

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 25 March 2019**

BALCA Case Nos.: 2019-TLN-00063  
ETA Case Nos.: H-400-18321-019209

*In the Matter of:*

GREEN ACRES LANDSCAPING, INC.,  
*Employer*

Certifying Officer: Chicago National Processing Center

Appearances: Patrick O'Mara  
Green Acres Landscaping, Inc.  
8195 Industrial Place  
Alpharetta, GA 30004  
*For the Employer*

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

Before: ANGELA F. DONALDSON  
Administrative Law Judge

**DECISION AND ORDER  
AFFIRMING DENIAL OF CERTIFICATION**

This matter arises under the H-2B temporary non-agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A.<sup>1</sup> 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. *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).<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> 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

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Green Acres Landscaping, Incorporated’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of the temporary labor certification under the H-2B non-immigrant program. For the following reasons, on behalf of the Board, I affirm the CO’s denial of certification.

## **BACKGROUND**

On January 7, 2019, Employer applied for temporary labor certification through the H-2B program to fill 20 full-time laborer “Landscaping and Groundskeeping” positions. AF at 165.<sup>3</sup> Employer stated that its business was established in 1985 and designs, builds, installs and maintains landscaping for residential and commercial customers throughout the Metro Atlanta, Georgia, area. *Id.* at 178. Employer specializes in subdivision entrance ways, common areas and amenity packages for “many of the top Atlanta and Charlotte country clubs and prestigious residential markets. Due to [Employer]’s outstanding reputation, all work comes from referrals or repeat customers.” *Id.*

In support of its request for laborers, Employer attached a Statement of Temporary Need asserting that the 20 new-hire positions are to satisfy a temporary seasonal need for workers from April 1, 2019 through December 30, 2019. AF at 178. It stated,

[Employer]’s need for 20 non-immigrant temporary workers is based on an insufficient number of U.S. employees that are qualified, and available to work. The local labor force is unable to sustain existing contractual obligations that the business has agreed to for the upcoming season and the labor afforded by the non-immigrant temporary workers will allow [Employer] to expand the business that could lead to additional U.S. management personnel and realize potential future commitments. The employment of non-immigrant, temporary workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

[Employer] has a need for non-immigrant temporary labor during the months of April through November. [Employer]’s need for non-immigrant temporary labor will decline during the months of December through March. Due to weather patterns of Georgia, [Employer] is limited to the months of April through November to complete the type of work that is scheduled as it would be impractical to perform the duties in months of inclement weather or the growing season is dormant.

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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.

<sup>3</sup> In this decision, AF is an abbreviation for “Appeal File.”

*Id.* at 175. To support this, Employer attached a graph and two charts showing the average precipitation and lows and high temperatures of Alpharetta, Georgia. In addition, Employer further explained,

The duties of the non-immigrant temporary labor shall be: Landscape or maintain grounds of property using hand or power tools or equipment. Workers typically perform a variety of tasks, which may include any combination of the following: sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation, and installation of mortarless segmental concrete masonry wall units.

*Id.*

Next, Employer addressed the local unemployment rate, stating,

The State of Georgia's unemployment rate is currently 3.6% and 3.4% in the Atlanta-Sandy Springs-Roswell metro area. Georgia companies will continue to see a very tight labor market with the current workforce shortage. The jobless rate in Georgia is at a four decade low, dating back to when state record keeping began. [Employer] has advertised and recruited continuously throughout 2018 trying to hire local laborers to help fill employment openings. [It has] had zero (0) applicants in 2018.

The current local labor shortage is making it difficult for [Employer] to serve [its] existing clients or expand [its] business. With growth comes more company revenue, State revenue and the ability to hire more workers.

AF at 175-76. Employer also referred to two attached graphs showing the drop in the unemployment rate of Georgia from January 2008 to January 2018. *Id.* at 176.

