Certification to establish its requested period of intended employment.” AF 138. The CO observed that Employer’s application for the previous year had only requested temporary workers from February 15 to November 15, 2017, and stated “[i]t is unclear why the employer’s dates of need have significantly changed from its previous certification.” AF 138. To cure these deficiencies, the CO instructed Employer to submit supporting evidence and documentation that justifies its attestation regarding the degree of temporary need.

On November 17, 2017, Employer submitted a cover letter and a number of attachments in response to the CO’s request for supporting documentation. AF 43-132. These attachments included: a letter of explanation, an amended statement of temporary need, an Economic Forecast for Texas’ Largest Metropolitan Areas, five letters of intent, Employer’s contract with Walgreens Stores, Inc., eight invoices, an email addressed to BB&T Bank Landscaping for services, Employer’s subcontract landscaping agreements for BB&T Bank and Caribou Coffee, pricing schedules, quarterly tax documents and charts, payroll project charts, and various other

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<sup>2</sup> 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.

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

documents. In sum, Employer argued that the objective data supported its marginally increased requests for workers and dates of need. AF 43-46. Employer noted that it had documented its need and met its burden for several years using similar kinds of evidence, and alleged that new and upcoming commercial contracts supported its request for a greater temporary workforce. AF 45-46.

By letter dated December 20, 2017, the CO again denied certification on the same two grounds. AF 18-24. The CO reviewed Employer's submissions and determined that Employer had failed to demonstrate sufficient need for its request for forty workers under 20 CFR §§ 655.11(e)(3) and (4). Addressing the individual documents submitted, the CO reasoned that "a random selection of five letters of intent and eight invoices do not support the employer's need for 40 workers."<sup>4</sup> AF 23. The CO further noted that Employer's quarterly tax history merely related to the entire organization—not the requested positions—and that Employer's quarterly payroll reports "do not separate out the employer's permanent workers from its temporary workers and it is void of total monthly hours worked." AF 23. Accordingly, the CO concluded that the quarterly payroll "is not useful in determining the employer's need for its requested number of workers," and found that the Employer did not overcome this deficiency. AF 23.

Regarding the deficiency noted under 20 CFR §§ 655.6(a) and (b), the CO again found that Employer's submissions failed to substantiate its need for an increased period of employment. AF 20-22. For the same reasons that the evidence failed to support a request for increased workers, the CO also determined that the evidence did not support the Employer's request for an increased period of intended employment. AF 21-22. Since Employer's response had not overcome either deficiency, the CO again denied certification. AF 18-24.

On December 22, 2017, Employer appealed the CO's denial of its application for temporary employment certification. AF 1, 15-16. It opined that the CO did not appear to review the totality of evidence submitted and failed to adhere to proper statutory, regulatory, and informal agency guidance.

On January 12, 2018, Employer submitted a brief along with additional documents submitted in connection with its 2017 application for temporary labor certification. Employer noted that it was a small company, and that it made a genuine effort to respond to the CO's request for documentation despite the fact that certain records that the CO requested may not be created in the regular course of business. Employer also asserted that the CO erroneously characterized two submitted contracts as unrelated to Employer's business, and failed to properly conclude that the totality of the evidence supported Employer's requested application. The CO did not submit a brief.

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<sup>4</sup> It appears that the CO mistakenly switched the rationales for this deficiency and the subsequent deficiency in the text of the letter. *See* AF 21-22; AF 23-24.

## DISCUSSION

### Legal Standard

The standard of review in the H-2B program is limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board “must 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(e). The Board must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. *Id.* While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO’s determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

An employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017); *Alter and Son Gen. Eng’g*, 2013- TLN-00003, slip op. at 4 (Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peak load, or intermittent need.<sup>5</sup> Temporary service or labor “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). An employer establishes a “peakload need” if it shows it “regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. § 655.11(e)(3) and (4); *Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012).

Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or

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<sup>5</sup> Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

### Analysis

At the outset, this Tribunal notes that it is able to consider only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). Accordingly, in reaching this decision, the Tribunal does not consider Employer’s submission of the documentation that accompanied Employer’s 2017 application for temporary labor certification.

Upon review of the appeal file, the Employer’s request for review, and the Employer’s brief, the undersigned finds that the CO erred by misconstruing certain pieces of evidence and failing to grant a partial acceptance. However, the Employer also failed to comply with the CO’s instruction to submit detailed employee payroll data, and the CO reasonably concluded that Employer’s documentation did not justify its 2018 request for an increased number of workers and extended period of need vis-à-vis its 2017 application. For the reasons explained below, this Tribunal reverses the CO’s denial of acceptance for 30 Landscape Laborers from February 15, 2017 through November 15, 2017, but affirms the CO’s denial of certification for 10 additional Landscape Laborers for the extended period of 23, 2018 through November, 23, 2018.

