

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 March 2018

BALCA Case No.: 2018-TLN-00086
ETA Case No.: H-400-17292-542878

In the Matter of:

KELLER COMMERCIAL & HOME SERVICES, INC.,
Employer.

Appearance: Robert D. Kershaw, Esq.
The Kershaw Law Firm, PC
Austin, TX 78746
For the Employer

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

Before: Alan L. Bergstrom
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”) pursuant to the Employer’s request for review of the Certifying Officer’s (“CO”) denial in the above-captioned H-2B temporary labor certification matter. 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, peakload, or intermittent basis, as defined by the Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 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 Employers who seek to

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. 115-66, Division H, Title I, § 113 (2018). This definition has remained in place since the Consolidate Appropriations Act of 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015).

hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”) using an ETA Form 9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 C.F.R. § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.53(b); 20 C.F.R. § 655.61(a). During the administrative review only the material contained within the appeal file (“AF”)³ upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 C.F.R. § 655.61(e). Accordingly, the documents attached to Employer’s filings after the February 26, 2018, denial determination are not considered.

STATEMENT OF THE CASE

On January 1, 2018,⁴ the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Keller Commercial & Home Services, Inc., for 7 “Landscape Laborers” as a peakload need for employment from April 1, 2018 to November 1, 2018 (AF 665-673), with attachments in support of the application (AF 674-714). The position was listed by the Employer as O*Net Code 37-3011, “Landscaping and Groundskeeping Workers” in Section B.2 and B.3 of the filed ETA Form 9142B (AF 665) and is to be performed in Williamson County, Texas. (AF 668). No minimum educational, training, experience or special requirement is specified in Section F.b of the application, though the Employer listed job duties under Section F.a Item 5 requiring –

“Mowing, digging, spread dirt, raking, pruning, mulching, and loading and unloading materials. Lifting required up to 50 lbs.”

(AF 667-668). The Employer retained Robert D. Kershaw, Esq., as its attorney in this matter. (AF 667).

On February 5, 2018 the CO issued a “Notice of Deficiency” (“NOD”) indicating the following deficiency (AF 660-664):

“Deficiency: Failure to establish temporary need for the number of workers requested.

... The employer did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bone fide job opportunities.

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. 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.

³ “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

⁴ Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e)

The employer noted in its application that its current application is a new application for its second peak that begins in April. In this application, the employer is seeking certification for 7 Landscaping and Groundskeeping Workers from April 1, 2018, through November 1, 2018. The employer also received certification for 14 Landscaping and Groundskeeping Workers from February 1, 2018, through November 1m 2018 in its previously submitted application, H-400-17276-723474. The employer is therefore requesting a total of 21 workers for its 2018 season.

The employer did not indicate how it determined that it needs an additional 7 workers for its 2018 season. The employer was certified for its 2017 season for a total of 12 workers. Therefore, further explanation and documentation is required in order to establish the employer's need for an additional 7 workers requested in this application and a total number of 21 workers for its 2018 season.

... The Employer must submit supporting evidence and documentation to establish that the number of workers being requested for certification is true and accurate and represents bone fide job opportunities. The employer's response must include, but is not limited to the following:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting 21 Landscaping and Groundskeeping Workers for Florence, TX during the dates of need requested;
3. If applicable, documentation supporting the employer's need for 21 Landscaping and Groundskeeping Workers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
4. 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. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employers' actual accounting records or system; and,
5. Other evidence and documentation that similarly serves to justify the requested dates of need, if any.

NOTE: If the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested number of workers.

On February 14, 2018, the Employer filed its response to the NOD (AF 533-659). The Employer reported "We requested 12 H2B workers in 2017, but due to our growth in the Austin area, we are requesting 21 in 2018 ... we have more business than we can handle. For that reason, we have increased the requested number to 21 total workers in 2018 ... in addition we are expanding our commercial maintenance and installation business, and we already have over \$500,000.00 in 2018 sales ... These contracts alone would justify these additional 7 H2B laborers." (AF 538-539).

On February 26, 2018, the CO found the Employer's response to the NOD unacceptable and denied the *Application for Temporary Employment Certification* for the 30 Quarry Rock Splitters requested by the Employer in accordance with Departmental regulations at 20 CFR §655.32(c). (AF 519-531). The CO set forth the following reason for the denial of the application (AF 521-525):

"Deficiency: Failure to establish temporary need for the number of workers requested.

