BALCA Case No.: 2021-TLN-00028

ETA Case No.: H-400-21001-990938

In the Matter of:

AMIS LAWN AND LANDSCAPE, LLC
Employer

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This case arises from the request of Amis Lawn and Landscape, LLC (“Employer”) for review of the Certifying Officer’s (“CO”) decision to deny its application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural 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 (“DHS”). 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).

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor (“Department”) using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification of the Department’s 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 January 1, 2021, ETA received an application for temporary employment certification from Employer. AF 88-138. Employer requested certification for 5 landscape crew members.

2 On April 29, 2015, the Department of Labor and DHS 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 have 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 In this Decision and Order, “AF” stands for “Appeal File.”
AF 88. Employer identified the nature of temporary need as “peakload” and the period of intended employment as April 1, 2021 to November 7, 2021. AF 88.

Included with Employer’s application was a “Statement of Temporary Need.” AF 93. Employer provided the following explanation regarding its peakload need:

Amis Lawn and Landscape is a growing business that continues to thrive in Jackson, Mississippi and surrounding areas. Since we have built up a reputation of reliability over the past twelve years, we have been able to attract more business from season to season.

In our metropolitan area, there is a great opportunity for tremendous growth, but our labor market is severely lacking. Even though we have made every effort to find seasonal, temporary workers by placing ads in the local newspapers and online job recruitment websites, contacting former workers, and placing posters, we have not been able to secure our seasonal workforce. The limited labor puts a strain on our current employees and the business as a whole. The labor market seems to dwindle with every passing year and there are a select few of available workers from which to choose that competing employers are trying to hire.

We have a peakload need of five (5) laborers to perform traditional lawn and landscape maintenance duties such as mowing, pruning, weed-eating, leaf blowing, etc. from approximately March through mid-November of each year. The colder winter climate is not ideal for landscaping installation and maintenance services are cut back by half. We have two landscapers on staff that can fulfill our winter service calls.

Please note: Our actual temporary need begins in early March; however, due to cap limitations, we are filing for an April 1 start date.

Evidence supporting request for (5) lawn and landscape maintenance laborers

In our metropolitan area there is a great opportunity for tremendous growth, and we continue to increase our payroll by over $60,000 between March and November each year. We give about ten workers 1099s each year and will not hire anyone on as temporary or permanent staff until they have stayed with us for 90 consecutive days. Based upon recent current and projected business volume, we anticipate needing 5 temporary H-2B workers to perform lawn and landscaping duties for the upcoming season.

The additional five (5) H-2B workers will not become a part of our ongoing operation as our season winds down in November and our permanent staff can handle any maintenance service calls during the winter months.

AF 93.

Also included with Employer’s application were a contract, bid proposals, and federal tax forms. There is a contract between Employer and Bruenburg Homeowners Association. AF 109-
This contract provides that Employer will provide landscaping services to the Bruenburg Homeowners Association from January 1, 2021 to December 31, 2021. Employer’s application also included a January 7, 2020 “Bid Proposal” between Employer and Cooper Creek HOA, the terms of which reflect that Employer would provide year-round grounds maintenance. There is a second “Bid Proposal,” dated January 28, 2020, between Employer and First Baptist Church for services between March 1, 2020 and February 28, 2021. Lastly, Employer’s application included several Form 941s, which are Employer’s Quarterly Federal Tax Returns. Employer submitted Form 941s for all four quarters of 2019 and the first three quarters of 2020.

On February 24, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). The CO identified four deficiencies in Employer’s application, one of which is relevant to the matter this Tribunal must decide. Citing to 20 C.F.R. § 655.6(a) and (b), the CO wrote that an employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” According to the CO, Employer “did not sufficiently demonstrate the requested standard of temporary need.”

The CO explained that in order to establish a peakload need, Employer must establish that it “regularly employs permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand, and that the temporary additions to staff will not become part of the employer's regular operation.” After quoting various portions of Employer’s Statement of Temporary Need, the CO wrote that it “remains unclear whether the employer employs permanent employees in accordance with the definition of a peakload temporary need.” The CO added that Employer’s temporary need may properly be defined as a “seasonal” need, which requires Employer to “show that the service or labor for which it seeks workers is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” The CO concluded: “The employer did not demonstrate how its need meets the regulatory standard for peakload need or seasonal need. The employer has not explained what events cause the seasonal or short-term demand.”

