



Issue Date: 01 February 2021

BALCA Case No.: 2021-TLN-00010
ETA Case No.: H-400-20185-694828

In the Matter of:

SEQUOIA LANDSCAPE SERVICES, LLC,
Employer

Appearances: Anique Watson,
For the Employer

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

Before: **NATALIE A. APPETTA**
Administrative Law Judge

**DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER'S DENIAL OF
TEMPORARY LABOR CERTIFICATION**

This case arises from the request for review of Sequoia Landscape Services, LLC (“Employer”) in regard to the Certifying Officer’s (“CO”) January 4, 2021 denial of Employer’s application for temporary labor certification under the H-2B non-immigrant program. 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 United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6),¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation.

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

foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration 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 December 1, 2020, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 10 landscape laborers for the period of March 1, 2021, to November 30, 2021. AF 57-93.³ Employer indicated that the nature of its temporary need was “peakload.” Employer attached a statement regarding its temporary need and its schedule of business operations. Employer stated:

The landscape and lawn maintenance business is directly related to the grass growing season. The lawn maintenance and landscaping portion of our business is performed during the grass growing season from April through end of November. We begin bi-weekly mowing in March and increase to weekly mowing April to October, then we scale that back to once a month December through February. We also perform fall/leaf clean through November, after that our full time year around staff can handle the workload. We do not require as many laborers during the grass dormant season December through the end of March because we do less lawn maintenance or landscaping service during that time of the year.

AF 189.

Employer also explained how its business has been affected by the visa cap in the past:

We were caught in the first half cap and had to reapply for a 4/1 start date. We cancelled or postponed our March services in hopes of receiving workers for April, but we were again caught in the cap. Fortunately we were able to find some local temporary labor to cover most of our demand, but we know that many of these intend to return to their previous employers once the covid situation resolves or back to school. As you can see at the end of summer we started to see a drop in temporary labor. We then submitted an application for a 10/1 start date for 20 workers. However, due to issues finding workers and delays in appointment processing due to the executive order we were only able to fill 10 of the 20 originally applied for. At this time we are only requesting those same 10 workers as the first half cap has been met and we can only submit for cap exempt workers.

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 References to the appeal file will be abbreviated with an “AF” followed by the page number.

As you can see on the attached payroll summary our temporary laborers worked on average approximately 1660 hours per month, which is more than enough to cover the 10 laborers we are requesting.

Id.

The CO issued a Notice of Deficiency on December 10, 2020, listing the deficiency as Employer's failure to establish the job opportunity as temporary in nature. AF 176-183. The CO stated the regulations at 20 C.F.R. § 655.6(a) and (b) require the employer to "establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. AF 180.

The CO noted that an employer's need is considered temporary if it is justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need as defined by DHS regulations. The CO determined that the Employer in this case had not submitted sufficient information to establish its requested standard of need or period of intended employment.

The CO found the Employer failed to sufficiently demonstrate its chosen standard of "peakload need" which pursuant to the regulations requires that an employer 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. *Id.*

The CO referenced the Employer's explanation regarding how the visa cap affected its applications for workers which mentioned that it would only be filing for 10 of the 20 workers it would normally request because the first half visa cap had been met and it could only find 10 "cap exempt" workers. On this basis the CO found, "it is unclear if the employer will file a separate application for additional workers for the same job opportunity once additional H-2B numbers open in the new H-2B visa cap." *Id.*

The CO noted that 20 C.F.R. § 655.15(f) mandates that only one application for temporary labor certification may be filed for the worksite within one area of intended employment for each job opportunity with an employer, for each period of employment. Therefore, the CO stated that it is not permissible for an employer to divide its filings into multiple applications for the same need as a "workaround to the H-2B visa cap." *Id.*

The CO directed the Employer to amend its application to reflect its entire need for workers, including the total number of workers requested by the employer for the seasonal peak period specified in the application. Specifically the CO directed the Employer to make the following amendments to its application:

- 1) Amending Section B., Items 4 and 8, of the ETA Form 9142 and the job order to indicate the true number of workers the employer needs for this job opportunity; and,
- 2) If applicable, amending Section B., Item 8 and any supplemental documentation or statements of temporary need submitted with the employer's original application,

to remove any statements regarding the employer's intent to split its filing into multiple applications.