... In response to the Notice of Deficiency, the employer submitted an explanation of need, payroll reports from 2015, 2016, and 2017, ten letters of intent, its 2016 Profit or Loss from Business, 2016 Federal Income Tax Return, a list of customers and anticipated sales, sample maintenance contracts, a list of anticipated sales from commercial complexes and sample contracts for 2018, copies of the above referred letters of intent, Certificate of Formation, Quarterly Federal Tax Returns for 2016.

The employer did not overcome the deficiency. The employer provided payroll summaries for 2015 through 2017. In each of these years, employer did not justify a need for an additional seven workers.

The employer's 2015 payroll summary is presented below.

Designated Occupation: Landscape Laborers
Payroll Report Period: Calendar Year 2015

<u>Month</u>	<u>Permanent Employment</u>			<u>Temporary Employment</u>		
	Total Workers	Total Hours Worked	Total Earnings Received	Total Workers	Total Hours Worked	Total Earnings Received
January	7	1072.25	\$11,151.55	0	0	0
February	7	867.78	\$ 8,743.72	1	123.97	\$ 1,249.10
March	7	666.01	\$ 6,869.82	5	475.74	\$ 4,906.24
April	7	1129.97	\$11,178.49	6	968.53	\$ 9,580.94
May	7	1019.90	\$ 9,789.22	3	437.10	\$ 4,195.70
June	7	873.63	\$ 8,890.10	7	873.64	\$ 8,891.82
July	7	882.97	\$ 9,047.53	11	1387.53	\$14,219.89
August	7	600.36	\$ 6,241.90	8	686.14	\$ 7,134.64
September	7	907.81	\$ 9,674.39	1	129.69	\$ 1,382.06
October	7	991.47	\$10,622.39	12	283.28	\$ 3,026.36
November	6	906.64	\$ 9,974.53	1	151.11	\$ 1,662.42
December	6	899	\$ 9,459.22	0	0	0

The employer's 2016 payroll summary is presented below.

Designated Occupation: Landscape Laborers
Payroll Report Period: Calendar Year 2016

<u>Month</u>	<u>Permanent Employment</u>			<u>Temporary Employment</u>		
	Total Workers	Total Hours Worked	Total Earnings Received	Total Workers	Total Hours Worked	Total Earnings Received
January	4	560.5	\$ 7,256.50	3	345.5	\$ 3,708.25
February	3	480	\$ 6,240.00	3	314.5	\$ 3,539.50
March	4	698.5	\$ 9,064.00	11	1,107.75	\$13,447.07
April	4	603.5	\$ 8,407.53	10	1,568	\$19,579.72
May	4	627.5	\$ 8,397.75	11	1,587.75	\$20,020.32
June	4	746.25	\$10,001.25	11	1,999	\$26,217.50
July	4	635.75	\$ 8,404.75	13	1,755	\$24,007.08
August	4	581.25	\$ 7,745.25	13	1,614.75	\$22,626.27
September	4	789	\$10,540.50	13	2,329.75	\$32,535.00
October	4	496.5	\$ 8,297.50	11	1,678.75	\$24,259.45
November	2	303.5	\$ 4,466.30	13	1,248.25	\$19,863.89
December	2	325.75	\$ 5,176.88	7	1,007.5	\$16,596.35

The employer's 2017 payroll summary is presented below.

Designated Occupation: Landscape Laborers

Payroll Report Period: Calendar Year 2017

<u>Month</u>	<u>Permanent Employment</u>			<u>Temporary Employment</u>		
	Total Workers	Total Hours Worked	Total Earnings Received	Total Workers	Total Hours Worked	Total Earnings Received
January	4	346	\$ 5,063.00	6	874	\$12,675.77
February	4	560	\$ 7,975.50	16	1520	\$20,810.36
March	4	776	\$11,079.50	14	2687	\$38,376.10
April	4	607	\$ 8,676.50	14	2219.75	\$31,853.74
May	4	623	\$ 8,899.00	14	2120	\$31,123.20
June	4	782.5	\$11,163.75	15	2720	\$39,440.00
July	4	585.5	\$ 8,335.00	15	2130	\$30,875.37
August	4	613	\$ 8,967.50	17	2863.75	\$42,418.45
September	4	622.75	\$ 9,055.75	16	2231	\$33,079.00
October	4	743.75	\$10,873.75	15	2835.25	\$42,858.50
November	4	777.25	\$11,275.25	16	2169.25	\$31,490.60
December	4	150	\$ 2,190.00	6	1196.5	\$ 2,695.50