Employer then listed a full schedule of operations for which temporary labor is needed from April to November, including several landscaping tasks such as landscape and hardscape installation, planting of trees, shrubs and flower beds, laying sod, fertilization and similar tasks, along with several maintenance tasks like aeration, mowing, weed and pest control, and pruning. *Id.* Employer also identified its minimal schedule of operations for December through March, the period during which temporary labor is not needed, including landscaping tasks like presenting bids, designing landscape, ordering and stocking supplies, as well as maintenance jobs involving maintenance of landscape and equipment. AF at 176-77.

Employer asserted that its "seasonal need for the non-immigrant temporary labor is supported by the evidence attached to the application," and described, as follows, how each report supported its seasonal need:

Contract Report: This report indicates the contractual amounts of work completed in 2017 and work scheduled for 2018. This report helps estimate the need for

temporary labor provided by the work force during the coming season. Based on these obligations, there is not sufficient labor available to fulfill the contracts.

**Samples of Contracts:** The submitted contracts show the different type of required work for each jobsite. This is the industry standard type of list to identify what type of work will be completed. This evidence shows a sample of work that is scheduled to be started, yet the established work force is inadequate to complete the future contracts.

**Employee Report:** The submitted employee report lists the current U.S. workforce, green card workforce, H-2B workforce, and workers that have quit.

**P & L Report:** The P&L Report reflects the gross income generated each year, net income generated each year and employee payroll information. This business tool shows the ability to sustain the business and meet payroll requirements of future labor required based on future contracted scheduled work. An increase in sales and gross income projects the necessity for additional labor during the specified time period.

**Payroll Reports:** The submitted payroll reports for 2016, 2017 and 2018 show the total number of workers, and graphing shows increased payroll during the requested months of need as the seasonality of the business increases. The reports show a monthly total of hours worked and total gross earnings by all laborers. These reports help estimate needed labor to complete contract work during the year, specifically during the requested months of need.

AF at 176-77.

Employer also submitted various supporting documents with its application, including an H-2B worker recruitment agreement with ANA Associates, Inc. (AF at 179-89); a job posting from EmployGeorgia.com with a description of the job duties (*Id.* at 190-91); Employer's monthly payroll, gross income, and net income reports for 2017 and 2018 (*Id.* at 192-93); Employer's 2016-2017 Payroll Reports with graphs and charts showing Employer employed no H-2B workers in those years (*Id.* at 195-96); Payroll Report graphs and pie charts showing employment of 17 H-2B workers in May, June, and July, 14 H-2B workers in August, and 15 H-2B workers in September, October, and November (*Id.* at 194); an Employee Report naming all permanent and H-2B seasonal workers employed by Employer during 2018 (*Id.* at 197); a "Contract Report" showing a list of clients Employer is contracted to work with in 2019 and total contract amount of \$5,700,000 (*Id.* at 198); a "Contract Report" showing a list of clients Employer worked with in 2018 and total contract amount of \$4,525,000 (*Id.* at 199); and various sample contracts reflecting landscaping projects in 2010, 2011, 2014, 2015, 2016, 2017, and 2018, some of which name clients that also appear on a "Contract Report" and other contracts that do not (*Id.* at 200-45).

On February 5, 2019, the CO issued a Notice of Deficiency ("NOD") to the Employer, citing two deficiencies pursuant to 20 C.F.R. § 655.11(e)(3)-(4) (number of worker positions and

period of need are justified), 20 C.F.R. § 655.16 (filing of the job order at the state workforce agency), and 20 C.F.R. § 655.18 (job order assurances and contents). Specifically, the CO first found Employer failed to establish a temporary need for the number of workers requested. AF at 161. The CO noted Employer received certification for 20 temporary Landscaping and Groundskeeping Workers during the previous year, from April 1, 2018 through December 30, 2018, and is again requesting 20 temporary workers to fill the same positions. However, the CO found Employer's submitted payroll records did not establish Employer used the number of workers that it was certified for in 2018, nor did its current application substantiate its need for 20 workers. The CO noted Employer submitted a contracts report that did not indicate the number of workers necessary to complete the job for each worksite, and submitted payroll reports for 2017 that did not contain the same data as the 2017 payroll reports submitted in its previous application. *Id.*

