



**Issue Date: 15 April 2009**

**BALCA Case No.: 2009-TLN-00042**  
ETA Case No.: C-09030-44484

*In the Matter of:*

**BERRY CONTRACTING, L.P.,**  
**d/b/a**  
**BAY, LTD.,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Vinh Trieu, Esquire  
Foster Quan, LLP  
Austin, Texas  
*For the Employer*

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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 has adequately documented a temporary need based on peakload and whether it is offering full-time or part-time employment for temporary workers.

## **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 ....”

Where a petitioning employer chose to rely on a peakload standard of need, TEGL No. 21-06 required the petitioner to

establish that (1) 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 (2) the temporary additions to staff will not become a part of the petitioner’s regular operation ....

## **BACKGROUND**

### *The Application, and the Employer's Temporary Needs Statement and Documentation*

On December 28, 2008, the Employer – an industrial construction company – filed its ETA Form 750A application for alien employment certification for 95 Structural Metal Fabricators and Fitters. The application stated that the work would take place in Corpus Christi, Texas, from April 15, 2009 to February 15, 2010. (AF 1149-1150).<sup>1</sup>

The Employer's temporary needs' statement was attached. (AF 1151-1155). It related that the Employer has been in business since 1953, and has offices and operations throughout the U.S. Gulf Coast, Latin America, and other overseas locations. Its operations cross disciplines -- including construction, fabrication, and maintenance -- and industries -- including chemical, petrochemical, gas, power generation, and environmental remediation. It also builds roads, highways, bridges and marine facilities for government and private industry. The Corpus Christi facility is dedicated to vessel, pipe and modular fabrication. At the time of the needs' statement, the Corpus Christi facility employed approximately 500 full-time employees and no H-2B temporary employees.<sup>2</sup>

The Employer stated that it regularly employs Structural Metal Fabricators and Fitters at the Corpus Christi facility to construct on-site, oil and natural gas structures and large steel structural components, but needs to supplement this workforce on a temporary basis due to a short-term demand to complete “the FHR/Jacobs 30DDS Modules” project. The Employer's temporary needs statement did not define this phrase. Reviewing the attached Statement of Work, however, it appears that the FHR stands for Flint Hills

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

<sup>2</sup> Although the Employer did not have H-2B employees at that time, as detailed in the discussion below, I note that it had many non-H-2B employees in 2008, and had H-2B employees in prior years.

Resources, LP; that “Jacobs” is a firm acting as agent for FHR; that DDS stands for “Distillate Desulfurizer;” and that the Employer will be supplying FHR/Jacobs with fabrications in a series of modules for a desulfurizer unit. The temporary needs’ statement indicated that the modules would be barged to the final destination plant, which would begin producing gasoline, diesel and jet fuel in early 2010.

To explain why this project involved an unusual increase in the demand for its services, the Employer contended, among other factors, that current conditions have put enormous pressure on the non-OPEC oil and gas industry to grow faster than ever; that the stockpile of gasoline in the East Coast petroleum district is vulnerable to shortages; that there was an anticipated improvement in the momentum of oil markets; and that gasoline usage spikes during the summer months. Consequently, the Employer’s oil and gas customers had created an unusual short term demand different from the Employer’s ordinary workload. In specific regard to the Corpus Christi facility, the Employer argued that the unusually high demand for services in the oil and gas industry had caused it to be unable to fill a peakload demand for U.S. workers, and in particular for the FHR/Jacobs 30DDS Modules project. The Employer attested that the temporary workers would not become part of the company’s regular operation.

Attached to the Employer’s temporary needs’ statement were several supporting documents. The first attachment was a summary payroll report for calendar years 2007 and 2008 for its Structural Metal Fabricators and Fitters. (AF 1156). The 2007 report showed that the Employer engaged between 60 and 80 permanent workers per month, and between 150 to 168 as temporary workers. The 2008 report showed between 73 and 78 permanent workers, and between 104 and 170 temporary workers. For both years, it appears that the low point for temporary workers tended to be during April and May. A low was also experienced by the Employer in December 2008. The second attachment was a printout from a Department of Energy web site concerning the impact of Hurricanes Ike and Gustav on Gulf Coast natural gas and gasoline production. (AF 1157-1163). The third attachment was a letter from the Employer’s Vice-President of Shops and Yards Division for the Corpus Christi facility. (AF 1164). This letter stated that the

anticipated start date for the FHR/Jacobs 30DDS Modules project was to be April 2009 with delivery beginning in February 2010. The assembly portion of the contract was to last approximately 10 months. The final attachment consisted of a purchase order, scope of work statement, and related appendices for the FHR/Jacobs 30DDS Modules project. (AF 1165-1228). One appendix was a “Module Assembly Schedule,” which showed assembly on modules was projected to begin on April 1, 2009, and that the delivery dates would begin on October 2, 2009 and continue until April 9, 2010. (AF 1227).