First, it is clear that the CO only found the increased portion of Employer’s 2018 request to be unsubstantiated by the record. For both the increased number of worker and extended period of need requested, the CO indicated that, using Employer’s prior application as a baseline, Employer’s submissions did not justify Employer’s request. For example, in the Notice of Deficiency, the CO stated:

The employer did not include adequate attestations to justify the change in number of workers from the employer’s prior certification, H-400-16322-352870, which requested 30 Landscape Laborers from February 15, 2017 through November 15, 2017. The current application requests 40 Landscape Laborers from January 23, 2018 through November 23, 2018. It is unclear why the number of workers requested has increased from the previous certification.

Further explanation and documentation is required in order to establish the employer’s need for a total of 40 workers.

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The employer did not include adequate attestations to justify the change in dates of need from the employer’s prior certification, H-400-16322-352870, which requested 30 Landscape Laborer from February 15, 2017 through November 15, 2017. The current application requests 40 Landscape Laborers from January 23, 2018 through November, 23, 2018.

It is unclear why the employer's dates of need have significantly changed from its previous certification.

AF 138. Similarly, in the Non-Acceptance Denial, the CO stated:

The employer did not include adequate attestations to justify the change in number of workers from the employer's prior certification, H-400-16322-352870, which requested 30 Landscape Laborers from February 15, 2017 through November 15, 2017. The current application requests 40 Landscape Laborers from January 23, 2018 through November 23, 2018. It is unclear why the number of workers requested has increased from the previous certification.

Further explanation and documentation is required in order to establish the employer's need for a total of 40 workers.

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It is unclear why the employer's dates of need have significantly changed from its previous certification.

AF 20, 22.

Thus, it appears that while the CO did not find Employer's evidence to sustain a request for an increased number of workers and extended period of need from Employer's prior application, the CO did not question that Employer's documentation would support Employer's prior request for 30 Landscape Laborer from February 15, 2017 through November 15, 2017.<sup>6</sup> Indeed, by using Employer's 2017 application as a baseline for analyzing its 2018 application, the CO tacitly acknowledged that Employer had presented enough documentation to support the 2017 application's requested number of workers and period of need. The regulations permit a CO to grant partial certification by reducing either the number of workers or period of need for certification. 20 C.F.R. § 655.54. Accordingly, the undersigned finds that—based on the CO's reasoning and findings—the CO erred in not granting at least a partial acceptance of Employer's request for certification. On remand, the CO shall issue a notice of acceptance in accord with 20 C.F.R. § 655.33, and permit Employer to engage in recruitment under 20 C.F.R. §§ 655.40 through 655.46.

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<sup>6</sup> Although the CO used generic boilerplate denial language at other points of the Non-Acceptance Denial, the quoted selections above more specifically indicate that the CO's central issue was Employer's increased request in relation to the prior year.

With regard to Employer's request for 10 additional workers and an increased period of need from January 23, 2018 through November 23, 2018, the CO also erred in its characterization of the evidence submitted by the Employer. Specifically, the CO noted that the Employer submitted "emails for Ferrandino & Son, Inc. to landscaping companies other than the employer named in this application: BB&T Bank Landscaping and Caribou Coffee Landscaping." AF 21, 23. Upon review of those emails, however, it is clear that Employer is correct in asserting that these emails detail subcontracts between Employer and Ferrandino & Son—a property management company—which require Employer to perform landscaping services at properties owned by BB&T Bank and Caribou Coffee. *See* AF 84-85; Employer's Br. at 3. As Employer submitted these new 2018 contracts to substantiate its need for increased labor vis-à-vis its prior application (*see* AF 79), the CO did not properly consider the totality of evidence submitted by Employer in response to the Notice of Deficiency. Such an evidentiary mischaracterization significantly undercuts the CO's reasoning and rises to reversible error even under the arbitrary and capricious standard.

However, notwithstanding this error and an independent review of the Employer's submitted evidence, this Tribunal is unable to conclude that Employer has sufficiently demonstrated the need for an additional 10 workers and a month-long increased period of need for Employer's 2018 peakload season. In particular, the Tribunal notes that the CO's Non-Acceptance Denial rested in significant part on Employer's failure to submit detailed payroll records. *See* AF 21-23. The CO directed the Employer in the Notice of Deficiency to submit, among other things, "[s]ummarized monthly payroll reports for a minimum of one previous calendar year 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." AF 137, 139. In denying Employer's application, the CO correctly noted that Employer's submitted quarterly payroll reports "do not separate out the employer's permanent workers from its temporary workers and it is void of total monthly hours worked." AF 22, 23, 124-127. Accordingly, the CO concluded that these payroll reports were not useful in determining Employer's need for the requested number of workers or peakload months. AF 22, 23.

In general, noncompliance with a CO's request for supporting documentation will result in a 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). And although an employer can substantiate its need for workers through alternative documentation, detailed payroll data plays a crucial role in determining an employer's need for temporary labor. *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046, slip op. at 6 (Apr. 23, 2013); *see also Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017) (affirming denial based on payroll data showing a lack of need for the employer's requested amount of temporary labor); *North Country Wreaths*, 2012-TLN-00043, slip op. at 5-6 (Aug. 9, 2012) (same). Perhaps for this reason, 20 C.F.R. § 655.20(i)(1) requires employers to keep records of their temporary employees' hours and wages.

