



Issue Date: 09 February 2018

BALCA Case No.: 2018-TLN-00035

ETA Case No.: H-400-17279-224515

In the Matter of:

ISLAND CREEK LANDSCAPING,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Island Creek Landscaping’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Non Acceptance Denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States. *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 (“Department” or “DOL”). 8 C.F.R. § 214.2(h)(6)(iii). Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

STATEMENT OF THE CASE

H2-B APPLICATION

Employer engages in landscaping work including lawn maintenance and landscaping, as well as the installing irrigation systems, lighting and hardscapes such as patios, fire pits and walkways. AF 13.² Employer’s services 120 customers. *Id.* Employer is located in Duplin County, North Carolina. *Id.* On October 6, 2017, the Employer filed an ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”) with the CO. AF 10. Employer filed Appendix B to ETA Form 9142B; *Additional Notes Regarding Statement of Temporary Need* (undated); and an *Additional Worksites* addendum with its Application. AF 11-

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“2015 IFR”) to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the “2008 Rule” found at 73 Fed. Reg. 78,020 (Dec. 19, 2008). *See* 80 Fed. Reg. 24,042, 24,109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015 whose period of need begins after October 1, 2015. *See* 20 C.F.R. 655.4(e) (explaining transition procedures).

² Citations to the Appeal File are abbreviated as “AF.” For purposes of clarity, the “P” prefix on each page number of the Appeal File has been omitted (*i.e.* “P60” is instead cited as “60”).

20. Employer requested certification for 5 Landscaping and Groundskeeping Workers from December 20, 2017 to October 6, 2018, based on alleged seasonal temporary need during that period. AF 13.

Notice of Deficiency

On October 18, 2017, the CO issued a Notice of Deficiency (“NOD”). AF 130. The CO listed five deficiency grounds: 1) that employer failed to satisfy application filing requirements under 20 CFR § 655.15(b) and 655.17; 2) that Employer had failed to establish the job opportunity as temporary in nature as required under 20 C.F.R. § 655.6(a) and (b); 3) that Employer failed to establish temporary need for the number of workers requested under 20 CFR § 655.11(e)(3) and (4); 4) that Employer failed to submit an acceptable job order under 20 CFR § 655.16 and 655.18; and 5) that Employer failed to submit a disclosure of foreign worker recruitment under 20 CFR § 655.9(a) and (b). AF 130-140.

As to the first deficiency ground, the CO explained that the Employer’s application did not meet the application filing timeframe. AF 133. Specifically, the CO noted that Employer indicated its dates of need as December 19, 2017 through October 6, 2018 and the Employer filed its application on October 6, 2017. *Id.* This is 74 days before the employer’s start date of need for H2-B workers while 20 CFR 655.15(b) requires ETA Form 9142 be filed no less than 75 days before the employer’s date of need. *Id.* The CO requested the Employer submit an emergency request that meets filing requirements or amend its application to reflect a start date complying with the regulation. *Id.*

As to the second deficiency ground, the CO explained that the Employer had not sufficiently demonstrated why the Employer’s need is considered temporary in nature. AF 134. Employer had originally submitted another certification application (H-400-17005-805285), which requested three Landscaping and Groundskeeping Workers from April 24, 2017 to December 13, 2017. *Id.* The employer did not explain why its seasonal need had changed from its previous application. *Id.*

For the second deficiency, the CO requested as evidence “[s]ummarized monthly payroll reports for a minimum of two previous calendar years, 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 earnings received.” AF 134–35 (emphasis added). In the alternative, the CO requested evidence that “similarly serve[d] to justify the chosen standard of temporary need.” *Id.*