Later in the Appeal File, both the CO and the Employer refer to an Oil Market Report as among the supporting documents accompanying the application. The Appeal File does not include a copy of this Report in the pages designated as representing the original application. However, the Report is found in the Employer’s later response to the CO’s “Request for Information.” (AF 54-111). The Report was drafted by the International Energy Agency, and was dated October 10, 2008. In general, the Report notes declines in demand and prices for oil, and downward demand forecasts for 2008 and 2009. Simultaneously, however, global oil supply declined due to hurricane outages in the Gulf of Mexico and stoppages in Azerbaijan and among OPEC producers. In sum, the Report states that “Global refinery crude throughput should average 74.9 mb/d in 4Q08, 0.8 mb/d lower than forecast in last month’s report, on weaker demand, higher maintenance, hurricane-related disruptions and economic run cuts.” (AF 54).

#### *The Request for Information*

The Employer then conducted recruitment supervised by the State Workforce Agency (“SWA”), and out of three applicants, hired one. (AF 1126-1148). The SWA transmitted the application to the federal CO on January 30, 2009. (AF 1124-1125).

On February 11, 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 inadequate documentation of a temporary need, and failure to comply with a policy of the DOL regarding processing of H-2B

applications, and therefore the Employer would need to respond to a “Request for Information” (“RFI”). (AF 1120-1123). Specifically, in regard to the documentation accompanying the Employer’s temporary needs’ statement, the CO, citing TEGL No. 21-06, Change 1, Attachment A, Section III.D.4., found that the Employer’s payroll documentation did not show a peak during the time of need specified, and in fact showed that temporary workers are employed year round; that the Oil Market Report and Internet article on the impact of Hurricanes Ike and Gustav on the Gulf Coast were not legally binding and were not specific to the application being considered; the contract for the work to be performed showed different start and end dates than the date of need shown on the ETA 750A.

The CO also found that the payroll documentation failed to comply with the documentation requirements for a job contractor, citing TEGL No. 21-06, Change 1, Attachment A, Section V.A.1.<sup>3</sup> The CO found that the temporary needs statement failed to be based on the employer’s business operations, citing TEGL No. 21-06, Change 1, Attachment A, Section III.D.3. Finally, the CO found that the Employer failed to complete item 19 (union information) on the Form ETA 750A, citing , citing TEGL No. 21-06, Change 1, Attachment A, Section III.A.

The CO then detailed documentation that the Employer would need to provide to address the issue raised by the CO, including signed work contracts; complete payroll records (including the documents its utilized to generate the summarized monthly payroll reports); IRS form W-2s for each permanent and temporary worker employees during 2007 for the worksite listed in the Form 750A; a new temporary needs’ statement; and two original, and completed, Form 750As.

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<sup>3</sup> There is no evidence based on the record before me that the petitioning Employer is a job contractor within the meaning of the TEGL.

*The Employer's Response to the Request for Information*

The Employer filed a response to the CO's Request for Information by cover letter dated February 17, 2009, and received by the CO on February 20, 2009.<sup>4</sup> (AF 18-1119). The Employer's attorney presented the Employer's responses.

In regard to the RFI citation that the Employer failed to present supportive documentation justifying the temporary need for alien labor certification, the attorney argued that such documentation had been presented in the form of 2007 and 2008 payroll summary charts, and the contract for the FHR-Jacobs 30DDS Modules project. In regard to the RFI citation that the payroll records did not show a peak need at the time requested, the attorney argued that close review of the payroll reveals that the same pattern on the number of workers and earnings from one year to the next with a gradual increase in April, achievement of a peak around August/September, and a slow decrease after those months. In regard to the RFI citation that the payroll report showed that temporary workers are employed year round, the attorney noted that in calendar year 2007, the Employer it did not get its H-2B workers in place until April, and they departed by November. In calendar year 2008, the Employer did not have any H-2B workers but was able to meet its temporary worker needs that year with U.S. citizens, lawful permanent residents, and other lawful sources. The attorney argued that the oil and gas industry's increased construction needs in 2007 and 2008 had forced the Employer to hire temporary labor to meet the demands of the different projects. The attorney argued that the Employer only resorted to the H-2B program when it is awarded a specific project, and that it does not keep these workers on its permanent staff.