With these rules and guiding principles in mind, this Tribunal views Employer's failure to submit more detailed payroll records as significant and problematic. The CO correctly observed that Employer only submitted a monthly total payroll report for 2017 that did not differentiate between temporary and permanent labor nor detail hours worked for either group.

AF 22, 23, 124-127. Employer intimated in its brief that it does not keep these kinds of detailed records in the ordinary course of its business (Employer's Br. at 3); however, these are the exact kinds of records that 20 C.F.R. § 655.20(i)(1) requires employers of H-2B workers to keep. Accordingly, the Tribunal agrees with the CO's reasoning and conclusion that Employer's failure to provide this detailed payroll information prevents meaningful evaluation of Employer's 2018 request for an increased number of temporary workers and an extended period of need. As Employer bears the burden to demonstrate a need for the number of workers requested for the alleged period of need under 20 C.F.R. § 655.11(e)(3) and (4), such a failure will result in a denial of Employer's application.

The undersigned recognizes that Employer has presented some evidence of increased work for the 2018 season, which nominally supports its 2018 request for additional labor. *See* AF 79-94 (containing contracts with new customers for the 2018 landscaping season). This documentation does little to substantiate Employer's request, however, as the contracts contain almost no quantification of the labor that will be required. Indeed, only one of these new contracts included in Employer's submission contains any indication of the amount of work that will be required. This contract—for landscaping of a Caribou Coffee property—states that the customer will only be billed \$231.21 per month from January to September. Such a small contract would likely not even support approval of a single additional temporary worker, much less the 10 additional that Employer requests for the 2018 season. But even if these contracts would contain sufficient information to satisfy a request for 10 additional temporary workers, Employer's failure to provide detailed payroll records would prevent approval of its increased request. As explained above, without payroll records detailing how many hours its temporary and permanent laborers worked in 2017, this Tribunal is unable to determine whether Employer requires additional temporary workers to meet its increased 2018 workload. Certifying Officers and BALCA examine applications to ensure that an employer's requested temporary labor would not displace U.S. labor, and payroll data is one way to analyze an employer's request for temporary labor. *See Roadrunner Drywall*, 2017-TLN-00035, slip op. at 8-10 (May 4, 2017) (affirming denial based in part on payroll data showing an unexplained, significant decrease in permanent staff alongside Employer's request for a greater number of temporary workers); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046, slip op. at 6-7 (Apr. 23, 2013) (reversing denial based on payroll records showing that eight permanent employees worked close to 7000 hours of overtime in the prior year). Accordingly, Employer's valid evidence of some additional contracts for 2018 does not satisfy its burden to demonstrate a need for 10 additional workers.

For the same reasons, the Employer's evidence does not substantiate Employer's alleged extended period of need in 2018. Granting the baseline period of need as stated in Employer's 2017 application—February 15, 2017 through November 15, 2017—Employer's evidence fails to justify a requested extended period from January 23, 2018 through November 23, 2018. Some of Employer's current clients have attested that they use Employer's services during a peakload season of January through November (AF 59-61), and some of Employer's new contracts specify service periods through the entire 2018 year. AF 79-89. Nevertheless, such general assertions do not permit this Tribunal to quantify Employer's need for a specific number of workers for a specific period. Therefore, this Tribunal is also unable to determine whether Employer's permanent employees could handle Employer's workload during that periods of extension that Employer requests. Moreover, Employer's 2017 payroll summary and 2018 payroll projection

correlate with the more limited period of need contained in its 2017 application. Employer's 2017 payroll summary shows a significant increase in wages paid starting in February as well as a relative decrease of wage payments in September. AF 124.<sup>7</sup> Indeed, Employer's wage payment projection for 2018<sup>8</sup> shows a sharp uptick in wage payments in March and a sharp decrease in November. Together, the 2017 wage summary and 2018 wage projections, though minimal evidence in their current form, only support a finding that Employer will have a 2018 peakload season of February/March through October. In addition to the quantification problems noted above, this documentation tends to support the CO's conclusion that Employer has not sufficiently demonstrated that its 2018 peakload season extends from January 23 through November 23.

In sum, Employer's failure to provide detailed payroll records prevents this Tribunal from performing a meaningful analysis of its labor needs over and above its prior 2017 application. Thus, Employer's application for 10 additional workers and an extended period of need January 23, 2018 through November 23, 2018 must be denied. Accordingly, this Tribunal reverses the CO's denial of acceptance for 30 Landscape Laborers from February 15, 2017 through November 15, 2017, but affirms the CO's denial of certification for 10 additional Landscape Laborers for the extended period of 23, 2018 through November, 23, 2018. On remand, the CO shall issue a notice of acceptance in accord with 20 C.F.R. § 655.33, and permit Employer to engage in recruitment under 20 C.F.R. §§ 655.40 through 655.46. Employer is reminded that, should the need arise, it can request an amendment to its application or job order to increase the number of workers or extend the period of employment. *See* 20 C.F.R. § 655.35.

**SO ORDERED.**

For the Board:

**SCOTT R. MORRIS**  
Administrative Law Judge

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<sup>7</sup> Employer's 2017 payroll report only provide wage data through September 2017.

<sup>8</sup> Employer provided no explanation for how it calculated these projections.