As to the first deficiency, the CO specifically requested Employer provide the following documentation:

1. An explanation with supporting documentation of why the employer is requesting 20 Landscaping and Groundskeeping Workers for Alpharetta, Georgia during the dates of need requested;
2. An explanation of why the 2017 payroll reports have different data from the 2018 application (H-400-17354-358210) to the current application (H-400-18321-019209).
3. If applicable, documentation supporting the employer's need 20 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 2018 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 employer's actual accounting records or system; and
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF at 161.

As for the second deficiency, the CO found Employer failed to submit an acceptable job order because, though it submitted a copy of its job order with its application, the information on the right side was cut off and illegible. AF at 163. The CO requested Employer submit a legible job order. *Id.* at 164.

On February 12, 2019, Employer responded to the NOD. AF at 136-37. First, Employer noted that it was requesting 20 landscaping and groundskeeping workers for the Alpharetta, Georgia area. Employer explained that it specializes in landscaping work for large subdivisions, country clubs, common areas, and amenity packages, and its work crews must complete their

work within the contracted time frame. *Id.* Further, Employer stated that the seasonality of requested grass, bushes, shrubs, and trees requires that most of the work be completed between April 1<sup>st</sup> and December 30<sup>th</sup>. *Id.*

Employer also specifically addressed its number of requested workers, stating,

To complete these large jobs, Green Acres Landscaping Inc. establishes “teams” of workers at each of the contracted areas based on the scope of work. With \$5,700,000 contracted work scheduled, the scope of the work requires 20 non-immigrant workers in addition to the 14 U.S. citizens reported on the employee report to complete the contracts in the scheduled timeframe. The 2018 payroll report shows that no less than 27 workers and up to 35 workers were needed to complete projects in the 2018 season, and the 2019 contracts report establishes contracts in excess of the 2018 season. Additionally, Green Acres Landscaping Inc., since submitting their application to DOL for the 2019 season, has contracted an additional \$345,000 in individual contracts, and a signed letter of intent from a long-standing customer for completing landscaping for 80-100 homes, no set price is reflected. In order to complete all scheduled work, it is only possible with the requested 20 workers.

Green Acres Landscaping Inc.’s approval in 2018 for 20 workers was justified, however 3 of the initially recruited workers were denied entry at the consulate, and alternatives were not immediately available. 4 workers absconded on July 7, 2018 and were reported as required, and 1 worker was terminated and returned home on August 13, 2018. One alternate worker arrived on August 27, 2018 and 2 additional alternate workers arrived on September 24, 2018 to meet the initial requested worker total of 20. 2019 contracts require the entire 20 H-2B requested workers to complete the contracts within the dates approved.

AF at 137.

Further, Employer specifically addressed the CO’s argument that Employer’s 2017 payroll data was inconsistently reported in its current and previous applications. Employer stated,

2017 payroll report submitted for current application (H-400-18321-019209) reflects an inaccuracy compared to the 2018 application (H-400-17354-358210) due to a change in the 3rd party payroll provider that Green Acres Landscaping contracts with. The initial payroll provider became disgruntled and apparently changed payroll records when they were requested by Green Acres Landscaping, Inc, creating the discrepancy. This error has been corrected, and the 2017 payroll report that was submitted for the 2018 application (H-400-17354-358210) reflects the correct information. A copy of the correct 2017 payroll report is attached.

The monthly payroll report for 2018 reflects a breakdown of full-time permanent and temporary employment, including the number of hours worked and the earnings of said workers.

AF at 137. Employer also noted that an updated 2018 payroll report was attached to its response. *Id.*

In reference to the second deficiency, Employer gave the CO permission to make any necessary changes. AF at 137.