In regard to the RFI finding that the Oil Market Report and Internet article on the impact of Hurricanes Ike and Gustav were inadequate as proof of temporary need for the period of need stated in the Employer's application, the attorney argued that the CO misunderstood the significance of the documents: "The purpose of the two professional

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<sup>4</sup> The W-2s were submitted by separate submission, with a cover letter dated February 20, 2009, and received by the CO on February 28, 2009. (AF 18).

articles submitted is not to support a need for more structural metal fabricators and fitters but demonstrates the reason why America is in more demand of oil and gas.” The article on the impact of the hurricanes was not “to prove a need to hire more temporary workers but instead it shows how these hurricanes affected America’s consumption of oil and gas” and how the hurricanes damaged oil refineries in the Gulf. Thus, according to the attorney, the articles helped to explain why there is an unusual increase in the demand for the Employer’s services – *i.e.*, the new pressure on the U.S. oil and gas industry to meet demand.

In regard to the RFI finding that the FHR-Jacobs 30DDS Modules project purchase order did not match the dates of need shown on the ETA Form 750A, and showed a period of need longer than one year, the attorney explained that construction contracts normally have a start-up period to permit hiring and ordering of materials and equipment. In regard to the FHR-Jacobs 30DDS Modules contract, an equipment delivery period and a delivery period were built into the contract’s timeline. Although the contract was for more than one year in length, the Employer only needed to supplement its permanent workforce from April 2009 to February 2010. In support of this argument, the Employer submitted as directed by the RFI

- Exhibit E – a work agreement supplement specifying the actual dates when work will commence and end, and defining the services and work to be performed for each month of the requested period.
- Exhibit F – the name of the telephone number of the Employer’s client’s for the FHR-Jacobs 30DDS Modules project.
- Exhibit B – payroll reports as specified in the RFI.
- Exhibit G – documents used to generate the summarized monthly payroll reports.

- W-2s for each permanent and temporary worker employed during 2007 (submitted separately because of the volume)
  
- Exhibit H – Statement in Support of Need.<sup>5</sup>

In regard to the RFI finding that the Employer did not provide adequate documentation as a job contractor to determine the need of the job contractor rather than its client, the attorney argued that it was not a job contractor.

In regard to the RFI finding that the temporary needs statement did not adequately explain the nature of the temporary need based on the Employer's business operations, the attorney reiterated the information previously provided by the Employer about its operations in general and the Corpus Christi facility in particular, and then focused the temporary peakload need contention on a short term demand to complete the FHR-Jacobs 30DDS Modules project. The attorney reiterated that FHR-Jacobs 30DDS Modules project would start production in April 2009 requiring 175,000 man hours, with completion by February 2010. The attorney reiterated the Employer's contention that this increase in demand for its services was unusual because of the unprecedented demand for oil and gas, various risk factors in those industries, and projected seasonal demand for summer use of gasoline.

In regard to the RFI finding that the Employer had not completed Item 19 (union information), the attorney stated that the Employer had marked N/A at items 19 a, b and c, because the Employer does not have a union for any positions at its company. The attorney, however, supplied two, complete ETA Form 750As.

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<sup>5</sup> The Employer resubmitted the same temporary needs' statement it supplied with the application. (AF 19-24).

### *The Final Determination*

The CO issued a Final Determination denying certification for all 95 workers on March 13, 2009. (AF 12-17). The CO found that the documentation submitted by the Employer in response to the RFI was still insufficient to prove a claim of temporary peakload need.<sup>6</sup> The CO focused on two main points: an insufficient payroll record, and an inconsistent Purchase Order.