Because of this deficiency, the CO directed Employer to submit the following: (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 regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need. Employer may amend Section B, Item 7, Nature of Temporary Need, and Section B., Item 8, Statement of Temporary Need, of the ETA Form 9142 to indicate a seasonal need if the employer's need meets the definition of a seasonal need. Additionally, the CO directed Employer to submit the following documents: (1) Monthly invoices from previous calendar year 2019 clearly showing that work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5 and 6; (2) Signed service
contracts from customers for the previous one calendar year; (3) 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 employer’s actual accounting records or system; and (4) An explanation of the data in submitted payroll documentation. AF 85-86.

On February 25, 2021, Employer submitted it response to the NOD. AF 64-79. This included: (1) a response letter; (2) a copy of the NOD; (3) a copy of a Bid Proposal between Employer and Parkway Baptist Church for services between March 1, 2021 and February 28, 2022; (4) a contract between Employer and Bruenburg Homeowners Association for services between January 1, 2021 and December 31, 2021; and (5) a copy of 1099 information for Tax Year 2020. Citing to the attached contracts, Employer wrote: “Note that the majority of work to be performed ranges from the month of March through November. There is work in the winter season, for which employer’s full time staff can handle.” AF 64. Employer further explained:

Employer unfortunately maintains a revolving door of temporary employees. He refuses to place on payroll workers that do not stay at least 90 days and instead issues them 1099s until they prove themselves reliable. For the 2019 season, Employer hired 9 seasonal workers on 1099s, of which only two lasted more than 7 months during employer's peak season - the others lasted less than two months. In 2020, employer hired 8 workers, 2 of which he hired on full time. Total number of workers for each 2019 and 2020 are below and clearly indicate a peak load need for temporary workers:

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Note that there 1 to 2 workers on payroll full-time year round - explaining the selection of "peak load" as temporary need. Employer consistently employed 3 seasonal workers during its peak season in 2019 and 4 in 2020. Employer expects business growth for 2021 and therefore is requesting 5 temporary, peak load workers.
On March 4, 2021, the CO issued a Final Determination denying Employer’s application. According to the CO, the information Employer submitted in response to the NOD did not establish a temporary peakload need. In explaining its decision to deny Employer’s application, the CO wrote the following:

Regarding the signed agreement with Bruenburg Subdivision, the terms of the agreement indicated that work would be done mainly from March to November and that some work is done from November to April. However, while the agreement indicated that the employer does have work during the requested period of need, this contract does not demonstrate that the employer has a peakload need throughout the season as the agreement only represents this specific client and not a distinct peak need during the year.

Similarly, the signed bid proposal with Parkway Baptist Church also indicated that the period of need is from March to October and that some work is done from November to February. Again, while the agreement indicated that the employer does have work during the requested period of need, this contract does not demonstrate that the employer has a peakload need throughout the season as the agreement only represents this specific client and not a distinct peak need during the year.

In addition, the employer submitted payroll for 2019 and 2020. The payroll submitted, however, did not include distinguish between temporary and permanent workers employed, total hours worked, or total earnings received. Thus it is not clear at what point during the year the employer has a clear peakload need.