AF 180-181.

The CO also noted that Employer had not established its requested standard of peakload need because Employer's filing history indicated that the Employer has been certified for 12 to 20 workers in 4 previous applications, in years 2017 through 2020, with the requested dates of need consistently listed as April 1 through November 30, for the same location in Carrollton, Texas (although the filing history shows Employer was also certified between October 1, 2020 through November 30, 2020 in the past year). The CO noted that the Employer historically requested a start date of April 1 which is 31 days later than the start date request in the current application requesting 10 workers from March 1, 2021 to November 30, 2021. The CO found Employer had not explained why its requested start date has changed. The CO also noted the submitted payroll records did not reflect that the employer utilized temporary workers during March of 2019 or 2020. Therefore the CO requested additional information in regard to this change and an explanation of how the Employer's need meets one of the regulatory standards of one-time occurrence, seasonal, peak load or intermittent need. Documentation requested included monthly invoices and signed service contracts for 2018, 2019 and 2020 showing that work will be performed in the requested months of need. AF 180-183.

Employer responded to the Notice of Deficiency on December 15, 2020. AF 134-175. In regard to the CO's statement that it is not permissible for an employer to divide its filings into multiple applications for the same need as a workaround to the H-2B visa cap, the Employer's representative claimed that this is a common and accepted practice since the need of employers is greater than the capped visas. In this regard Employer's representative, stated:

In fact at the beginning of FY 2021 many employers were caught in the FY 2020 CAP and had to file 10/1/21 applications to obtain workers for the end of their peakload or seasonal need. We [representative's firm] received many approvals from USDOL but we also received similar NODs and denials stating that it was not permissible as you are here.

AF 135.

Employer's representative also noted that its firm had filed appeals with what it alleged to be favorable results. Employer attached a copy of one such BALCA case decision which it claimed was applicable to the current situation. Employer also noted that it attached a revised statement of need and payroll summary which allegedly supported the Employer's need for 20 laborers, total.

In regard to why the previously submitted payroll information did not show a March need for workers, Employer asserted that it could not find temporary local help for March, and the first half visa cap had already been met. Therefore a March 1st start date was not possible. Further, since a March start date had not been feasible due to the visa cap, work had to be postponed or

cancelled. Employer stated, “The employer’s need for the last few years has been for a 3/1 start date but the CAP has prevented them from obtaining workers on that date until this year.” *Id.*

On January 4, 2021, the CO issued a Final Determination Denial to the Employer. AF 128-133. The CO acknowledged the Employer’s response and Employer’s position that it is a common and accepted practice for an employer to divide its filings due to the H-2B visa cap. However, the CO stated, “employer is reminded a labor certification needs to reflect an employer’s need, not the availability of H-2B workers.” AF 133. The CO stated that the regulations specifically tie the certification of an H-2B application to the employer’s need and not to artificial timing related to the availability of H-2B workers as a result of the H-2B cap. The Co also noted that the regulations limit employers to one certification for the same job opportunity, area of intended employment, and period of employment need. Accordingly, Employer’s stated intention of filing two applications for two certifications for the same job opportunity, area of intended employment, and period of employer need would not be permissible. The CO concluded that Employer did not overcome the deficiency and therefore Employer’s application was denied. *Id.*

On January 7, 2021, Employer filed a timely request for administrative review of the CO’s determination. AF 1-126. In its request for review Employer makes multiple assertions regarding different applications it alleges received inconsistent determinations and also attaches multiple documents that were not before the Certifying Officer at the time the current application was denied. Pursuant to the regulation at 20 C.F.R. §655.61(a)(5), the request for review “may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued.” In addition, 20 C.F.R. § 655.61(e) provides that BALCA must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs. Accordingly, additional documents not previously provided to the CO in this matter have not been considered by the undersigned, nor will they be addressed in this decision.