In addition to its response, Employer also submitted a letter of intent from Don Donnelly from Hedgewood Homes, in which Mr. Donnelly stated he had employed Green Acres for the past six years to install landscaping, that Hedgewood had closed 80 homes in 2018 and expected to close 80-100 homes in 2019, and that Hedgewood expected all of its suppliers, including Employer, to “position themselves to handle the increase in volume.” AF at 138. Employer also included a Project Work Authorization form from Beazer Homes, LLC, in the amount of \$97,765.40, along with a list of the materials necessary for that project (*Id.* at 139-41). Employer submitted several contracts for landscaping, including a contract with NNP-Looper Lake, LLC, covering November 5, 2018 to October 29, 2019, in the amount of \$91,067.00 (*Id.* at 142-46); and three contracts with D. R. Horton, Inc., dated November 13, December 3 and 20, 2018, in the amount of \$66,080.00, \$55,512.00, \$34,810.00 (*Id.* at 147-53).

Employer also submitted its 2017 Payroll Summary, which showed only the number of U.S. permanent workers employed from January to October. AF at 154. Employer’s total number of permanent workers ranged from 14 workers in September and October to a high of 22 workers in May, with a monthly average of 16.8 workers over the ten months reported. *Id.* Employer also submitted “Year Payroll Report” graphs and pie charts which show Employer employed 17 H-2B workers in May, June, and July, 14 H-2B workers in August, and 15 H-2B workers in September, October, November, and December. *Id.* at 155. However, the year of this payroll report was left blank. *Id.* Finally, Employer also submitted a job posting describing the Laborer, Landscaping and Groundskeeping positions. *Id.* at 156. In the description, Employer specifically stated that it sought to fill 20 temporary, full-time positions. *Id.*

On February 20, 2019, after examining the additional information provided by Employer in response to the NOD, the CO issued a Final Determination denying Employer’s application. AF at 129. The CO found Employer had not overcome the first deficiency and had thus failed to establish a temporary need for the number of workers requested. *Id.* at 131-32. The CO noted Employer submitted a letter of response explaining the 2017 payroll report inaccuracy was due to disgruntled payroll personnel. *Id.* at 133. However, the CO found the corrected 2017 payroll report showed Employer employed no temporary workers during the year and the permanent workers did not work significantly more hours during the peak months than in the non-peak months. *Id.* Additionally, the CO found the 2018 payroll report included in its response did not specify the year. *Id.* The CO also noted Employer indicated it needed 27 to 35 total employees to support its need, but its undated payroll report only showed that 17 H-2B workers, at most, worked between May and December. *Id.*

Further, the CO assumed the undated payroll report was for 2018 and found, “The employer was certified for 20 workers from April 1, 2018 to December 30, 2018 (H-400-17354-358210); of which the hours worked for fulltime temporary workers (at 35 hours a week) should

be 2,800 a month.” AF at 133. According to the CO, the payroll report in the NOD response shows the following:

0 workers - April 0 hours worked  
17 workers - May 659 hours worked  
17 workers - June 3,290 hours worked  
17 workers - July 1,743 hours worked  
14 workers - August 1,493 hours worked  
15 workers - September 1,744 hours worked  
15 workers - October 2,291 hours worked  
15 workers - November 2,411 hours worked  
15 workers - December 1,704 hours worked

Based on these calculations, the CO concluded that the temporary workers only worked full-time hours in June, October and November 2018. Therefore, the CO found that the payroll did not substantiate Employer’s request for 20 temporary fulltime workers. AF at 133.

The CO further found the Employer submitted contracts with no clear commencement and completion dates, and that the submitted letter of intent indicated the client had contracted with Employer for large projects over many years, but, based on Employer’s payroll, the projects did not give Employer enough jobs to provide full time work hours to its employees. AF at 133.

Therefore, the CO found Employer failed to overcome the deficiency and subsequently denied Employer’s application.

On February 26, 2019, Employer submitted a request for administrative review to BALCA appealing the CO’s Final Determination. AF at 7. Employer also responded to the CO’s determination by both reaffirming its responses to the NOD and offering new responses to the Final Determination, with new evidence attached.

