



**Issue Date: 16 April 2009**

**BALCA Case No.: 2009-TLN-00051**

ETA Case No.: C-09044-44721

*In the Matter of:*

**BARANKO BROTHERS, INC.,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Glenn Baranko  
*Pro Se for the Employer*

Lesli Downs  
Southern Impact  
*Agent for the Employer*

Gary M. Buff, Associate Solicitor  
Stephen R. Jones, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **JOHN M. VITTON**  
Chief Administrative Law Judge

**DECISION AND ORDER**

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for temporary alien labor certification under the H-2B non-immigrant program, which permits employers to hire foreign workers to perform temporary nonagricultural work within the U.S. on a one-

time occurrence, seasonal, peakload, or intermittent basis. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2008) (effective until Jan. 17, 2009); 20 C.F.R. Part 655, Subpart A, available at 73 Fed. Reg. 78020 (Dec. 19, 2008) (new regulations effective Jan. 18, 2009). The issue in this appeal is whether the Employer's failure to provide payroll records in the format required by the CO warranted denial of the application.

## **PREFACE**

At the time of the filing of the application in this matter, the CO and petitioning employers were operating under procedures set forth in *Training and Employment Guidance Letter No. 21-06, Change (1), Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations* (hereinafter "TEGL No. 21-06"), 72 Fed. Reg. 38622 (July 13, 2007). TEGL No. 21-06 required the petitioning employer to attach to its application a detailed, signed statement under its own letterhead, explaining "(a) why the job opportunity and number of workers being requested reflect a temporary need, and (b) how the employer's request for the services or labor meets one of the standards of a one-time occurrence, a seasonal need, a peakload need, or an intermittent need." The application was also required to include "[s]upporting evidence and documentation that justifies the chosen standard of temporary need ...." The TEGL provided examples of the kind of documentation that could be used to support the temporary needs' statement. One example was summarized payroll reports. The TEGL stated:

c. Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, 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. Employers should be prepared to provide the documents utilized to generate the summarized monthly payroll reports if requested by the NPC Certifying Officer.

TEGL No. 21-06, Change 1, Appendix A, Section III, D., 4., c.

## **BACKGROUND**

On January 9, 2009, the Employer – a construction company located in North Dakota – filed its ETA Form 750A application for alien employment certification for five Construction Laborers. The application stated that the Employer expected to employ the Aliens from March 15, 2009 to November 30, 2009. (AF 52-53).<sup>1</sup>

The Employer's temporary needs' statement was attached. (AF 56). According to that statement, the Employer's business is to construct highways, and perform site work for conservation and well locations. The work involves moving, grading, digging and other preparation with dirt and gravel. It also involves concrete installation. The Employer's busy season was stated to be from mid-March through November when the weather is more conducive for concrete pours.

The Employer attached several documents in support of its temporary needs' statement, one of which was a payroll summary. (AF 58). The payroll summary was presented in the form a bar chart representing the total dollar amount of payroll for each month in 2006, 2007 and 2008. No other details were presented.

Following recruitment supervised by the State Workforce Agency, the application was transmitted to the federal CO. On February 17, 2009, the CO issued a letter stating that upon initial review of the application, he had concluded that the Employer appeared not to be eligible for H-2B temporary labor certification based on several grounds, the only one of which is still at issue was that the payroll records did not list specific job titles. (AF 15-18). The CO therefore issued a "Request for Information" ("RFI"), directing the Employer to submit a payroll report for the job title "Construction Laborer." In the portion of the RFI stating what corrective action by the Employer was required, the

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<sup>1</sup> Citations to the Appeal File will be abbreviated as "AF" followed by the page number.

CO quoted the relevant portion of the TEGL, and highlighted in bold the following: **“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.”**

The Employer filed a response to the CO’s Request for Information by letter dated February 18, 2009. (AF 13). In regard to the payroll citation, the Employer wrote:

Baranko’s payroll system does not differentiate between job titles; thus, the payroll chart provided to you shows payroll in Baranko’s offseason. The payroll during these months consists of janitorial staff, office personnel, officers, shop workers, and foreman who work year-round. Construction Labor on highways and conservation sites ceases from the end of November through mid-March, and construction workers are laid off.

As indicated on the payroll chart, there is a spike in payroll beginning in April, and it tapers off after November. Note that this payroll increase/decrease is due to the hiring/lay off of construction laborers during Baranko’s busy season.

*Id.*

The CO issued a Final Determination denying certification for all five workers on March 19, 2009. (AF 9-12). The CO found that the Employer’s response to the RFI was insufficient because the Employer did not provide a payroll report. The CO stated that the Employer “was asked to provide a payroll report for a minimum of one previous calendar year for the specific job title (Construction Laborer) signed by the employer and failed to do so.” (AF 12).