In regard to the payroll records, the CO found that the Employer had merely resubmitted the same payroll record that was found to be insufficient in the RFI. The CO did not find that it showed that the Employer had a discernable peak in temporary workers during the requested dates of need. Specifically, the CO observed that the month in which the Employer had the fewest number of workers in 2008 was May – precisely the month which the Employer now claims to be a peak. The CO also observed that the Employer’s employment of temporary workers in 2008 did not approach a peak of 95 workers as now requested. Specifically, the CO noted that in March 2008, outside the Employer’s currently requested peakload dates of need, the Employer carried 162 temporary Structural Metal Fabricators and Fitters, and that this number was greater in all but two months “within the Employer’s requested peak by as many as 48 temporary workers.” (AF 16). The CO also noted that the Employer had been able to employ between 104 and 170 temporary Structural Metal Fabricators and Fitters for each month in 2008 without the use of the H-2B program, and thus the Employer should be able to hire more than the requested number of temporary U.S. workers. *See* TEGL No. 21-06, Change 1, Attachment A, Section V.A.2. (CO is to consider whether U.S. workers are available). The CO also concluded that the payroll showed that the Employer did not have full-time employment available for temporary workers, citing TEGL No. 21-06, Change 1, Attachment A, Section II.B. The CO observed that the only month in 2008 in which temporary Structural Metal Fabricators and Fitters received an average of 40 hours

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<sup>6</sup> The CO noted that the Employer’s response was tardy. This is apparently in reference to the W-2s, which were sent by separate transmission, and which did not arrive at the CO’s office until February 20, 2009. The due date was February 19, 2009. The CO, however, did not base the denial on an untimely response. I note that the W-2 response was voluminous, constituting pages 170 to 1000 of the Appeal File, with four W-2s per page.

per week was August. Finally, the CO found that the documents used by the Employer to generate its payroll report failed to separate temporary from permanent workers, causing the CO to be unable to determine if full-time work is available for the temporary workers.

In regard to the Purchase Order, the CO had focused in the RFI on the inconsistency between the contract dates for the FHR-Jacobs 30DDS Modules project and the dates of need stated in the ETA Form 750A. The CO accepted the Employer's explanation as to the start date, but concluded that the contract and the Employer's own words in the response to the RFI demonstrated that the completion date was not until April 2010, which contradicted the end date for the H-2B workers of February 2010 stated in the Form 750A, and showed a period of need covering more than the 10 months allowed for a peakload or seasonal need under TEGL No. 21-06, Change 1.

#### *The Request for Review and Appellate Briefs*

The Employer requested review of the CO's Final Determination by letter dated March 20, 2009, and received by BALCA on March 23, 2009. In its request for review, the Employer's attorney argued that the CO's assumption that the Employer's peakload needs in the construction industry would exactly correlate with prior years was "improbable." The attorney noted that the Employer had stated that its permanent staff could finish up the modules after the H-2B workers left in February 2010. In regards to the CO's finding that the Employer should have been able to hire more U.S. temporary workers, the attorney pointed to the fact that it had engaged in supervised recruitment under the SWA, and had only found one qualified U.S. worker. The attorney complained that the construction industry has been unfairly scrutinized under the H-2B program in comparison with landscaping companies and ski resorts.

The Board issued a Notice of Docketing on March 24, 2009, setting out an expedited briefing schedule.<sup>7</sup> The Appeal File was received by the Board on March 31, 2009.

The Employer's appellate brief largely reiterated the arguments it previously made -- that its contract to provide modules for a desulfurizer unit was sufficient to establish a peakload temporary need for H-2B workers; that it had attempted to find U.S. workers by engaging in good faith recruitment through the SWA; that its 2007 and 2008 payroll records, while not showing a perfect spike in number of hires, showed a bell curve showing a gradual increase in number of hires beginning in April, peaking in August/September, and slowly decreasing thereafter; that there is no law requiring a showing of a consistent 10 month period in payroll records; that the Oil Market Report and the article about the impact of Hurricanes Ike and Gustav were meant only to show why it was awarded a contract to supply modules for a desulfurizer (supply and demand) and the national interest to the U.S. government in attempts to rely less on foreign oil; and that the construction industry is being unfairly singled out for scrutiny under the H-2B program.

The CO's brief focused on only part of the Final Determination. The CO noted under TEGL No. 21-06, Change 1, a peakload need, where that need is of a recurring nature, is defined as a period not to exceed 10 months. The CO argued that the Employer had H-2B workers in three out of the past four years, showing that the need was of a recurring nature. The CO argued that, based on the end-date of the contract and the delivery schedule, the CO reasonably concluded that the actual period of need was one year, but that the Employer was only asking for a 10 month period of employment in an

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<sup>7</sup> In the briefing schedule, I directed that the parties confer regarding the issues in this matter and report in their briefs on the status of those discussions. The Employer reported that its attempts to confer with the other parties in the matter went unanswered. The CO's brief failed to report on the directive to confer.