Employer’s request for review also reiterated its position, as stated in its response to the Notice of Deficiency, that it believed it was permissible to file two applications for its period of need with two different start dates, and to divide its request for workers into the two separately filed applications. Employer restated its intention to request 10 workers for the period of March 1, 2021 through November 30, 2021 (the current application), and then file a second application for 10 workers for the period of April 1, 2021 through November 30, 2021. Employer alleges that the Chicago National Processing Office has issued inconsistent rulings in regard to whether it is permissible to file a second application for the same job opportunity in the same period of need. In this regard Employer lists several cases numbers which are not the subject of this appeal and claims the CO has acted arbitrarily and capriciously in adjudicating these H-2B applications. The files pertaining to these cases are not part of the record in this matter and therefore no conclusion regarding this claim can be reached by the undersigned.

Employer asserts that its practice of filing two applications for the same job opportunity as noted above is consistent with the regulation at 20 C.F.R. § 655.15 (f).

By order dated January 19, 2020, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before January 28, 2020. Neither party submitted a brief.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for review, which may contain only 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). After considering this 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).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO's determination in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUE

Whether the Certifying Officer properly denied the Employer's H-2B application because Employer had failed to establish the job opportunity as temporary in nature on the basis of Employer's stated standard of "peakload" need.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. § 214.2(h)(6)(ii).⁴ This regulation states:

Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

8 C.F.R. § 214.2(h)(6)(ii)(A).

⁴ Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. § 214.2(h)(6)(ii). This definition has remained in place through subsequent appropriations legislation.

The DHS regulation further states in regard to the nature of petitioner's need:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B).

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. *See, e.g., Alter and Son General Engineering*, 2013-TLNL-3 (Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need). Other requirements imposed on Employer's seeking temporary labor certification for H-2B workers are found in the regulations found at 20 C.F.R. Part 655, Subpart A.

In the current case the Employer applied for temporary labor certification for 10 landscape laborers for the period of March 1, 2021, to November 30, 2021 on a "peak load" basis. In regard to peak-load need, the DHS regulation states, "[t]he petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. §214.2(h)(6)(ii)(B)(2).

In the CO's Notice of Deficiency the CO noted Employer's history of filing applications for 12 to 20 workers for the past four years for dates of need between April 1st and November 30th. The CO determined that Employer had not sufficiently established its peakload need for 10 workers for the dates of March 1, 2021 through November 30, 2021 as stated in its current application. The CO also noted that statements in the Employer's current application implied that Employer planned to apply for half of its workers in the current application and the other half of the needed workers in a second application, to be filed at a later date.

Employer responded to the Notice of Deficiency asserting that it had become a common and accepted practice for employers to divide their H-2B filings as a "workaround" to the H-2B visa cap. Employer also attempted to justify the change in its dates of need by explaining that it was attempting to frame its dates to fit the H-2B program, including its ability to obtain H-2B workers despite the H-2B visa cap. Since Employer had not been able to obtain workers in March previously, due to the cap, it explained that it had listed its beginning date of need as April 1, 2021 (the beginning date of the second allotment of the yearly visa cap) on previous applications. However, it claimed its actual beginning date of need was March 1, 2021, consistent with the current application. It also noted that it altered its usual request for 20 workers to 10 workers, in the current case, because that is the number of workers it could find that were "cap exempt" and therefore available despite the visa cap.

In the CO's Final Denial the CO rejected Employer's arguments. The CO noted the Employer's statement and concluded that Employer's explanation "demonstrates that it intends to split its filings based on availability of H-2B workers and that it is impermissibly filing applications that do not represent its business need." AF 132. The CO further concluded that the regulations specifically tie the certification of an H-2B application to the employer's need and not to artificial timing related to the availability of H-2B workers as a result of the H-2B visa cap.

The record supports the CO's determination that the Employer did not meet its burden of proving its need for 10 workers for the period of March 1, 2020 through November 30, 2020, as requested in the current application. Employer's own statement submitted in its current application reflects that Employer's peak need begins in April and ends at the end of November. The Employer's statement of temporary need submitted with its application states:

The landscape and lawn maintenance business is directly related to the grass growing season. The lawn maintenance and landscaping portion of our business is performed during the grass growing season from April through end of November ... We do not require as many laborers during the grass dormant season December through the end of March because we do less lawn maintenance or landscaping service during that time of the year.

AF 189.

