



Issue Date: 21 September 2018

BALCA Case No.: 2018-TLN-00161
ETA Case No.: H-400-18183-745205

In the Matter of:

ENVIRONMENTAL QUALITY, INC.,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearance: Jeffrey A. Devore, Esq.
Devore Law Group
Palm Beach Gardens, FL
For the Employer

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

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Environmental Quality, Inc.'s (Employer) request for review of the Certifying Officer's (CO) Final Determination in an H-2B temporary alien labor certification matter. The H-2B non-immigrant 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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

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. 24042 *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). The rules provided in the IFR apply to this case. All citations to 20 C.F.R. Part 655 in this Decision and Order are to the IFR.

Employers who seek to hire foreign workers under this 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. A CO in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA) reviews applications for temporary labor certification. Following the 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 July 3, 2018, the ETA received an Application for Temporary Employment Certification from the Employer (Application).³ The Employer sought a temporary labor certification to hire 10 Landscaping and Groundskeeping Workers (landscapers) from October 1, 2018 to May 31, 2019. (AF 29, 210.)⁴ The Employer described the nature of its temporary need as “peakload,” and justified such need as follows:

[Employer] has the following contracts, among others, in place for the upcoming year:

- US DOI, National Parks Service, Invasive Exotic Plant Species Control IDIQ
- Florida Fish and Wildlife Conservation Commission, Invasive Plant Management IDIQ
- US DOI, Bureau of Land Management, Jupiter Inlet Lighthouse Outstanding Natural Area Habitat Restoration

* * *

[Employer] has the increased need for ten (10) temporary Landscaper workers during the months of October-May due to the fact that the weather patterns allow for more work to be done. It is not possible for the Landscapers to be outside during the other months of the year due to lightening, increased rainfall, increased damage to environmentally sensitive areas, and heat stroke and other health concerns.

(AF 221.) The Employer identified locations in or near Dade, Broward, Palm Beach, Martin, and St. Lucie Counties in Florida as the areas in which the landscapers would work. (AF 213, 216.) Further, the Employer identified the duties that must be performed by the landscapers as follows:

Landscape and maintain grounds of property using hand or power tools or equipment. Perform duties including moving, trimming, planting, watering, fertilizing, digging, raking [sic]. Use hand tools, such as shovels, rakes, pruning saws, saws, hedge or brush trimmers, or axes.

³ The Application includes Employer's ETA Form 9142, attachments, and other documents.

⁴ References to the appeal file in this Decision and Order are abbreviated with an “AF” followed by the page number.

(AF 212.) The landscapers will also have to lift/carry 50-100 lbs. of equipment for long periods of time. (AF 213.)

The CO issued a Notice of Deficiency (NOD) on July 9, 2018. (AF 31, 202.) The Employer timely responded to the NOD on July 20, 2018. (AF 31, 51.) The CO issued a Final Determination denying Employer's Application on August 8, 2018. The CO identified the following deficiencies in the Employer's Application and response to the NOD: (1) a failure to establish the job opportunity is temporary in nature; (2) a failure to satisfy the obligations of H-2B employers pursuant to 20 C.F.R. §§ 655.20(e) and 655.11(e)(4); and (3) a failure to satisfy the obligations of H-2B employers pursuant to 20 C.F.R. § 655.20(e). (AF 31, 35, 39.) The Employer submitted this timely appeal to the Board on August 22, 2018, within 10 business days of the CO's decision. The CO has not filed a brief.

DISCUSSION AND APPLICABLE LAW

A. Standard of Review

The Board's standard of review in H-2B cases is limited. The Board 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 that the Employer actually submitted to the CO before the date the CO issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, the Board 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).⁵

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, *7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, *2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, *5 (Jul. 28, 2009). To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. §§ 655.6(b), 655.11(a)(3). The Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." 20 C.F.R. § 655.6(a). The applicable regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will

⁵ Additionally, the Board has adopted the position that review of the CO's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brooks Ledge, Inc.*, 2016-TLN-00033, *4-5 (May 10, 2016); *see also* *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). Under the arbitrary and capricious standard, if there is any rational basis for the CO's determination, it must be sustained. *See Dellew Corp. v. United States*, 108 Fed. Cl. 357, 368 (Fed. Cl. 2012); *Erinys Iraq Ltd. v. United States*, 78 Fed. Cl. 518, 525 (Fed. Cl. 2007); *see also* *Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 669, n.11 (9th Cir. 1980).

be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

B. The CO's Determination that the Employer Failed to Establish that the Job Opportunity is Temporary in Nature

In this case, the Employer alleges that it has a peakload need for 10 landscapers from October 1, 2018 to May 31, 2019. (AF 29, 210.) In order to establish a peakload need, the Employer "must establish that 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).