As to the third deficiency, the CO explained that 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. AF 135. Specifically, the Employer’s current application, H-400-17279-224515, received on October 6, 2017, is requesting certification for five Landscaping and Groundskeeping Workers from December 19, 2017 to October 6, 2018. However, the Employer’s previously certified application H-400-17005-805285 requested three Landscaping and Groundskeeping Workers from April 24, 2017 to December 13, 2017. *Id.* Based on this information, the CO found the application unclear if the employer has a need for

five or eight Landscaping and Groundskeeping Workers. *Id.* The CO requested the Employer must explain why it is requesting a temporary need for five Landscaping and Groundskeeping Workers in this area of intended employment during this period of need since it has already received certification on April 24, 2017 for the same temporary area of intended employment and overlapping dates of need. *Id.*

As to the fourth deficiency ground, the CO explained the Employer did not submit an acceptable job order because it did not include required information. AF 137. Specifically, the job order states employer has three job openings; however, ETA Form 9142 indicates employer has five job openings; and the job order states employer's basic wage offer is \$11.28 per hour and overtime wage offer is \$16.92 to \$22.50 per hour; however, ETA Form 9142 indicates a basic wage offer of \$11.36 to \$15.00 per hour and an overtime wage offer of \$17.04 to \$22.50 per hour. *Id.* The CO requested Employer job openings and overtime wages consistent between its job order and ETA Form 9142 or an already-amended job order that has all required content under 20 CFR § 655.18. *Id.*

As to the fifth and final deficiency ground, the CO explained the Employer did not include any agreements between itself and an agent or recruiter engaging in the recruitment of H2-B workers. AF 139–40. The CO requested the Employer provide a copy of all agreements with any agent or recruiter with whom it plans to engage or the Employer must notify the Department it will not utilize a recruiter. *Id.*

Employer Response

On October 24, 2017, Employer responded to the NOD. AF 21. As to the first deficiency ground, Employer authorized the CO to change the date of need to December 20, 2017, meeting the filing requirements. *Id.* As to the second deficiency Employer provided more information regarding its peak load temporary need, claiming an increase in demand for Employer's services, caused by company growth and an expansion of services, necessitated the additional temporary workers. *Id.* Employer further noted the need to finish overdue projects and catch up on seasonal tasks, such as pruning, necessitated the 5 additional workers. *Id.* Employer also explained that the dates of need changed its prior application because it did not receive any foreign workers during the prior period requested. AF 22. Additionally, Employer included a *Monthly Payroll* document for dates October 2015-October 2017 and a Job Order for 2017. AF 22–125. Finally, for the fifth deficiency ground, Employer stated it will not use any agent or recruiter for the recruitment of H2-B workers under this application. AF 23.

CO's Final Determination

On December 4, 2017, the CO issued a Non Acceptance Denial of Employer's Application. AF 8. The CO found that Employer's response had failed to cure the deficiencies. *Id.*

The CO determined that the information provided by Employer failed to establish the job opportunity as temporary in nature. AF 10–11. First the CO determined that Employer did not include adequate attestations to establish its requested period of intended employment. AF 11.

The employer's previous certification established its seasonal period for 2017 as April 24 through December 13. AF 12. The current application is requesting workers to finish overdue projects and to catch up on seasonal task from December 20, 2017 to October 6, 2018. *Id.* The CO determined that combination of the employer's applications points to a permanent need for Landscape Project Laborers. *Id.*

The Employer also submitted 92 pages of individual payroll records. AF 12; AF 22-115. The CO explained it specifically requested the Employer to submit its payroll in a summarized monthly form. *Id.* Therefore, the CO did not evaluate the payroll, as it was not submitted in the proper format. *Id.*

The CO also found that Employer failed to explain what duties are performed in the fall and why Landscape Project Laborers are no longer needed in the fall, as workers were previously requested during this time. AF 12. The CO explained it found the submitted explanation and documentation does not support a temporary need for workers and did not provide a sufficient explanation as to why the employer's seasonal dates of need have changed. *Id.* Instead, the CO found the Employer's explanation points to the Employer's need for workers on a year-round basis. *Id.* Accordingly the CO found the employer did not overcome the deficiency. *Id.*

PROCEDURAL HISTORY

On December 28, 2017, BALCA received a request for administrative review of the CO's Final Determination in this matter. On January 3, 2018, during a conference call, the parties agreed to submit their briefs by a postmark date of January 22, 2018. On January 8, 2018, I issued a Notice of Assignment and Briefing Schedule reflecting these dates. On January 21, 2018 Employer submitted a brief in support of their claim. On January 23, 2018, the Solicitor's office submitted notice it would not file a brief in this matter.