As noted by the CO, Employer's filing history reflects that Employer has been certified in the four previous years for 12 to 20 workers between April 1st and November 30th. In the CO's Notice of Deficiency the CO gave the Employer the opportunity to amend its application to be consistent with the "true number of workers the employer needs for this job opportunity." AF 180. The CO also directed the Employer to remove statements in its application reflecting its intent to split its filing into multiple applications as the CO stated that this was in violation of the regulations at 20 C.F.R. § 655.15(f) which mandates that only one application for temporary labor certification may be filed for the worksite within one area of intended employment for each job opportunity with an employer, for each period of employment. *Id.*

Employer responded to the NOD, choosing not to make the requested amendments, and instead asserting that it is "common practice" to file more than one H-2B application for the same job opportunity in an effort to "workaround" the visa cap imposed on H-2B certifications. Employer also explained that the reason for varying its start date of need in past and current applications stemmed from its intent to obtain certification consistent with the timing of available visas due to the visa cap in prior applications, rather than stating an accurate reflection of its peakload need for workers.

The undersigned finds the CO did not act unreasonably in rejecting Employer's explanation and denying certification because Employer had not established the peakload need for the labor requested in its current application. Previous BALCA decisions support that an Employer is not permitted to alter its actual dates of need in order to avoid the visa cap. *AC Sweepers*, 2017-TLN-00012 (Jan. 17, 2017) ("employer cannot use the H-2B visa cap as an argument to extend its

temporary need”) citing *Marco, LLC, d/b/a Evergreen Lawn Care & Rainmaker Irrigation*, 2009-TLN-00043, slip op. at 4 (Apr. 9, 2009) (holding that because of the visa cap, “the CO must be vigilant against employers who might claim to need workers earlier than they actually do.”)

Significantly, the payroll records submitted by the Employer with its application reflect that Employer employed between 8 and 14 temporary landscape laborers between April and November in the two previous years. AF 217. Thus these records support that Employer’s peakload need for landscape workers is April through November, and not March through November as stated in the current application.

The CO also reasonably rejected Employer’s assertion that it was “common and accepted” practice for an employer to file more than one application for the same period of intended employment, and that such practice is a permissible “workaround” to the visa cap.

The regulation at 20 C.F.R. § 655.15(f) states, in pertinent part:

Except as otherwise permitted by this paragraph (f), [exceptions applicable to seafood workers] **only one** Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment (emphasis added) ...

The CO did not act arbitrarily or capriciously in applying this regulation to Employer’s stated intent of splitting its need for the same job opportunity into multiple applications. See *KDE Equine, LLC d/b/a Steve Asmussen Racing Stable*, 2020-TLN-00043, slip. op. at 9 (May 20, 2020) (holding that the employer’s application sought H-2B workers for the same job opportunity and period of employment as a previous certification, even though the start dates of employment differed). *Crystal Springs Ranch, Inc., dba Shooting Star*, 2020-TLN-00054 (Aug. 25, 2020)(a second application for workers for the same job opportunity is an impermissible application under 20 C.F.R. § 655.15(f) even though the second application indicates a truncated period of need, or subset of the original period of need listed in the original application); *Nature Group Inc., dba Nature’s Partner*, 2020-TLN-00056 (Aug. 21, 2021) (affirming denial of certification where CO determined a second application for certification for the same job opportunity was impermissible under the regulation at 20 C.F.R. §655.15(f)).

Therefore the CO reasonably rejected Employer’s stated intention of filing multiple applications for the same job opportunity and period of employment as a “workaround” to the visa cap.

CONCLUSION

Accordingly, for the above stated reasons, the CO did not act arbitrarily and capriciously in denying Employer’s application for 10 landscape laborers between March 1, 2020 and November 30, 2020 as Employer failed to establish its peakload need for the requested dates. The CO also reasonably rejected Employer’s stated intention of addressing its peakload need by splitting its applications into multiple applications for the same job opportunity at the same worksite, for the same period of employment, in violation of 20 C.F.R. § 655.15(f).

ORDER

Accordingly, it is hereby **ORDERED** that the CO's denial of Employer's application for temporary labor certification, is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

NATALIE A. APPETTA
Administrative Law Judge