In the CO's NOD, she stated that the Employer "did not sufficiently demonstrate the requested standard of temporary need." (AF 205.) The CO pointed out that the Employer's Statement of Temporary Need provides an extensive list of services, which are not included in Employer's ETA Form 9142. The CO found that the Employer did not sufficiently demonstrate how its need meets the regulatory standard for peakload need, and noted that the Employer has not explained what events cause the seasonal or short-term demand that leads to its peakload need. (AF 205.)

The CO requested that the Employer submit further explanation and various documents, including: monthly invoices from 2017, showing that the specified work will be performed in each month of requested need; signed service contracts from 2017, which detail services to be provided; and summarized monthly payroll reports for a minimum of 2016 and 2017, with various specified information. (AF 206.) In response, the Employer provided further explanation of its claimed need and various documents, including invoices from 2017; signed contracts from 2017; proposals for work to be performed in 2018; work orders from 2016, detailing the work to be performed; summarized payroll records for 2016 and 2017; a 2017 Employer's Quarterly Report with the current landscaper laborers identified; a scope of work document; photographs of landscapers working in full gear; and Employer's Helicopter Safety Plan. (AF 51-52.)

The CO found that the Employer did not overcome the deficiency of failing to establish that the job opportunity is temporary in nature. (AF 34.) In support of her final determination, the CO explained that the Statement of Temporary Need submitted by the Employer in response to the NOD was identical to the Statement of Temporary Need submitted as part of Employer's Application - it did not sufficiently demonstrate how Employer's need meets the regulatory standard, and the Employer has not explained what events cause the seasonal or short-term demand that leads to its peakload need. (AF 34.) Further, the documentation submitted by the Employer does not support its "claim that 'it is not possible for the Landscaper to be outside during the other months of the year due to lightning, increased rainfall, increased damage to environmentally sensitive areas, and heat stroke and other health concerns.'" (AF 34.) Lastly, the payroll documents provided by the Employer, among other omissions, do not indicate that they are specific to landscapers; they show that the months with the second highest gross wages paid

out for each year were June 2017 and July 2016, which fall within the period the Employer claims was not possible for landscapers to work outside. (*Id.*)

In its appeal, the Employer explains that “[w]hile the Employer’s business operations may offer a variety of services beyond those that would encompass the duties be [sic] performed by Landscapers, it appears that the CO is under the mistaken assumption that the temporary workers sought in the instant matter will also be performing all of the other services and associated duties that are provided by the Employer.” (AF 3.)⁶ The Statement of Need provides a list of approximately 30 different services the Employer provides. (AF 220.) None of the services expressly match the duties that must be performed by landscapers. (*Compare* AF 220 to AF 212.) However, some or most of the duties to be performed by landscapers logically would be required for some of the listed services that the Employer provides. Standing alone, this discrepancy cannot sustain the CO’s determination. However, the CO cites other reasons in support of her determination

The Employer sufficiently explained and documented the nature of its business, the duties, conditions and environment in which its landscapers work, and the fact that weather patterns allow for more work to be safely completed during the period of claimed peakload need (October – May). It established that it is dangerous for landscapers to work outside in the environments in which they are utilized during June through September (claimed off-peakload period) because of lightening, increased rainfall, increased damage to environmentally sensitive areas, and the danger of heat stroke and other health concerns. It also established that it “regularly employs permanent [landscapers] to perform the services or labor at the place of employment.” *See* 8 C.F.R. 214.2(h)(6)(ii)(B)(3). (*See* AF 51-201, 210-305.) However, it did not adequately explain the inconsistencies in the documents it submitted to the CO, which in turn justify the CO’s remaining reasons for finding that the Employer did not overcome the deficiency of failing to establish that the job opportunity is temporary in nature.

A review of the Employer’s summarized payroll reports for 2016 and 2017, do not support a peakload need from October through May. As the CO pointed out, they show that the months with the second highest gross wages paid out for each year were June 2017 and July 2016, which fall within the period the Employer claims was not possible for landscapers to work outside. In its appeal, the Employer counters that “when looking at the amount of the Employer’s payroll for the third quarter of 2017 [July – September] in comparison to the remaining three quarters of 2017 reveals that the payroll for the off-peakload period of time . . . was the lowest.” (AF 9.) However, further analysis of the payroll reports demonstrates the following:

⁶ It may have been helpful to the Employer had it explained this fact to the CO the same way it explained the fact to the undersigned. Instead, the Employer merely responded to the CO that its Statement of Temporary Need “provides [a] detailed description of its business history, activities and schedule of operations throughout the year. The Statement of Temporary Need also sets forth the reasons why the nature of the employer’s job opportunity and number of foreign workers being requested for certification meets the regulatory standard of a peakload need. Although this documentation was previously submitted, the CO did not address the information provided by the Employer in the instant NOD.” (AF 53.)