On March 9, 2021, Employer submitted its Request for Administrative Review. This included: (1) an appeal letter; (2) Agent Employer 2021 Service Agreement; (3) a copy of the Final Determination; (4) a copy of the NOD; and (5) a copy of Employer’s response to the NOD. In its appeal letter, Employer largely cited to the evidence and arguments it made in response to the NOD. Employer wrote that it “submitted with its application federal 941 returns from 2019 to Quarter 3 of 2020 that show it maintains two full-time, year-round workers on staff.” Employer added that it also submitted “a list of nine (9) temporary workers issued 1099s and explained that ‘will not hire anyone on as temporary or permanent staff until they have stayed with us for 90 consecutive days.’” Furthermore, Employer “submitted three lawn maintenance contracts justifying its dates of need requested and evidence that employer offers year-round services, but that lawn maintenance, the most labor-intensive service, doubles during the ‘active growing season (March – October.)’” Employer noted that in response to the NOD, it “submitted additional contracts showing the majority of the work to be performed is from March through October and that clearly show that there is work during the winter season, ‘for which employer’s full-time staff can handle.’” According to Employer, this evidence establishes a peakload need.
Regarding the number of workers requested, Employer explained that it “submitted annual contractual agreements with Parkway Baptist Church with a contract period of March 1, 2021 to February 28, 2022 and with Bruenburg Homeowners Association with a contract period of January 1, 2021 to December 31, 2021.” AF 3. Employer also “submitted a print-out of the eight (8) workers issued 1099s for the 2020 calendar year, identifying the total amount paid to each worker for the calendar year and month each laborer worked.” AF 3. According to Employer, “of the eight workers issued 1099s two were hired on as full-time, year-round staff – the other six were hired as temporary help.” AF 3. Employer further explained that in its response to the NOD, it “displayed a chart of its workers for calendar years 2019 and 2020 showing a base of one or two full-time, year-round workers and corroborating its federal 941 returns, and demonstrating Employer ‘consistently employed 3 seasonal workers during its peak season in 2019 and 4 in 2020.’” AF 3.

According to Employer, “The CO requested and the Employer submitted contractual arrangements in support of its purported need for temporary workers from March through November of each year.” AF 3. Employer wrote that the CO “should not disparage the submission of evidence that the CO itself requested.” AF 3.

Regarding the CO’s objection to the payroll records it submitted, Employer explained:

Employer submitted its 941 federal returns showing it maintained one (1) full-time, year-round worker on staff in 2019 and two (2) full-time, year-round workers on staff in 2020. It submitted payroll records in the form of an accounting system print-out of 1099s issued identifying the worker name and amount earned as well as the months in which each worker worked. In the NOD response, Employer compiled the number of full-time, year-round workers on the 941s and those on the 1099 print-out for both 2019 and 2020. It further explained that it ‘consistently employed 3 seasonal workers during its peak season in 2019 and 4 in 2020’ and therefore is requesting five (5) temporary, peak load workers for the 2021 season due to normal, expected business growth.

AF 3-4.

**STANDARD OF REVIEW**

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under § 655.61(a), the request for review may contain only legal arguments and evidence that were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). The Board “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

Although neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing a CO’s determinations. *Brazen & Greer Masonry, Inc.*, 2019-TLN-00038 (Mar. 6,
Under the “arbitrary and capricious” standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. See Judulang v. Holder, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Id.

A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” Id. Inquiry into factual issues “is to be searching and careful,” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), but the Board “may not supply a reasoned basis” that the CO has not provided. State Farm, 463 U.S. at 43; see also FCC v. Fox Television Stations, Inc. 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

**DISCUSSION**

As set forth above, the CO concluded that Employer failed to establish a temporary peakload need, which requires a showing that Employer:

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.


The record before the Tribunal reflects that Employer regularly employs permanent workers to perform the same labor and that its requested temporary laborers would not become part of its permanent work force, as required under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). For example, in its “Statement of Temporary Need,” Employer wrote: “We have two landscapers on staff that can fulfill our winter service calls.” AF 93. Employer added that the five temporary workers “will not become part of our ongoing operation as our season winds down in November and our permanent staff can handle any maintenance calls during the winter months.” AF 93. The quarterly tax forms submitted by Employer generally reflect that Employer has at least 1 and sometimes 2 employees at all times. AF 119-125. Additionally, in its response to the NOD, Employer wrote that there are “1 to 2 workers on payroll full-time year round” and included a chart that reflects that Employer had at least 1 employee during all of 2019 and 2020. AF 64. Accordingly, the Tribunal finds that Employer has established that it regularly employs permanent workers and that its requested temporary laborers would not become part of its permanent work force.
In order to establish temporary peakload need, Employer also must demonstrate 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 . . . .” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (emphasis added). In the Final Determination, the CO wrote that the materials Employer submitted in response to the NOD failed to establish a peakload need. AF 61-62. Specifically, the CO wrote that neither the contract with Bruenburg Homeowners Association nor the bid proposal with Parkway Baptist Church “demonstrate that the employer has a peakload need throughout the season as the agreement only represents this specific client and not a distinct peak need during the year.” AF 62. Additionally, the CO concluded that the payroll evidence submitted by Employer did not demonstrate when Employer has a peakload need because it “did not include distinguish [sic] between temporary and permanent workers employed, total hours worked, or total earnings received.” AF 62. The Tribunal disagrees with this analysis and finds that Employer has demonstrated a need to supplement its permanent staff due to a seasonal or short-term demand from April to the beginning of November.