While the payroll history shows an increase in growth in 2017, this growth is not consistent and does not show a pattern indicating a specific period of need. In only four months did temporary employees work overtime in 2017. During the remaining months in these three years, with the exception of two months in 2016, the hours worked were consistently less than the amount expected from full time workers. Despite this history, employer stated in the NOD response that it expects to have “gross sales of over \$3,500,000,000 [sic] in 2018” which is a 44% increase since 2016. The employer did not substantiate this significant increase.

The employer provided 10 letters of intent and additional copies of letters 6 through 10. None of these letters include reference to the number of workers needed. While they express an intention of customers to use employer's services, the letters are speculative. The employer did not provide any explanation as to how these letters translate to a specific need for additional workers. As such, the letters, without further explanation, are not sufficient to support a need for an additional seven workers.

The employer provided a list of customers for 2018 and annual contract amounts. In support of this list, the employer provided 50 copies of Residential Lawn Maintenance contracts. However, this summary only lists amounts of anticipated payment. It does not indicate the number of workers needed to complete any of these projects. Moreover, with the exception of nine of these contracts, each lists a start date of 2017. It is not clear whether this work was completed in 2017, or whether it is expected to continue into 2018. Gross sales under this list are \$1,125,302.

In addition, the employer provided a list of Commercial Complexes for 2018. In support of this list, the employer also provided individual contracts. Again, this list does not indicate the number of workers needed to complete any of these projects, nor did the employer provide the Department with this explanation. The amount anticipated is \$434,598. Combining the two amounts between Residential Lawn Maintenance and Commercial Complexes lists, the employer anticipates a total of \$1,559,897 gross sales for 2018. Even taking into consideration employer's statement that not all landscape maintenance is contracted early in the year, this figure is 20% less than the gross sales of 2016, which the employer states was \$1,960,000. Thus, the above referenced lists and contracts do not exhibit any increase in growth.

Finally, the employer also provided tax documents for 2016. These documents only indicate business income and existence and do not provide support for an additional seven workers.

The employer has not adequately supported a temporary need for seven workers in addition to the 14 previously certified workers (H-400-17276-723474). Therefore, the employer did not overcome this deficiency.

... Based on the foregoing reason(s), the employer's application is denied."

On March 9, 2018, the Employer filed a timely formal request for administrative review of the denial determination with attachments some of which were not submitted with the response to the NOD. (AF 1-518). In its "Notice of Appeal", the Employer submits that "We are requesting these 7 H2B workers for our second April 1st peak-need. We requested 14 H2B workers with a 2/1/18 start date and 7 more with a 4/1/18 start date because we begin getting busier in February, but our busiest in April or May of each year." He states that the payroll summaries were not submitted to justify a need for 7 more workers but to show a peak season business between February 1st to November 1st. The Employer states that "we estimate that we need at least 1 landscape laborer for every \$50,000.00 in annual gross sales" and that there were gross sales of over \$1,960,000.00 in 2016, which grew to roughly \$2,200,000.00 in 2017 and is expected to grow to over \$3,500,000.00 in 2018, such that 33.8 workers are justified for 2018. He states they employ "5 year-round U.S. workers and 14 already approved H2B workers for 2/1/18 to 11/1/18 (total 19), so we definitely need all 7 April 1st start date H2B workers (total 26). We could actually use more than 33, since work is coming in every day."

On March 16, 2018, BALCA issued a Notice of Assignment and Briefing Schedule directing the CO to assemble and transmit the AF to BALCA by Tuesday, March 20, 2018, and granting leave to the Employer and Solicitor to file briefs on the denial issues involved in this case by mail or facsimile transmission to the office of this BALCA Judge, or e-mail to the National Office. No subsequent filings were made.