1. In 2016, gross pay in the third quarter was the second highest quarter that year:

2016 Quarter 1 Gross Pay	\$ 88,754
2016 Quarter 2 Gross Pay	\$ 87,682
2016 Quarter 3 Gross Pay	\$104,840
2016 Quarter 4 Gross Pay	\$115,313

This substantially differs from Employer's comparison of gross pay by quarters in 2017. Thus, Employer's method of analyzing the payroll records, i.e. by quarters, is at best ambiguous.

2. Ranking each month in 2016 by the amount of gross pay, from the month with the highest gross pay to the month with the lowest gross pay shows the following:

June	8 th highest
July	2 nd highest
August	5 th highest
September	10 th highest

3. Ranking each month in 2017 by the amount of gross pay, from the month with the highest gross pay to the month with the lowest gross pay shows:

June	2 nd highest
July	5 th highest
August	10 th highest
September	12 th highest

In 2016 and 2017, not just one, but 2 of the 4 months in the claimed off-peakload period have higher amounts of gross pay than 7 of the months in the claimed peakload period.

4. It would take only 1.67 additional landscapers working full time, without any overtime, to make up the difference in gross pay between the third quarter of 2017 and the quarter with the next highest gross pay.⁷ It would take only 3.42 additional landscapers working full time, without any overtime, to make up the difference in gross pay between the third quarter of 2017 and the quarter with the highest gross pay, i.e. the fourth quarter.⁸ These numbers of landscapers are far smaller than the number of temporary foreign workers allegedly needed by the Employer.

Employer's payroll history for 2016 and 2017 does not support a historical peakload need from October through May.

⁷ One landscaper paid at \$12.99/hour, the basic rate of pay proposed by the Employer, who works 40 hours per week for 13 weeks (one quarter of a year), should earn \$6,754.80. (See AF 214.) The difference in gross pay between quarter 3 and quarter 1 in 2017, is approximately \$11,267.00. \$11,267.00 divided by \$6,754.80 equals 1.67.

⁸ The difference in gross pay between quarter 3 and quarter 4 in 2017, is approximately \$23,099.41. \$23,099.41 divided by \$6,754.80 equals 3.42.

Employer argues that its 2017 Employer's Quarterly Report identifies 24 landscapers who worked for it in the first quarter of 2017, and 11 landscapers who worked for it during the remaining 9 months of the year. (AF 9, 139-152.)⁹ This argument also tends to support the CO's determination and contradict the Employer's claim of a peakload need from October through May. If the Employer truly had a peakload need from October through May, one would expect to see it employ more landscapers or incur substantially more overtime hours in April, May, October, November, and December than during its claimed off-peakload period, which is not the case. The Employer incurred an average of approximately 70.27 hours of overtime per month for April, May, October, November, and December compared with an average of approximately 19.56 hours of overtime per month for its claimed off-peakload period. (See AF 133-134.) The difference in these overtime numbers, approximately 50 hours per month, does not equate to even one additional full time landscaper per month during Employer's claimed peakload period compared to its claimed off-peakload period.

At least some of the Employer's contracts require landscapers' work to be performed during the dry season. It is reasonable to believe that the Employer is able to perform its landscaping services during its claimed peakload period even for contracts that run into or through its claimed off-peakload period. (See AF 6.) And, it may not be possible for Employer's landscaper to *safely* work outside in the wilderness or similar environments described by the Employer during its claimed off-peakload period. However, none of these facts explain why Employer's gross pay amounts are so high in the months that it claims its landscapers cannot work outside. None of the evidence pointed to by the Employer demonstrates that its need for landscapers from October 2018 through May 2019, will differ from its need in previous years. None of these facts explain why Employer's payroll history fails to support a peakload need.

In light of the inconsistencies in the evidence, the CO had a rational basis for finding that: The Employer's statement of temporary need does not sufficiently demonstrate how its need meets the regulatory standard; the Employer has not explained what events cause the seasonal or short-term demand that leads to its peakload need; and the Employer has not supported its claim that it is not possible for landscapers to work outside during Employer's claimed off-peakload period because of lightening, etc. The CO had a rational basis for finding that the Employer failed to establish that the job opportunity is temporary in nature. Thus, the CO did not act arbitrarily or capriciously in denying Employer's Application.

Since I have upheld the CO's decision based on the first deficiency noted in her Final Determination, i.e. the Employer failed to establish that the job opportunity is temporary in nature, I will not address the remaining deficiencies noted in the Final Determination.

⁹ With the exception of 2 employees listed on the 2017 Employer's Quarterly Report, all the employees are identified as landscapers. (AF 9, 139-152.) Thus, it is reasonable to use gross pay as an indicator of Employer's historical need for landscapers.

ORDER

For the foregoing reasons, the Certifying Officer's final determination denying certification is AFFIRMED.

For the Board:

Jason A. Golden
Administrative Law Judge