I am well aware that the CO and the Office of the Solicitor have been inundated with H-2A and H-2B case work in the past several months, undoubtedly making it difficult to find time to engage parties in settlement negotiations over matters that may not be capable of compromise. However, I am disappointed by the failure of the CO's brief to even acknowledge that I had directed the parties to confer and provide a report on that conference at the time that briefs were due.

attempt to show temporary need as required by TEGL No. 21-06, Change 1. The CO noted that the Employer's reliance on an increase in demand for its services in the past few years due to a rise in demand from the oil and gas industry in the wake infrastructure damage from recent hurricanes only bolstered the CO's conclusion. The demand had been consistent over the past several years – thus making the need for additional workers on a temporary basis suspect. The contract presented for the desulfurizer project is just one of the Employer's major recent contracts. Thus, according to the CO, based on the Employer's own statements, it appeared to be attempting to fill permanent worker positions with temporary workers.

## **DISCUSSION**

The Employer's justification for a temporary peakload need for H-2B workers boils down to the fact that it has a contract to supply FHR-Jacobs with fabricated modules for a desulfurizer unit, and that it will need to supplement its permanent workforce for a 10 month period out of a 12 month contract to get this work done. The Employer contends that once the temporary workers leave in February 2010, its permanent work force can wrap up the work.

*The Employer's Overall Needs for Temporary Workers Not Raised Specifically As an Issue Until the CO's Brief*

The Employer's temporary peakload need argument is based entirely on a single contract. In his appellate brief, the CO argued in part that the Employer's justification based on a single contract was not good evidence of a temporary need when viewing the Employer's business as a whole, and that in fact the Employer's documentation and statements of a recent trend of increased work based on unprecedented demand for oil and gas, undercut its contention that it has only a temporary need for Structural Metal Fabricators and Fitters. Rather, the increase in demand for the Employer's products and services appears to be consistently present, and therefore reflect a permanent need for temporary workers to supplement the workforce. This observation reflects my own

reaction to the Employer's documentation.<sup>8</sup> But, while there was passing reference in the CO's RFI that the temporary needs statement failed to be based on the Employer's business operations, the CO's Final Determination did not discuss this aspect of the Employer's temporary needs statement. Indeed, the record before me contains little specific information about the Employer's use of temporary workers other than on the FHR/Jacobs desulfurizer project, although it is clear that the Employer routinely uses temporary workers on various projects. That absence of information is undoubtedly attributable to the fact that it was not the focus of the CO's adjudication of the application.

Thus, because the Employer was not asked to focus on the issue of whether its overall needs for temporary workers prevented a finding that it has a temporary need for workers on a single contract, I will focus on the grounds for the denying the application specified by the CO in his Final Determination. As detailed above, the CO concluded (1) that the payroll records showed that the Employer did not have a peakload in 2008 during the months now claimed as a peakload; (2) that the fact that the Employer was able to find ample numbers of U.S. workers in 2008 indicated that it should be able to do the same in 2009; (3) that the payroll records only showed part-time work was provided for temporary workers in 2008 except in one month; and the payroll records failed to separate temporary from permanent workers adequately so as to permit the CO to determine if full-time work was actually available for temporary workers; and (4) that the Employer's contract with FHR/Jacobs on desulfurizer project was inadequate as documentation of a temporary need because it (a) showed a completion date two months beyond the stated terminal date for the H-2B workers, and (b) showed a period of need covering more than 10 months.

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<sup>8</sup> I also note that the Oil Market Report clearly projected a decline in demand for oil and gas products in 2009.

(1) *The Payroll Records and Peakload*

Upon review of the Employers' payroll summary for 2007 and 2008, I find that neither the Employer nor the CO's positions are entirely valid. The trend I discern upon review of the summary is that the Employer's temporary workforce varied by no more than five workers from May to December 2007, reached a peak in January 2008, dropped by 65 workers by May of 2008, gradually increased between June and November 2008, then dramatically dropped by 58 workers in December 2008. The bell curve relied upon by the Employer is not dramatic, but it does exist. It does not, however, match its dates of need under the current application. Moreover, I note that for 18 months during that two year period, the Employer engaged between 150 and 170 temporary workers, and only in six months did the number drop below 150 temporary workers, mostly in the Spring and Summer of 2008. Thus, looked at differently, over the two year period of 2007-2008, the Employer's temporary workforce was often relatively stable.