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The qualifications and requirements for the job "must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment," 20 CFR §655.20(e). Additionally, 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 ... The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by [the Department of Homeland Security] regulations.

These regulations provide that in order for an employer 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 [employer's] regular operation." 8 CFR §214.2(h)(6)(ii)(B)(3)

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b). BALCA may only consider the documentation considered by the CO in its final denial determination as contained in the AF and may also consider the arguments set forth in the request for review and legal briefs submitted to BALCA. 20 CFR §655.61(e). Accordingly, the specific documents which were attached to the request for review cannot be considered; however those same documents that appear in the AF that were submitted for consideration by the CO in reaching the February 26, 2018 denial determination are considered.

Where an employer has been granted certification for a specific classification of H-2B workers and subsequently submits an additional application for the same classification of H-2B workers at the same location of intended employment with the same work duties and requirements, consideration of the work periods involved in the prior certified application(s) is appropriate on the issue of “temporary need” for the H-2B workers because of the nature of dates of need and similarities in job requirements and duties. see *William Ashby Maltsberger d/b/d Maltsberger Ranch*, 2016-TLN-00078 (Sept. 28, 2016)

The Employer attested to employment and payroll summaries for 2015, 2016 and 2017 as subsequently set forth in the NOD (AF 540-541, 675-676). These summary reports indicate the Employer employed permanent and temporary workers as follows:

Permanent Employees / Temporary Employees
(Monthly Hours per Employee Classification)

Month	2015	2016	2017
January	7/0 (153.18/0.0)	4/3 (140.13/115.17)	4/6 (86.5/145.67)
February	7/1 (123.97/123.97)	3/3 (160.0/104.83)	4/16 (140.0/95.0)
March	7/5 (95.14/95.15)	4/11 (174.63/100.70)	4/14 (194.0/191.93)
April	7/6 (161.42/161.42)	4/10 (150.88/156.80)	4/14 (151.75/158.55)
May	7/3 (145.7/145.67)	4/11 (156.88/144.34)	4/14 (155.75/151.43)
June	7/7 (124.80/124.80)	4/11 (186.56/181.73)	4/15 (195.63/181.33)
July	7/11 (126.14/126.14)	4/13 (158.94/135.00)	4/15 (146.38/142.0)
August	7/8 (85.77/85.77)	4/13 (145.32/124.21)	4/17 (153.25/168.46)
September	7/1 (129.69/129.69)	4/13 (197.25/179.21)	4/16 (155.69/139.44)
October	7/12	4/11	4/15

	(141.64/23.61)	(124.13/152.61)	(185.94/189.02)
November	7/1	2/13	4/16
	(151.11/151.11)	(151.75/96.02)	(194.32/135.58)
December	7/0	2/7	4/6
	(149.83/0.0)	(176.38/143.93)	(37.50/199.42)

This demonstrates that the Employer kept is permanent employees near constant full-time employment throughout 2016 and February to November in 2017; while keeping temporary employees at less than full-time employment in 2016 and near full-time employment level in 2017, with minimal over-time indicated in March, June, October and December 2017.

The Employer asserts that the 2016 Federal Tax Returns submitted demonstrate over \$1,960,000.00 in gross sales.⁵ The Employer states “In 2017 we grew to roughly \$2,200,000.00 in gross sales and we expect to have gross sales over \$3,500,000.00 in 2018.” However the Employer did not document the 2017 gross sales number. (AF 538). The Employer also states that landscape maintenance contracts account for over \$1,300,000.00 of gross sales and they have over \$1,000,000.00 in new additional maintenance contract related installation/construction sales at this time. (AF 538). The Employer states that they “already have” over \$1,500,000.00 in maintenance contracts for 2018 and over \$500,000.00 in commercial maintenance/installation contracts for 2018, but also referred to the \$1,500,000.00 in maintenance contracts as including “with our new commercial accounts.” (AF 538). The Employer states it arrives at the number of landscape laborers needed by dividing the projected gross sales by an industry standard of \$50,000.00 in annual gross sales per landscape laborer; however, it provided no documentation of such an industry standard. (AF 538).