First, in response to the CO’s finding that Employer did not use the 20 workers it received certification for in 2018, Employer again explained that 3 workers were denied entry, 4 absconded in July, 1 was terminated, and 3 alternative workers were hired in August and September to make up for the 3 workers denied entry. AF at 7. Regarding the CO’s assertion that Employer’s contract reports did not indicate the number of workers necessary to complete each job, Employer argued that “the scope of the work requires 20 non-immigrant workers in addition to the 14 U.S. citizens reported on the employee report to complete the contracts in the scheduled timeframe. The 2018 payroll report shows that no less than 27 workers and up to 35 workers were needed to complete projects in the 2018 season, and the 2019 contracts report establishes contracts in excess of the 2018 season.” *Id.* Additionally, Employer noted that, since submitting its application, it has contracted for an additional \$345,000 in individual contracts, and asserts that Employer will only be able to complete all of its scheduled work with the requested 20 workers. *Id.* at 7-8.

As for discrepancies between Employer’s 2017 payroll report submitted with the current application and its 2017 payroll report submitted in its previous application, Employer

acknowledged the discrepancies and asserted that they were due to a disgruntled payroll provider; Employer submitted a corrected payroll report for 2017. AF at 8.

Concerning its present need for 20 Landscaping and Groundskeeping Workers, Employer stated,

In the original Statement of Need, the purpose of the Contract Report is to not only to [sic] list the work being worked on in the current year (2018) but also show the intended work that is projected for the coming season (2019). It is explained that by analyzing the amount of work that is currently being worked on in 2018, helps determine the number of workers that are needed to accomplish the same or greater amount of work in the coming season of 2019 that requires the twenty (20) workers being requested on the ETA Form 9142B application.

AF at 8. Employer also pointed to the letter of intent showing an increase in work for Hedgewood Homes in 2019, and contracts it submitted showing ongoing landscaping projects in 2019. *Id.*

Employer further asserted that it submitted its 2018 payroll report with the ETA Form 9142B, showing payroll for laborers (doing the same work) including permanent workers, U.S. and Green Card workers, and seasonal use of temporary employees. AF at 8. In further support of its need for the number of workers requested, Employer relied on other evidence it submitted, including two P&L Reports showing the amount of work and revenue would be increasing during the requested dates of need, an Employee Report that showed all of Employer's employees and their hiring or termination dates, and copies of contracts for current and upcoming projects. *Id.* at 9-10. Employer confirmed that it did not hire H-2B workers in 2017, but in that season it recognized its need for additional temporary workers, due to housing market growth, during that season. *Id.*

In response to the CO's finding that payroll reports (which the CO presumed were 2018 reports) only showed the temporary workers working full-time hours in June, October, and November, Employer responded that the "actual payroll as verified by the enclosed payroll reports and actual W2's turned into the government" often showed greater monthly hours than the payroll previously submitted to the CO, as follows:

0 workers – April – 0 hours worked  
17 workers – May – 2,479.75 hours worked  
17 workers – June – 3,305 hours worked  
17 workers – July – 2,390 hours worked  
14 workers – August – 2,276.5 hours worked  
15 workers – September – 2,600.5 hours worked  
15 workers – October – 3,275.5 hours worked  
15 workers – November – 2,319.5 hours worked  
15 workers – December – 1,480.5 hours worked

The total hours are 20,127.25 hours

AF at 11.