But what this proves is not a lot. The payroll trends support the CO's position insofar as they show that the Employer did not in the past two years experience a spike in the need for temporary workers in the exact months specified in the Employer's current H-2B application, and insofar as they tend to show a consistent need for temporary workers. As the Employer pointed out, however, there is no law or guidance letter requiring that a peakload need always occur at the same time each year. The Employer's contention that in the construction industry the timing of a contract may not follow any particular pattern, is not obviously wrong. Given the nature of the Employer's Corpus Christi fabrication facility – which does not seem to be related to weather or seasonal fluctuations, but rather simply to when a contract project needs to be started and completed – a past history of the timing of peakloads that does not match the current need is not particularly strong grounds for finding that the current need is not a peakload need. An absence of peakloads might support a finding that the Employer's need for the duties to be performed is permanent rather than temporary. But as noted, this potential aspect of the Employer's business operation was not adequately explored before the CO

for a meaningful record to have been established for review. Thus, I do not reach that question.

(2) *The Employer's Ability to Find Temporary Non-H-2B Workers in 2008*

The Employer did not use any H-2B workers in 2008. At one point in that year, the Employer had 170 temporary Structural Metal Fabricators and Fitters, who were either U.S. citizens, permanent lawful residents, or other lawful workers. The CO therefore concluded that the Employer should have been able to do the same in 2009. The Employer's response to this conclusion was that it engaged in good faith recruitment through the SWA, and found one qualified U.S. worker. I find that this was an inadequate response to the CO's conclusion.

TEGL No. 21-06, Change 1, Attachment A, Section V.A.2. provides:

A. The NPC Certifying Officer shall determine whether to grant or deny the temporary labor certification or to issue a notice that such certification cannot be made based on whether or not:

\* \* \*

2. Qualified U.S. workers are available for the temporary job opportunity.

a. To determine if a U.S. worker is available, the NPC Certifying Officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or at the employer's expense, if the prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses....

This provision does not go into detail about how the CO is to determine whether qualified U.S. workers are available for the job. But it clearly gives the CO the authority to take into consideration the availability of U.S. workers when deciding whether to grant certification of an H-2B application. Here, where the Employer was able to find legal

non-H-2B sources for an entire year for temporary workers well exceeding the number of workers now being requested, the CO reasonably raised the issue.

It is true that the Employer engaged in supervised recruitment with the SWA. The Employer advertised for three days in the Corpus Christi Caller-Times in January 2009, notified the Texas AFL-CIO of the openings,<sup>9</sup> and placed a job order with the SWA. But plainly, this recruitment was a minimal legal test of the local labor market. It could not be credibly argued by the Employer that this was a vigorous attempt to find U.S. workers willing to work on a 10 month project. Moreover, the supervised recruitment occurred in early January 2009. Yet in 2008, the Employer had been able to find all the temporary workers it needs without resort to the H-2B program.

That said, the TEGL provides a very specific procedure for a CO to require additional recruitment if the CO needs to “determine whether there are other appropriate sources of workers from which the employer should have recruited in order to obtain qualified U.S. workers.” TEGL No. 21-06, Change 1, Attachment A, Section IV.I. The TEGL goes on to state that “[i]f further recruitment is warranted, the NPC Certifying Officer shall return the application to the SWA with specific instructions for additional recruitment.” *Id.* In view of this specific procedure, it appears that the TEGL contemplates a remand for additional recruitment rather than outright denial of certification based on a finding that other sources should have been tested. The appropriate procedure would have been to issue a supplemental RFI asking questions about what sources the Employer used in 2008 to find its temporary workers, and then, if the CO concluded that those sources should have been tested, to remand the application for additional recruitment.

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<sup>9</sup> The Employer was instructed to notify an applicable union by the SWA on December 31, 2008. (AF 1145). In its recruitment report dated January 20, 2009, the Employer stated that the Texas AFL-CIO had been notified but had made no referrals. The Appeal File, however, does not indicate when the AFL-CIO was notified, so it is not clear how much time had transpired between the notice to the union and the report of no referrals.