As referenced above, in its “Statement of Temporary Need,” Employer wrote:

We have a peakload need of five (5) laborers to perform traditional lawn and landscape maintenance duties such as mowing, pruning, weed-eating, leaf blowing, etc. from approximately March through mid-November of each year. The colder winter climate is not ideal for landscaping installation and maintenance services are cut back by half. We have two landscapers on staff that can fulfill our winter service calls.

AF 93.

Employer’s contract with Bruenburg Homeowners Association, which spans the entirety of 2021, reflects that Employer will perform various landscaping duties including cutting grass, trimming/pruning, edging, fertilizing, weed removal, pest control, planting, mulching, pine straw application, and creek cleanout. AF 75-78, 109-112. This contract reflects that the grass will be mowed “every 7 to 10 days during the active growing season (March through October).” AF 77, 111. Additionally, all plant materials will be fertilized once per year in the spring. AF 77, 111. Furthermore, seasonal flowers will be planted twice per year at the beginning of the spring and fall, and creek cleanout will occur in March and September. AF 78, 112.

The bid proposal between Employer and Parkway Baptist Church that Employer submitted in response to the NOD, which is for a period of March 1, 2021 to February 28, 2022, also reflects that Employer performs landscaping duties on a year-round basis but with increased frequency during the spring, summer, and fall. AF 72-74. The bid proposal notes that “[m]owing service will be performed every week during the active growing season (March-October)” while “[m]owing/mulching of leaves and picking up of all debris will be performed once a month (November-February).” AF 72. According to Employer, the contract with Bruenburg Homeowners Association and the bid proposal with Parkway Baptist Church reflect “the majority of work to be performed ranges from the month of March through November.” AF 64.
Based on the foregoing, the Tribunal finds that Employer has established that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand from April to the beginning of November. Employer is in the landscaping business and naturally has a “busy season” that lasts from spring through fall. The evidence submitted by Employer reflects that while its cuts grass year-round, it does so more frequently during the spring, summer, and fall. For example, the bid proposal between Employer and Parkway Baptist Church shows that the grass will be cut every week from March through October as opposed to monthly from November through February. AF 72. Additionally, the other services offered by Employer also occur entirely during the requested dates of need of April through the beginning of November. The contract with the Bruenberg Homeowners Association reveals that Employer fertilizes plant materials once per year in the spring, plants seasonal flowers at the beginning of spring and fall, and does a creek cleanout in March and September. AF 77-78, 111-112. Overall, it is apparent to the Tribunal that Employer has a seasonal or short-term demand for additional labor during the spring, summer, and fall because the services it provides either increase in frequency during this period or are performed exclusively during this period. Accordingly, the Tribunal finds that Employer has established a peakload need from April 1, 2021 to November 7, 2021 because Employer has demonstrated that it regularly employs permanent workers, that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand, and that the requested temporary laborers would not become part of its permanent work force, as required under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In summary, the sole deficiency identified by the CO in the Final Determination concerned Employer’s failure to establish a peakload need as defined under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Because the Tribunal has determined that Employer did establish a peakload need under this regulation, and because no other deficiency was identified by the CO, the undersigned concludes that the CO’s Final Determination denying Employer’s application for temporary labor certification was arbitrary and capricious.

CONCLUSION AND ORDER

The Certifying Officer acted in an arbitrary and capricious manner in denying Employer’s H-2B Application for Temporary Employment Certification (Form ETA-9142B). Accordingly, the Certifying Officer’s denial of Employer's Application for Temporary Employment Certification is REVERSED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey