BALCA CASE NO.: 2021-TLN-00061
ETA CASE NO.: H-400-21001-990315

In the Matter of:

M&M LAWN AND IRRIGATION, LLC,
Employer.

DECISION AND ORDER REVERSING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This appeal is before the Board of Alien Labor Certification Appeals on M&M Lawn and Irrigation, LLC’s application for an extension of a certification under the H-2B nonimmigrant alien work program. 1 A certifying officer at the Department of Labor’s Employment and Training Administration approved Employer’s initial application for temporary, seasonal workers. After two hurricanes, Employer requested an extension of the certification based on a one-time need. The certifying officer denied the extension, and Employer timely requested BALCA review.

BALCA review of denials of H-2B applications is limited to “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). 2 I will reverse the certifying officer’s denial of the extension and find the application sufficient to continue processing.

Findings of Fact

Employer is a landscaping company based in Lake Charles, Louisiana. AF 190. 3 The company primarily does general landscaping, which includes mowing, weeding, planting, and fertilizing. AF 192. They rely on temporary, seasonal H-2B workers during the Louisiana landscaping season, which begins in the spring of each year and lasts through November. AF 190.

Approval of initial application. On January 1, 2021, Employer applied for 16 Landscaping and Groundskeeping Workers under the H-2B nonimmigrant alien worker program. They requested that workers begin on April 1, 2021, and end on November 30, 2021. Id. In their statement of

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1 See Immigration and Nationality Act, 8 U.S.C. § 1101, et seq., and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.

2 The request for review may contain only legal arguments and evidence that was submitted to the certifying officer prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5).

3 “AF” refers to the Appeal File.
temporary need Employer explained that its need for H-2B, seasonal, temporary employees is evidenced in its history of approved labor certification filings, which for years had been consistent with the recurring annual Louisiana landscaping season. AF 190. Job duties included mowing, weeding, edging, digging trenches, planting, watering, fertilizing, raking, planting seed, mulching, and installing “mortarless segmental concrete.” AF 192. The temporary workers were to work in multiple towns and cities in three different specified Louisiana parishes. AF 196. On January 29, 2021, the certifying officer approved the application. AF 177.

Request to extend labor certification. On July 19, 2021, Employer requested an extension through March 31, 2022. AF 98. They explained that the need for an extension was “based on extreme and unforeseen weather conditions beyond control of the employer,” namely, the “unique, unforeseeable, and catastrophic event to southwest Louisiana in the form of Hurricanes Laura and Delta which made landfall in the fall of 2020.” AF 98.

In support, Employer included news articles about the hurricanes, reports from the National Weather Service, and their own photos of clients’ property, “evidencing extensive hurricane damage.” AF 99; 103-175. Documentation showed that Hurricane Laura moved across Louisiana around August 27, 2020, and that, just 43 days later, making landfall on October 9, 2020, Hurricane Delta surged through coastal Louisiana. AF 104-117; 126-129.

The news articles that Employer submitted include the following reports:

- The National Hurricane Center warned that after making landfall as a Category 4 storm, Hurricane Laura could create “‘unsurvivable’ storm surges of up to 15 feet [that] could overwhelm parts of the Gulf Coast.” AF 106.

- The Washington Post reported that “[w]hen Hurricane Laura struck western Louisiana...with top sustained winds of 150 mph, it became one of the strongest storms on record to hit the United States...people are combing through rubble and tabulations of losses will take months, if not longer...1.5 million people were under some sort of evacuation order across the northern Gulf Coast in advance of the storm.” AF 113 (emphasis added).

- The Washington Post reported that early estimates of the damage from Hurricane Laura were $25 to $30 billion, which would rank Hurricane Laura amongst the costliest storms on record to strike the United States. AF 116.

- The New York Times reported that after Hurricane Laura made landfall south of Lake Charles, “Trees were shredded and houses cracked open like eggs. Entire blocks of homes sustained so much damage they will almost certainly have to be razed.” AF 121. “Then, this month, Hurricane Delta hit the coast not even 20 miles from where Laura made landfall, unleashing floods that besieged neighborhoods and heavy rainfall that swamped homes with already damaged roofs. It was virtually impossible to discern where the destruction from one storm ended and that of the other began.” AF 121.

- The New York Times reported that, after Hurricane Delta struck, “Residents from Lake Charles to Lafayette [found] themselves cleaning up from yet another vicious storm, a process that will take months or longer to complete.” AF 126 (emphasis added). “While
Delta was less ferocious than Laura when it crashed ashore, its damaging winds were more widespread and packed a wallop.” AF 126.

- The National Weather Service reported that “Laura was the strongest hurricane to strike Southwest Louisiana since records began in 1851...wind damage to buildings and trees and storm surge damage was major to catastrophic across Cameron and Calcassieu parishes, with considerable damage occurring where the core of the hurricane passed across Beauregard and Vernon parishes. Wind damage to trees and structures as well as damage from the storm surge occurred in Vermillion and Iberia parishes. Numerous trees, power lines and power poles were blown down...” AF 131.

The photographs that Employer submitted show notable hurricane damage: large, uprooted trees; fences and roofs that have been torn up entirely; and yards with severe storm damage to the plantings and landscaping. Id. AF 137-175. As Employer stated in support of the request for extension:

2021 has not been a normal year in or around Lake Charles, Louisiana. Hurricane Laura specifically caused massive, once-in-a-lifetime destruction to the Lake Charles, Louisiana area including massive amounts of fallen trees, debris, trash and other major damages caused to the citizens’ yards and homes.

Unlike Employer’s previous H-2B applications, each of its landscaping jobs and contracts for the relevant time includes a total renovation of the client’s yards to address such conditions as fallen trees; bushes ripped from the ground; and debris from roofing and housing plus other garbage from the 150-mile-per hour winds. Employer faces major projects on each contract.

Denial of extension. On July 20, 2021, the certifying officer denied Employer’s extension. AF 94-95. The CO held that Employer had not demonstrated that an extension was necessary due to “weather conditions or other reasons beyond the control of the employer that could not be reasonably foreseen.” AF 94. As the CO stated:

[T]he employer indicates that the request is based on an increase in work for storm damage cleanup as the result of Hurricanes Laura and Delta which made landfall in the Fall of 2020. The employer filed its application with the Chicago National Processing center (CNPC) on January 1, 2021. The hurricanes occurred several months before filing the initial application.

The employer’s Statement of Temporary Need makes no mention of the effects of hurricanes Laura and Delta on its business activities. Further, the employer did not mention any delays caused in meeting its usual contract requirements as a result of clean-up efforts caused by Hurricanes Laura and Delta.

Therefore, had the employer truly believed the hurricanes caused a significant backlog in its business, it seems reasonable it would have mentioned this fact in its original Statement of Temporary Need submitted to the Department.”

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4 Employer’s H-2B workers are located in the listed parishes: Beauregard, Cameron, and Calcasieu. AF 196.
AF 94-95.

Appeal. On August 3, 2021, Employer filed a request for review of the denial. AF 1. Employer argued:

When employer filed its Application for Temporary Labor Certification on January 1, 2021, the area of the state had only allowed residents to return in the previous 60 days as the area was under mandatory evacuation in October 2020. Employer could not have foreseen, at that time, the exact amount of damage its clients or future clients had as the majority of the population of the area remained living in other areas. The major damage to the area has caused major unforeseen additional work for employer’s landscaping crews considering the amount of trees and debris that must be removed from properties…

To expect an Employer to anticipate the exact backlogs and damage caused by the storms that ravaged the state of Louisiana within a mere 3 months after the final storm is an unrealistic and wrongful conclusion made by the Certifying Officer in error. Further, the filing on January 1, 2021, was three months prior to Employer’s opening date of its April 1, 2021, seasons and before damages were assessed…

AF 1-2.5

Discussion

Standard of review. The regulations are silent about the deference the Board of Alien Labor Certification Appeals should accord to a certifying officer’s determination. When the certifying officer’s determination turns on the Department’s (through ETA) long-established policy-based interpretation of a regulation, it would seem that considerable deference is owed to ETA. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (addressing deference courts must give administrative agencies). In such cases, BALCA likely should not overturn a certifying officer’s determination unless it is arbitrary, capricious, or inconsistent with the ETA’s established policy interpretation. But, absent ETA’s long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer’s denial de novo. On the present record, I need not determine the deference owed the certifying officer, for I would reverse the denial of the application even on the more deferential, arbitrary and capricious review.

