



**Issue Date: 02 July 2018**

BALCA Case No.: 2018-TLN-00150  
ETA Case No.: H-400-18116-621992

In the Matter of:

WERBRICH'S LANDSCAPING, INC.,  
Employer.

Certifying Officer: Nora Carroll, Esq.  
Chicago National Processing Center

Appearances: Theresa L. Nelson, Esq.  
Strauss Troy  
Cincinnati, Ohio  
For the Employer

Before: Joseph E. Kane  
Administrative Law Judge

### **DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Werbrich Landscaping, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.<sup>2</sup> 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”).<sup>3</sup> A

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<sup>1</sup> On April 29, 2015, the Department of Labor 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. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655). Pursuant to this rule, the Department will process an *Application for Temporary Employment Certification* filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR. *Id.* at 24110. The Employer filed an *Application for Temporary Employment Certification* after April 29, 2015, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

<sup>2</sup> 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 definition of temporary need is now governed by 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) § 113 (Dec. 18, 2015).

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.<sup>4</sup>

### **STATEMENT OF THE CASE**

The Employer is a landscaping installation and maintenance company in Cleves, Ohio. (Administrative file “AF” 266) On April 26, 2018, the Employer filed with the CO an Application for Temporary Employment Certification (“Application”), ETA Form 9142. (AF 266). The Employer requested certification for three temporary workers to work as landscapers and laborers between May 7, 2018 and December 15, 2018. (AF 266). The Employer listed its temporary need as follows:

Werbrich's Landscaping is a landscape installation and maintenance company. Demand is great in our area and we need more help to get our work done. Our work season is from March to early December which makes us seasonal. Due to cold temperatures between December 15th and March 1st, Werbrich's Landscaping is not able to perform work outdoors. Plant material (trees and bushes) cannot be planted during cold temperatures. Also since the plants/grass do not grow during these months, they do not need to be cut/trimmed during this time period. The main source of work is snow removal which is not guaranteed. Company's sales follow a specific pattern demonstrating the increased need on a seasonal basis: amount of sales January (appx. \$42,000), February (\$150,000), March \$263,000), April (\$327,000), May (\$347,000), June (\$323,000), July (\$286,00), August (\$397,000), September (\$300,000), October (\$289,000), [...], November (\$223,000) and December (\$200,000). The values provided herein as gross sales. The months from April to October are the highest peak of sales, with sales slowing in November and December to the lowest amount in January, February and March.

[C]urrent workers work 40-50 hrs per week but would need to work 50-60 hours per week if we do not get additional help. Without additional help, we will not be able to add the crew that we want to add. A crew is made up of 3 workers - the number of workers requested. Each crew produces approx. \$300,000.00 in revenue per year, so we are talking about \$300,000 in potentially lost revenue. As landscapers, our busiest time is the spring and early summer. We have to compete with all other employers for workers during this time frame. Werbrich's Landscaping posts ads on-line, at their facility and requests workers refer potential employees for hire. But are unable to find and retain reliable workers for the entire season. Werbrich's Landscaping has a standard work force it employs year-round. However, in the peak months (April to October), Werbrich's Landscaping's standard work force cannot keep up with the demand. The increased demand would require Werbrich's Landscaping's standard work force to work an extremely high number of hours each week. During the peak months (April to October), Werbrich's Landscaping is seeking to hire additional

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<sup>4</sup> 20 C.F.R. § 655.61(a).

employees to ensure its standard workforce is not overworked, but the work available and for which Werbrich's Landscaping is contracted to complete can be performed. Werbrich's Landscaping does not need and will not continue to employ any seasonal workers during the slow months (December to March).

(AF 266, 272).

The CO issued a Notice of Deficiency (“NOD”) on May 4, 2018, noting among other things, the Employer failed to establish an emergency need to waive the time period requires, failed to establish that the job opportunity was temporary in nature by failing to establish a seasonal need, and failed to submit an acceptable job order. (AF 259-262). To remedy this deficiency, The CO directed the Employer to provide a revised statement of temporary need containing:

1. A description of the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. An explanation detailing why the months of November and December are included in the employer’s dates of need if sales are at its lowest

(AF 261). The CO also required supporting evidence that justified the dates of need including:

1. Signed service contracts from customers for the previous one calendar year that includes contract dates; and
2. Summarized 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 261).

The Employer timely responded to the NOD. (AF 230-255). The Employer provided an amended job order, an amended ETA Form 9142B, 2017 payroll records and two job proposal contracts. (AF 230-255). The Employer also submitted a statement reiterating that the employer’s previously submitted statements and evidence are sufficient to establish a seasonable need. (AF 230).

On May 30, 2018, the CO issued a Final Determination denying the Employer’s application. The CO determined that the Employer corrected two of the three deficiencies identified in the NOD, but one deficiency remained. (AF 218). The CO found the Employer failed to establish a seasonal need. The CO stated that the Employer did not demonstrate how the months of November and December fit within its seasonal need, as both months have lower sales than the month of March. The Employer’s specification that its sales slow during November and December did not support its argument of a need during this time. The CO determined that it was unclear how the dates of need were established. (AF 219). The CO further stated that the Employer failed to provide an explanation detailing why the months of

November and December were included in the need. (AF 220). Also the proposals submitted by the Employer did not include dates within the requested need timeframe. (AF 220).

Thereafter, the Employer requested administrative review of the CO's Final Determination, as permitted by 20 C.F.R. § 655.61.<sup>5</sup> (AF 1-215). On June 18, 2018, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer ("Solicitor") to file briefs within seven business days of receiving the Appeal File.<sup>6</sup> BALCA received the Appeal File from the CO on June 19, 2018. The parties did not file briefs. The matter is now ripe for decision.

### **DISCUSSION AND APPLICABLE LAW**

BALCA's standard of review in H-2B cases is limited. BALCA may consider only 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 that the Employer actually submitted to the CO before the date the CO issued a Final Determination.<sup>7</sup> Only evidence submitted before the CO can be considered. After 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.<sup>8</sup> The Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>9</sup> The regulations do not specify a standard of review for BALCA, but the Board has adopted the arbitrary and capricious standard.<sup>10</sup>

For an employer to participate in the H-2B program, it must establish a need for temporary nonagricultural services or labor. 20 C.F.R. § 655.6(a). An employer's need is considered temporary if the employer can establish that the need is either: (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need, as defined by the Department of Homeland Security at 8 C.F.R. § 214.2(h)(6)(ii)(B). 20 C.F.R. § 655.6(b). The following is required to establish seasonal need:

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<sup>5</sup> Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

<sup>6</sup> See 20 C.F.R. § 655.61(c).

<sup>7</sup> 20 C.F.R. § 655.61.

<sup>8</sup> 20 C.F.R. § 655.61(e).

<sup>9</sup> 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

<sup>10</sup> *Brook Ledge*, 2016-TLN-00003 (May 10, 2016); *Three Season Landscape Contracting Services*, 2016-TLN-00045 (June 15, 2016).

The 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 services 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).

The CO reviews H-2B applications and makes a determination based on factors including whether the number of worker positions and period of need are justified, and whether the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3),(4). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

In denying certification in the instant case, the CO found that the Employer's evidence submitted with its NOD did not demonstrate an increase in sales during a specific seasonal period and the sales identified did not establish a need for all the months requested. (AF 257-265). The Employer requested need between May 7, 2018 and December 15, 2018. However, the month of March has some of the highest sales. The Employer did not explain this discrepancy before the CO. The Employer also stated that due to the temperatures they cannot plant during the winter months. Therefore, the CO found that the Employer failed to explain the need in November and December. The payroll records and sales during this time period also did not support this requested need.

In its request for appeal, the Employer argues that it provided sufficient evidence to the CO to support the application. The Employer asserts that the CO "completely ignores" the payroll documentation, which shows a need from April to December. (Appeal p. 3). However, I agree with the CO that the Employer has not overcome the deficiency. Sales and payroll in March are similar to the summer months, while November and December are still significantly lower. While the Employer asserts that workers are needed during November and December to help with continued fall cleanup, the Employer did not adequately explain this inconsistency and need before the CO. Thus, I do not find a distinct increase in sales during the Employer's alleged seasonal period from May to December. I also do not find that the sales show an increase in sales in a "predictable manner that is not subject to change." An employer's lack of evidence supporting its assertion that it requires more workers in specific months out of the year warrants denial of certification.<sup>11</sup>

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2), an employer must demonstrate its services or labor are "traditionally tied to a season of the year by an event or pattern and is of a recurring nature." The regulation requires an employer to "establish when the . . . season occurs and how the need for labor or services during this time of the year differs

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<sup>11</sup> See *Lodoen Cattle Company*, 2011-TLC-109, slip. op at 5 (Jan. 7, 2011) (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) (finding an employer's bare assertion without supporting documentation insufficient to meet its burden of proof).

from the other times of the year.”<sup>12</sup> The Employer’s sales by month do not demonstrate increased sales during all the months requested are clearly linked to its purported seasonal period. The Employer needed to adequately explain to the CO why, despite the disparity in sales, they still had a need during the requested months. Based on the documentation submitted by the Employer, I am unable to find that the period between May 7, 2018 and December 15, 2018 constitutes a distinct time of the year requiring employment of additional landscapers based on the evidence submitted before the CO.

Based on the foregoing, I find the Employer failed to meet its burden of establishing a need for temporary workers on a seasonal need basis.<sup>13</sup> Accordingly, I hereby affirm the CO’s denial of the Employer’s application.

**ORDER**

In light of the foregoing, it is ORDERED that the Certifying Officer’s decision denying certification be, and hereby is, AFFIRMED.

For the Board:

JOSEPH E. KANE  
Administrative Law Judge

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<sup>12</sup> *Stadium Club, LLC d/b/a Stadium Club D.C.*, 2012-TLN-2, slip op. at 9 (Nov. 21, 2011).

<sup>13</sup> 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(b); 8 U.S.C. § 1361.