Thus, according to the Employer's appeal statement, the hours in the corrected 2018 payroll records (attached on appeal) reflected full-time hours in all months. AF at 11. The Employer acknowledged a "big discrepancy between the hours turned into the Department of Labor originally vs the actual hours worked and enclosed in the above chart." *Id.* at 11-12. Employer explained that the discrepancy was due to its hiring of a new payroll company in May of 2018, at the time its H-2B workers became available, and thereafter H-2B workers were paid bi-weekly whereas permanent employees were paid weekly. The Employer stated that,

When the payroll reports were requested by the DOL they were sent in a twenty-four hours period to our office which was further expedited to the DOL without any kind of verification by our office. The payroll company had sent in a biweekly payroll breakdown of each employee for that week without realizing the breakdown did not include the difference between the regular employees and the H2B employees. Some of the H2B employees were left off and some of their hours were never added to the total payroll which created a big discrepancy in the overall total of hours worked for each employee. My office has a separate payroll sheet for the H2B workers that are always turned into the payroll company when payroll checks are issued for each pay period. When the DOL showed the payroll report as being deficient we knew immediately we had an issue and were then able to send the payroll reports to the payroll company were [sic] they matched up each employee to the payroll dates and hours which are further verified in our appeal.

*Id.* at 11-12.

Employer's revised monthly 2018 payroll records and totals were only submitted with the appeal. AF at 14-126. Regarding the prior set of 2018 payroll reports that Employer submitted to the CO, Employer acknowledged it was "true, [that] the submitted 2018 payroll did not have the year identified on it" but since the remaining reports were labeled "2017," Employer submitted that it "would make sense" that the remaining report was for 2018. *Id.*

In response to the CO's statement that the letter of intent and contracts do not have clear commencement or completion dates, Employer argued that contracts for months in advanced rarely have solid work scheduled and, as landscaping is often the last project prior to the closing of a home, landscaping projects are often pushed beyond the scheduled completion dates. AF at 12. Finally, in response to the CO's statement that "[t]he submitted letter of intent indicates that [the client] has contracted [Employer] for large projects for many years; however, based on its payroll, the projects did not give the employee enough jobs to provide full hours to its employees," Employer responded,

The payroll reports are not a factor on intended work in the future. They serve the purpose of indicating what number of worker and manhours that are worked on in the current year. Letters of Intent are letters confirming that [Employer] can count on the 2019 work although there is not a signed contract presently.

Their ability to have concrete work lined up for the coming year when the H-2B application is submitted in January is very difficult. The Letters of Intent and some signed contract work is available at the time of submittal, but often times employers are working with work projections based on information that is provided to them well in advance of the work commencing.

*Id.*

On March 8, 2019, BALCA docketed the appeal and issued a Notice of Docketing. The parties were given an expedited briefing due date of seven days (excluding federal holidays) after their receipt of the brief file, in accordance with 20 C.F.R. § 655.33. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) in accordance with 20 C.F.R. § 655.33(b) on March 11, 2019.

### **DISCUSSION**

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(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. Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

In seeking review, the employer’s request must: (1) clearly identify the particular determination for which review is sought; (2) set forth the particular grounds for the request; (3) include a copy of the CO’s determination; and (4) only contain legal argument and “such evidence as was actually submitted to the CO before the date the CO’s determination was issued.” 20 C.F.R. § 655.61(a).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012) (“[t]he

scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.") (citing 20 C.F.R. § 655.33(a), (e)).

After considering evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO's determination; or (2) reverse or modify the CO's determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e). BALCA may overturn a CO's decision if it finds the decision is arbitrary or capricious. *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016).

### ***Employer Did Not Establish a Temporary Need for the Number of Workers Requested***

The issue on appeal is whether Employer has established a temporary need for the 20 workers requested. To obtain certification under the H-2B program, Employer must establish that the number of worker positions is justified and the request represents a bona fide job opportunity. 20 C.F.R. §§ 655.11(e)(3)-(4); *BMC West LLC*, 2018-TLN-00099 (July 13, 2018) (affirming denial where the employer's uniform letters of intent, fluctuating sales reports, and other documentation failed to support a need for the number of workers requested); *Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018) (reversing denial because the employer provided a comprehensive and specific explanation to support its request for 44 stonemason helpers).

In the present case, Employer attempted to establish a need for 20 "Landscaping and Groundskeeping" workers. As set forth herein, I agree with the CO's determination that the Employer failed to establish such need.