H-2B program requirements. An employer seeking certification under the H-2B program must “establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer’s need is temporary if it is: “a one-time occurrence; a seasonal

5 On August 24, 2021, Employer filed additional briefing in support of their request for review. I strike this brief as late filed. See 20 C.F.R. § 655.61 (an employer’s legal argument must be submitted when it requests BALCA review). I considered the arguments Employer raised when it requested review. The certifying officer did not submit a brief.
need; a peakload need; or an intermittent need.” 20 C.F.R. § 655.6(b). Here, there is no dispute that ETA correctly certified the initial application based on seasonal need, consistent with a number of similar requests in earlier years. See 8 C.F.R. 214.2(h)(6)(ii)(B)(2) (defining seasonal need).

Extension of certification period.

An employer may apply for extensions of the period of employment in the following circumstances. A request for extension must be related to weather conditions or other factors beyond the control of the employer …, and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer… Except in extraordinary circumstances, the CO will not grant an extension where the total work period under that Application for Temporary Employment Certification and the authorized extension would exceed 9 months for employers whose temporary need is seasonal, peakload, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need…

20 C.F.R. § 655.60.

Here, the question is whether the effects of the two hurricanes constitute an extraordinary and not reasonably foreseeable circumstance warranting the requested extension. I reject the CO’s conclusion that the circumstances are insufficient because, if they were as bad as Employer contends, Employer would have mentioned the storms in its initial application on January 1, 2021.

The Certifying Officer exaggerates the time that passed between the hurricanes and Employer’s initial application. It was not, as the CO states, “several months.” The initial application was filed somewhat under three months after Hurricane Delta made landfall in Louisiana on October 9, 2020.

But more to the point is that the CO neglects the extent of the devastation and how much time was required to assess the damage. State officials only allowed residents to return to the area around November 1, 2020. Of course, Employer is a landscaping contractor, not a resident; it could not begin to assess what its clients might need until later. See AF 1. National newspapers of record commented at the time that it would take months at least to tabulate the damage (Washington Post) and to clean up (New York Times). The National Weather Service reported that the first of the two hurricanes was the worst to hit Louisiana in at least 170 years (with some $25 billion to $30 billion in damages in the largely rural area), and that doesn’t take into account the second hurricane that followed in the same location shortly after. The evacuation order extended to some 1.5 million people. All of this affected the very locations where Employer does the work for which it needs the H-2B workers seasonally. These effects, unique in at least 170 years, could not have been reasonably appreciated or foreseen when Employer made its initial application on January 1, 2021.

Nothing in the CO’s analysis and no evidence on the record brings any of these facts into question. This extraordinary, one-time occurrence led to a need for a tremendous clean-up effort—an effort that included work needed from Employer M&M Lawn and Irrigation, LLC and its employees, as
well as many others. Much as Employer argues, the two hurricanes created a need “so extreme and the jobs so massive, still 8 months post-hurricane season that Employer is requiring an extension based on this one-time extraordinary circumstance.” AF 100-101.6

Order

For the foregoing reasons, the Certifying Officer’s final determination that the Employer failed to establish an extraordinary circumstance warranting an extension for 16 Landscaping and Groundskeeping Workers under the H-2B nonimmigrant alien worker program is REVERSED. This matter is REMANDED for further processing consistent with this Decision and Order.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge

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6 The one-time occurrence of the two hurricanes in succession in the same location creates a need for temporary workers under both the initial application and the extension for a time shorter than the 3-year limit in the regulation for extensions based on a one-time occurrence. See 20 C.F.R. § 655.60.