SCOPE OF REVIEW

BALCA's standard of review is limited in H-2B cases. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon considering the evidence of record, BALCA must: 1) affirm the CO's determination; 2) reverse or modify the CO's determination; or 3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

DISCUSSION

The issue raised on appeal is whether Employer has established the job opportunity as temporary in nature.

Employer Has Not Established Temporary Need.

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of four temporary need standards: one-time

occurrence, seasonal, peakload, or intermittent. *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). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. At filing, an employer need only submit a detailed statement of temporary need with their application. 20 C.F.R. § 655.21(a). However, should the CO request supporting evidence for an employer's application, the employer must "timely furnish the requested supplemental information or documentation." *Id.* § 655.21(b); *North Country Wreaths*, slip op at 6 ("the CO is not required to take [Employer] at its word.") Failure to furnish information may be grounds for denial of the application. *Id.*

Of the four kinds of temporary need, Employer asserts Temporary Seasonal need. AF 141. To qualify for seasonal need, an employer must establish "1) that the service or labor is traditionally tied to a season of the year by an event or pattern and is of recurring nature." 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). An employer must specify any periods of time during each year in which it does not need the services or labor. *Id.* Moreover, "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 petitioner's permanent employees." *Id.*

In this case, the CO found that Employer had failed to provide sufficient information to prove temporary need, and in response the CO requested additional information, including specific, summarized monthly payroll reports for at least two prior years. AF 134–35. Employer responded by giving overall payroll information for the two year period, without including monthly summaries. AF 22-115. Upon review of this evidence, I find it is insufficient to establish temporary seasonal need.

The regulations plainly state that, to prove seasonal need, an employer must specify any periods of time during the year in which it does not need additional services. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). Employer's statement of need states that, "The work is seasonal and additional help is needed for the peak periods. Starting as early as January of each year a pre-emergent is applied to turf. In April, the first of 3 lawn fertilizer applications begin. The second is normally in early June and the final in August. In the Fall and Winter, pre-emergent are once again applied." AF 13. After the CO requested additional information, Employer responded by stating, "The company continues to grow and expand its services each year due to requests from the current customer base...The addition of 5 workers will allow the company to finish overdue projects, catch up on seasonal tasks." AF 21. Employer fails to provide sufficient information to verify its seasonal need. Employer's payroll summaries do not establish a seasonal need, because the records do not demonstrate that any time period has required more laborers than any other. AF 22–115.

First, the initial NOD went into detail explaining that Employer had to submit "[s]ummarized *monthly* payroll reports for a minimum of *two previous calendar years* that identify, for *each month* and separately for full-time permanent and temporary employment . . . the total number of workers or staff employed, total hours worked, and total earnings received." AF 133 (emphasis added). The CO's meaning is clear. Despite these instructions, Employer failed to provide the proper information, instead providing non-summarized payroll records.

Further, the Employer submitted a brief in support of their appeal to this office on January 21, 2018. Employer's Brief. In its brief Employer states, "I have the flexibility to shift projects into any given month based on the number of employees I currently have on hand." *Id.* To qualify for seasonal need, an employer must establish "1) that the service or labor is traditionally tied to a season of the year by an event or pattern and is of recurring nature." 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). Employer's statements directly conflict with the regulation requirements as the Employer's need is not tied to any pattern or event, but rather by its own admission is flexible to be shifted to any month. These statements suggest that Employer's need reflects a peakload or intermittent need under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) or 8 C.F.R. § 214.2(h)(6)(ii)(B)(4) rather than the seasonal need for which it applied.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

William S. Colwell

Associate Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002