The Employer requested review of the CO’s Final Determination by letter dated March 26, 2009, and received by BALCA on March 27, 2009. In its request for review, the Employer argued that it had provided payroll information for the prior three years; that it had adequately explained in the response to the RFI that its system includes payroll records for all job titles, and that it is not possible to break down each job title; that the

payroll chart clearly showed a seasonal need due hiring/lay off of construction laborers; that the CO failed to acknowledge the Employer's explanation; that the CO does not have the authority to mandate that the Employer operate with a specific recordkeeping system; that the TEGL does not require payroll records to be provided but only lists them as one of many suggested forms of supplemental information; and that the Employer had also submitted a chart showing seasonal sales totals and a work contract as proof of seasonal need. The Employer also observed that it had been granted labor certifications in the past based on similar payroll records. The Employer stated concern that the Department of Labor was making it difficult for employer to hire alien workers legally.

The Board issued a Notice of Docketing on March 30, 2009, setting out an expedited briefing schedule. The Appeal File was received by the Board on April 1, 2009.

On April 6, 2009, the Board received an e-mail filing from the Employer's agent. This filing did not contain any legal argument, but consisted only of copies of the Employer's Form 750A application, the Employer's original temporary needs' statement, and the contract used to support the temporary needs' statement. All of this information was already contained in the Appeal File, and it is not clear why the Employer's agent made this submission.

The CO filed a brief on April 8, 2009. The CO observed that the TEGL requires a payroll summary to 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." (CO's Brief at 2, emphasis as in brief). The CO observed that the Employer's response to the RFI and appeal clearly reflected an understanding of what the Employer was being asked to provide, that the Employer stated that it could not provide it and disputed the CO's right to require it. The CO cited a decision in another H-2B appeal in which the undersigned affirmed the denial of labor certification based on failure to provide documents requested by the CO in an RFI -- TGL Management, Inc., 2009-TLN-10 (Mar. 31, 2009). Although the TGL case

did not involve failure to submit payroll records, the CO pointed out that the decision in that case underscored the importance of information specific to the occupation in which workers are being sought. Further, according to the CO the TGL decision substantiated that once an employer sets out to justify its temporary need with payroll records, it is subject to the TEGL requirements on supporting evidence and documentation. The CO stated that “[w]ithout [occupation-specific payroll information] the CO cannot distinguish between the portion of the payroll that would have been paid to permanent, year-round staff (e.g., janitors and officers) and the portion paid to temporary workers; i.e., the construction laborers.” (CO’s Brief at 3).

## **DISCUSSION**

The Employer is correct in arguing that the TEGL does not mandate that payroll records be used as supporting evidence to justify the Employer’s temporary need. But this argument ignores the fact that the Employer chose to rely in part on a summary of its payroll records to document its temporary needs’ statement.

The Employer is also correct in arguing that the CO does not have the authority to mandate the type of recordkeeping system an Employer uses for its payroll records. But again, this argument ignores the fact that the Employer chose to rely on payroll records. It was the Employer’s decision to rely on payroll records that were of poor evidentiary quality, and which plainly did not comply with the TEGL’s description of what kind of payroll record would be acceptable as documentation of temporary needs. The TEGL unambiguously provides that such records must identify “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.” If the Employer’s payroll recordkeeping system was not capable of this breakdown, it should have chosen to present other types of supporting documentation. The CO correctly found that the Employer’s bar chart was insufficient as documentation of a temporary need, and reasonably requested a more detailed report in the RFI. The Employer’s inability to produce such a report is not the fault of the CO.

That the Employer may have had prior labor certification applications approved using a similar payroll summary does not excuse its failure to produce a payroll record for the instant application that was sufficiently detailed to enable the CO to make a reasoned decision on whether the payroll records supported the Employer's temporary needs' statement. *See generally Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990); *Verdi's Restaurant & Catering*, 1998-INA-239 (Mar. 19, 1999) (permanent labor certification cases holding that prior decisions of the CO to grant certification are not binding in future cases).

Without payroll records that credibly and specifically showed the Employer's pattern of employment of construction laborers, the Employer was left only with its own statement of temporary need, a bar chart showing monthly sales patterns (which the Employer itself noted could be misleading because it included oil field sales not reflective of the Employer's construction work (AF 56)); and a single civil construction contract showing a start date of January 1, 2009 and an end date of December 31, 2009. These documents standing alone do not establish a temporary need for construction workers.

It is the Employer's burden to establish why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. Nothing in the TEGL forced the Employer to use documentation of poor evidentiary quality. It may be obvious to the Employer that it needs to use temporary construction laborers for the time period requested, but it is incumbent on the Employer to present evidence to the CO sufficient to convince the CO of that need.

Based on the foregoing, I find that the CO properly denied certification.

**ORDER**

Based on the foregoing, **IT IS ORDERED** that the CO's denial of certification is **AFFIRMED**.

For the Board:

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**JOHN M. VITTON**  
Chief Administrative Law Judge