### ***Payroll Reports***

The CO correctly concluded that Employer's prior employment of H-2B workers in 2018, as documented in its 2018 payroll reports submitted to the CO prior to the Final Determination, were not supportive of Employer's need for 20 temporary workers.<sup>4</sup> As an initial matter, based on the Employer's appeal statement, the CO correctly concluded that undated payroll reports submitted for consideration at the time reflected Employer's 2018 payroll. I find that the Employer provided a sufficient explanation for its employment of fewer than the approved 20 workers in 2018, based on its explanation of workers who were denied entry, who absconded, who were terminated, and who were hired as replacements. AF at 7.

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<sup>4</sup> The CO also correctly found that the Employer's 2017 payroll report submitted in the current application was inaccurate compared to its prior application, but the corrected report still showed Employer did not employ any temporary workers in 2017 and its permanent workers did not work significantly more hours during the peak months than in the non-peak months. In response, Employer explained that it did not hire or seek certification for H-2B visa workers in 2017 and only began seeking H-2B workers in 2018. (AF, p. 10). As Employer did not seek certification for H-2B workers in 2017, I find the inaccuracies in the 2017 payroll report have limited relevance to the current application.

However, the payroll reports submitted to the CO did not reflect consistent full-time employment of even the reduced number of workers throughout 2018. Consistent with the CO's findings regarding monthly H-2B workers' hours in 2018, the Employer's records showed that full-time hours were only reached in June, October, and November. In the other months, the total hours were often considerably less than full-time hours, whether there were 14, 15, or 17 workers at the time. For example, full-time employment at 35 hours per week (140 hours per month) for 17 workers totals at least 2,380 hours; Employer's 17 workers in May 2018 worked 659 hours and in July 2018 they worked 1,743 hours. Full-time employment of 15 workers totals 2,100 hours; Employer's 15 workers in September worked 1,744 hours and in December worked 1704 hours. The 2018 payroll reports available to the CO thus did not reflect employment of additional workers in 2018 sufficient to support Employer's present request for 20 workers.

Although Employer has submitted new payroll records on appeal, which appear to show consistent full-time hours and even overtime hours worked by H-2B workers for the majority of the 2018 season,<sup>5</sup> BALCA's review on appeal is limited to the argument and evidence *actually submitted* to the CO *before* the date of the CO's determination. *See* 20 C.F.R. § 655.61a(5); *C&H Concrete, LLC*, 2018-TLN-00054 (Feb. 6, 2018) (affirming denial of certification where employer submitted erroneous wage information that was not in the records available to the certifying officer). *Cf. Component Mfg. Co.*, 2018-TLN-00109 (April 20, 2018) (remanding where dates of temporary need supported evidence that was before certifying officer).

Employer notes the "big discrepancy" between the hours in the payroll reports originally turned in to the CO and the hours reflected in the payroll reports submitted with its request for review. AF at 11-12. In the additional information requested in the NOD, the CO requested summarized monthly 2018 payroll reports identifying the total number of workers, total hours worked, and total earnings received, separately for full-time permanent and temporary workers in the requested occupation. *Id.* at 161. According to the NOD, "Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system." *Id.* Employer now acknowledges that when it previously sent its 2018 payroll information to the CO, it sent the records "without any kind of verification by our office." *Id.* at 11-12. Further, "When the DOL showed the payroll report as being deficient we knew immediately we had an issue" and only at that point-after the Final Determination-did Employer examine or verify the accuracy of the payroll company's records against its own records. *Id.* Employer does not dispute that the CO did not have the benefit of reviewing any corrected 2018 payroll reports by the date of the Final Determination. Administrative review based on the "evidence as was actually submitted to the CO before the date of the CO's determination was issued" supports the CO's finding that 2018 payroll reports did not substantiate Employer's request for 20 temporary, full-time workers.

