



Issue Date: 02 February 2018

BALCA CASE NO.: 2018-TLN-00045

ETA CASE NO.: H-400-17308-957755

In the Matter of:

TITUS WORKS, LLC,
Employer.

ORDER DENYING RECONSIDERATION

This matter arises under the labor certification process for temporary non-agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to § 655.61(a).

On January 30, 2018, I issued a Decision and Order affirming the denial of certification based on the record prepared before the CO and the parties’ positions. In the Decision and Order, I found that Employer failed to provide payroll information requested by the CO in the Notice of Deficiency and that the CO properly found Employer’s evidence insufficient to establish a temporary need for the requested dates.

The same day, January 30, 2018, Employer submitted a “Follow-Up to *Pending Appeal Brief*” via email. It is unclear whether Employer filed this brief before or after becoming aware of the issuance of the Decision and Order.¹ Given the timing of the filing and in the interest of fairness, I will consider Employer’s “Follow-Up” brief as a Motion for Reconsideration.

Discussion

The Board has no obligation to exercise its reconsideration authority; rather, the decision to reconsider a particular case is left to the Board’s discretion. *Cajun Constructors, Inc.*, 2009-TLN-00096, slip op at 4 (Dec. 8, 2009). Summary denial of a motion for reconsideration is appropriate if the petitioner does not identify a flaw in the judicial process by which the Board reached its decision, or alleges that the Board overlooked some important fact. *Id.* at 4-5. The Board may also decline to reconsider its decision if the movant merely reiterates arguments previously made that were deemed to be without merit. *Id.* at 5.

¹ The parties were notified via email that the Decision and Order had been issued at 5:11 p.m., Pacific Time on January 30, 2018. Employer’s attorney emailed the “Follow-Up to *Pending Appeal Brief*” at 6:08 p.m., Pacific Time.

In its brief, Employer cites to a recent decision by the Board, *Grass Works Lawn Care, LLC*, 2018-TLN-00038 (January 23, 2018), that was not available to Employer before it submitted its original brief on appeal. Employer alleges that according to the reasoning in *Grass Works Lawn Care, LLC*, partial acceptance of its request for certification is appropriate. Employer also repeats its argument that the CO improperly applied the definition of “temporary” found in 20 C.F.R. § 655.6(b), which limits temporary employment to nine months, instead of DHS’s definition found at 8 C.F.R. § 214.2(h)(6)(ii)(B), which limits temporary employment to one year.

First, the argument that the CO applied the wrong definition of “temporary” was dismissed in the Decision and Order, as there was no indication in the record that the CO based his decision on the inapplicable nine-month limit found at 20 C.F.R. § 655.6(b). Reconsideration of this determination is denied.

Second, the decision in *Grass Works Lawn Care, LLC* is distinguishable from the case at hand.² In *Grass Works Lawn Care, LLC*, the employer applied for certification of 40 workers from January 23, 2018, through November 23, 2018. Slip op. at 2. The employer’s application the previous year had requested 30 workers from February 15, 2017 through November 15, 2017. *Id.* The CO denied the 2018 application, specifically citing the 2017 application and asserting that the employer did not justify the increase in the number of workers or the change in the dates of need. *Id.* In *Grass Works*, the CO only found the increased portion of the 2018 request to be unsubstantiated by the record, and did not question that the documentation supported the employer prior request for 30 workers from February 15, 2017, through November 15, 2017. *Id.* at 5-6. The Board stated that “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.” *Id.* at 6. However, the Board noted because the employer failed to submit the detailed employee payroll data requested by the CO, the CO reasonably concluded that the employer’s documentation did not justify its 2018 request for an increased number of workers and extended period of need. *Id.* at 7-8. The employer argued that it did not keep the requested data in the ordinary course of its business, but the Board noted that “these are the exact kinds of records that 20 C.F.R. § 655.20(i)(1) requires employers of H-2B workers to keep” and referred to its failure to submit the records as “significant and problematic.” *Id.* Given its findings, the Board remanded the matter to the CO to certify only the period of need and number of workers indicated in the employer’s 2017 application. *Id.* at 9.

Here, unlike *Grass Works Lawn Care, LLC*, the CO did not base the decision on Employer’s previous applications, nor indicate that the previous dates were substantiated by the documentation submitted. The decision in *Grass Works Lawn Care, LLC* does not warrant reconsideration and actually offers support for the Decision and Order, as Employer here also failed to submit the detailed payroll data requested by the CO. Reconsideration of the Decision and Order is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

² While this decision may be persuasive authority, it is not precedential.