(3) *Payroll Records and Part-Time Work in 2008*

In the Final Determination, the CO found that the payroll records presented by the Employer only showed part-time work for temporary workers in 2008 except in one month, and failed to separate temporary from permanent workers adequately, causing the CO to be unable to determine if full-time work is available for the temporary workers. Although the CO first made this observation in the Final Determination, the Employer had an opportunity to address it in its request for review and appellate brief. No argument, however, was presented in response to this aspect of the Final Determination.

TEGL No. 21-06, Change 1, Attachment A, Section II.B. states that “[p]art-time employment does not qualify as employment for temporary labor certification under the H-2B program. Only full-time employment can be certified.”

The Employer’s response to the RFI included Reports showing Hours Worked by its employees in 2007 (AF 1080-1102) and 2008 (AF 1020-1037). The reports are not well-labeled, but they appear to all reflect workers in the same craft. They list workers in no particular order, and there is no labeling to show distinctions between permanent and temporary employees, or full-time and part-time workers. The work hours shown vary quite a bit by month and worker, and it is difficult to discern a particular pattern. But there are many workers listed whose hours do not consistently reflect a full-time work schedule, even taking into account sick or vacation leave, or varying start/departure dates for employment.

My review of the records leads to the conclusion that the CO’s review of the records and the conclusions he drew were rational. Indeed, the records appear to be a raw data dump designed to minimally comply with the documentation requests in the RFI. But it is the Employer’s burden of proof to establish eligibility for temporary labor certification. It behooves a petitioning employer to present its documentation in a manner to permit the CO to understand its import.

Given that the records appear to support the CO's conclusions, and that the Employer did not respond to those conclusions in its request for review or appellate brief, I find that the CO's findings regarding the Employer's apparent history of providing only part-time work for temporary workers constituted grounds for denial of the Employer's application for certification of H-2B workers.

*(4) The period of work shown by the FHR/Jacobs Contract*

The Employer's temporary peakload need argument is based on a single contract with FHR/Jacobs to provide fabrication modules on desulfurizer construction project. In the Final Determination, the CO found that this contract was inadequate as documentation of a temporary need because it (a) showed a completion date two months beyond the stated terminal date for the H-2B workers, and (b) showed a period of need covering more than 10 months.

I concur with the CO that the contract showed a period of need covering more than 10 months, and that the completion date was two months beyond the stated terminal date for the H-2B workers. The Employer explained that it only needed to supplement its workforce for 10 months of the project, and that its permanent workforce would be adequate to finish the project after the H-2B workers left. The mere fact that the contract specified deliverable modules beyond the time when the H-2B workers would be discharged does not lead to the ineluctable conclusion that temporary workers would be needed for the last several modules. Perhaps the point of the CO's finding on this issue was that the Employer was misrepresenting its needs merely in order to qualify workers for the H-2B program. But the record is too ambiguous on the Employer's motivation or actual needs to conclude that the Employer's explanation that its permanent work force could wrap up the work required on the final several months of the contract was not credible.

## **SUMMARY**

I acknowledge that the CO might reasonably have questioned whether the Employer in this case has a permanent need for temporary workers based on its overall business operations, and therefore focusing on a single contract to define the Employer's temporary need may not reflect the reality of the Employer's temporary need within the meaning of the H-2B program. But since this issue was not fully developed on this basis before the CO, I decline to base my decision on that issue. Rather, based strictly on the grounds specified in the CO's Final Determination, I find that the CO could not base denial of certification on a past history of use of temporary workers in months that did not match the current stated need where the petitioning Employer's work needs were not shown to follow any particular pattern; that the CO correctly questioned whether the Employer could have found U.S. workers for its temporary needs based on the Employer's ability to do so in the prior year, but that procedurally the CO should have remanded for additional recruitment on this issue; that the Employer failed to show why the CO's finding that it was not offering only part-time work for its temporary working based on the payroll records of past years was in error; and finally, that the record was too ambiguous to reject the Employer's explanation for the difference in timing between the stated dates of need and the date of completion of the desulfurizer contract, and for a need shorter than the length of the contract.

Thus, although I have rejected the CO's reasoning and procedure on several issues, I affirm the denial based on the part-time employment issue. Since I affirm the denial on this ground, the need for a remand on the additional sources of workers issue is moot.

**ORDER**

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

For the Board:

**A**

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