### *Contracts and Letter of Intent*

Among the additional information requested in the NOD is the request for "documentation supporting the employer's need [for] 20 Landscaping and Groundskeeping

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<sup>5</sup> The payroll records attached to Employer's appeal are also more consistent with the Employer's explanation of the total number of monthly H-2B workers after some were denied entry, absconded, terminated, and hired as replacements.

Workers such as contracts, letters of intent, etc. that specify the number of workers and dates of need.” AF at 161. Employer submitted a number of sample contracts, a letter of intent, and contract reports describing continuing projects and increased work for 2019. Regarding the CO’s finding that Employer’s contracts reflected no clear start or completion dates, I find Employer’s explanation reasonable that its contracts obtained months in advance of actual work rarely have solid schedules and that landscaping is typically the last item to be completed in a rolling construction schedule. The CO, however, also noted that the work contemplated by the contracts and by any letters of intent only indicated that the Employer had prospective large projects, but that Employer did not establish how the projects translated to the number of workers requested, particularly given the 2018 payroll’s documentation of H-2B worker employment. The CO’s finding is again supported by the evidence.

Employer’s explanation of its need for 20 temporary workers is conclusory and very generally stated. To complete its large landscaping jobs, Employer states that it “establishes ‘teams’ of workers at each of the contracted areas based on the scope of work. With \$5,700,000 contracted work scheduled [in 2019], the scope of the work requires 20 non-immigrant workers in addition to the 14 U.S. citizens reported on the employee report to complete the contracts in the scheduled timeframe.” AF at 137. According to Employer, the 2018 payroll report shows that “no less than 27 workers and up to 35 workers were needed” to complete projects in the 2018 season. *Id.* Employer’s supporting documentation to the CO, however, reflected that during the same season of using 27 to 35 total workers, the total number of H-2B workers ranged from 14 to 17. *See id.* at 194. Moreover, as noted above, the payroll records before the CO failed to document consistent, full-time employment of those temporary workers, such that the payroll reports are not supportive of its present request for 20 temporary, full-time workers.

Employer also relied on the amount of its contracted work, which increased from 4,525,000 in 2018 to 5,700,000 in 2019 according to the “Contract Reports,” to support its general assertion that “[i]n order to complete all scheduled work, it is only possible with the requested 20 workers.” AF at 137, 198-99. However, Employer did not explain how the number of workers was derived from the amount of contracts. BALCA has affirmed the denial of certification where employers provide overly general assertions, including descriptions of future projects and/or data without sufficient explanation for the number of workers sought. *See BMC West LLC*, 2018-TLN-00099 (July 13, 2018) (payroll reports showing fluctuating use of workers did not establish temporary need or need for number of workers requested); *Gerardo Concrete, LLC*, 2018-TLN-00122 (May 16, 2018) (letters of intent indicating prospective contracts were not sufficient to show specific need for number of workers requested where employer did not demonstrate how it quantitatively determined the number of workers needed to perform the projected work). *But see Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018) (employer described process by which it quantified the number of temporary stonemason helpers that it was requesting). “An employer cannot just toss hundreds of puzzle pieces—or hundreds of pages of documents—on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers.” *Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016).

Employer did not meet its burden here of identifying the right pieces of information regarding its prospective projects and connecting them to establish how it quantitatively arrived at the request for 20 temporary workers. For all of these reasons, I find Employer has failed to present sufficient evidence to overcome the cited deficiency.

### **CONCLUSION**

Based on the foregoing discussion, I find and conclude the CO properly denied the Employer's H-2B application. It is the employer's burden to demonstrate eligibility for the H-2B program, and here, Employer did not demonstrate its temporary seasonal need for 20 "Landscaping and Groundskeeping" workers for the period of April 1, 2019 through December 30, 2019. Thus, the denial of the Employer's H-2B certification must be **AFFIRMED**.

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

**ORDERED** this 25<sup>th</sup> day of March, 2019, at Covington, Louisiana.

For the Board:

**ANGELA F. DONALDSON**  
**Administrative Law Judge**