The Employer submitted a 13 page list of individuals and commercial customers that the owner attested were existing residential and commercial contracts with the Employer for 2018 in the gross amount of \$1,125,302.21. (AF 554-556). The Employer submitted some sample “Residential Lawn Maintenance” contracts related to the 13 page list of 2018 customers. (AF567-616) and several form “Letters of Intent” from commercial customers listed on the 2018 customer list. (AF 542-551, duplicated at AF 636-640, 677-681). The Employer submitted a list of “2018 Contracts for Commercial Complexes” customers in which the owner certified a total contract amount of \$434,598.45 for 2018 (AF 617) and several “Sample Commercial Contracts (AF 618-634); however all of the listed “commercial complexes” were included in the list of 2018 customers and did not reflect additional customers or gross sales. (AF 555-556). The Employer also included a “Quote” dated April 1, 2018, for landscaping related services to Southwestern University in the total amount of \$181,287.00. (AF 635).

When the documents submitted in response to the NOD are considered as a whole, the Employer has established gross sales in the amount of \$1,968,891.00 in 2016 and anticipated gross sales of \$1,125,302.21 for 2018 with an outstanding bid for \$181,287.00. Even if the outstanding bid is considered, the projected gross sales for 2018 do not demonstrate gross sales beyond prior years. The Employer argues that additional contracts are normally acquired during the calendar year; but did not demonstrate this assertion by establishing such a pattern of additional contracts added over a calendar year, such as may have been experienced by the

⁵ Gross sales in 2016 were \$1,968,891.00 (AF 552-553, 684).

Employer in 2016 or 2017. The Employer asserts a growth from \$1,968,891.00 in 2016 to over \$2,200,000.00 in 2017, an increase of \$231,109.00 over 2016 or an 11% increase in gross sales. The Employer also asserts expected gross sales in 2018 of \$3,500,000.00, an increase of \$1,300,000.00 over 2017 or a 59% increase over 2017 gross sales. The Employer failed to document an 11% increase in gross sales for 2017 over 2016 and failed to document the reasonableness of an additional 59% increase in gross sales over the undocumented 2017 gross sales.

The summary of hours worked by temporary landscape laborers in 2016 and 2017 indicates a pattern that the total number of permanent and temporary landscape laborer employees increased in 2017 over 2016 as follows: January 7 to 10; February 6 to 17; March 15 to 18; April 14 to 18; May 15 to 18; June 15 to 19; July 17 to 19; August 17 to 21; September 17 to 20; October 15 to 19; November 15 to 20; and December 9 to 10. Based on the Employer's assertions, that particular employment pattern in 2017 was able to account for the 11% increase in gross sales from 2016 to 2017. For 2018 the Employer has been previously approved to employ 14 H-2B landscape laborers under application number H-400-17276-723474. The Employer asserts it will have 5 permanent landscape labor employees in 2018. This means that the Employer will have at least 19 landscape laborers throughout the peak season from February 1, 2018 through November 1, 2018. This equals or exceeds the 2017 employment numbers for 2017 peak season, except for August and September. The Employer asserts it needs 21 temporary landscape laborers for the period April 1, 2018 to November 1, 2018 during which time its 5 full-time landscape laborers will not be able to meet service demands.

When the credible evidence submitted to the CO prior to the December 18, 2017 denial determination is considered as a whole, this presiding Judge finds that the assertion that 26 landscape laborers are required to meet the service demands from April 1, 2018 through November 1, 2018, is not supported by the documentation submitted with the original application or in response to the NOD and that Keller Commercial & Home Services, Inc., has failed to meet its burden to establish a need for 7 additional H-2B Landscape Laborers for the period April 1, 2018 through November 1, 2018.

After deliberation on the AF and argument of the Parties, this presiding Judge finds that the CO properly denied the Employer's January 1, 2018, *Application for Temporary Employment Certification* for 7 H-2B Landscape Laborers for the period of need from April 1, 2018 through November 1, 2018, pursuant to 20 C.F.R. §655.6(b) and 20 C.F.R. § 656.32(c).

ORDER

It is hereby ORDERED that the Certifying Officer's **DENIAL** of the Employer's January 1, 2018, *Application for Temporary Employment Certification* is **AFFIRMED**.

SO ORDERED.

For the Board:

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia