



Issue Date: 09 April 2009

BALCA Case No.: 2009-TLN-00015

ETA Case No.: C-09006-43955

In the Matter of:

CABALLERO CONTRACTING & CONSULTING LLC,

Employer

Certifying Officer: Kevin W. Henderson
Chicago National Processing Center

Appearances: Malvern C. Burnett, Esquire
For the Employer

Gary M. Buff, Associate Solicitor
Frank P. Buckley, 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 central issue in this appeal is whether, under the facts and applicable law, the petitioning job contractor can establish a temporary need for 150 general laborers based on agreements entered into with two customers.

BACKGROUND

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

On December 2, 2008, the Employer, a “labor contractor,” filed its ETA Form 750A application for alien employment certification for 150 general laborers. (AF 50).¹ The stated duties of the laborers were: “Perform tasks involving physical labor at building and construction work sites. May operate hand and power tools of all types: earth tampers, cement mixers, small mechanical hoists, surveying equipment and measuring equipment.” The laborers were to work at “[v]arious work sites throughout Lafourche Parish, Louisiana.” The period of need was from April 1, 2009 to September 30, 2009. (AF 51).

At the time of the filing of the application, 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”),² 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-

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

² An earlier version of the TEGL was published in the Federal Register on April 20, 2007. 72 Fed. Reg. 19961. In this decision, however, references to TEGL No. 21-06 are to the later, July 13, 2007 version of that document, and specifically Appendix A to that version.

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 Employer in the instant case complied with that requirement with a temporary needs’ letter signed by its Manager, dated December 1, 2008. (AF 52-53). The letter stated that the Employer “is a supplier of labor for businesses of all types located in the South Central Louisiana area” The Employer stated that one of its customers is a shipyard that has plans to expand in the immediate future, and will need general laborers for clean up and prep work prior to erection of new bulkheads for an expanded dock area and conversion of the yard for vessel building. The Employer stated that the client would no longer need the workers “once the shipyard has been cleaned, repaired and expanded.” The Employer characterized its need as an “intermittent” need.

The Employer also referred to a customer having several projects to prepare for landscaping and planting of trees along roadways in the Spring and Summer. The Employer stated that “once the planting projects are complete, the customer will no longer require the workers.” Again, the Employer characterized its need as an “intermittent” need.

Finally, the Employer stated that it needed to fill the 150 general laborer positions “in order to be able to keep up with situation caused by the projects of our customers” and that “[t]hese temporary workers will not become a part of the permanent workforce.”

Accompanying the temporary needs’ letter were letters of commitment and agreements from the aforementioned clients. (AF 54-57). Each Employer stated a need for 75 temporary workers.

The Certifying Officer's Request for Information

Following recruitment supervised by the Louisiana Office of Workforce Development, the application was forwarded to the CO. (AF 27). On January 26, 2009, the CO issued a *Request for Information* ("RFI"), in which the CO found upon initial review that the Employer appeared not to be eligible for temporary labor certification, and provided notice of what additional information the Employer needed to submit to address the deficiencies found with the application. (AF 24-26). First, the CO stated that the temporary need of a job contractor is determined by examining the job contractor's need for workers, rather than the needs of its customers. The CO found that the Employer's documentation only illustrated temporary needs of its customers. Second, the CO found that the Employer's temporary needs' statement failed to explain how its needs fit the intermittent needs criteria.

The Employer's Response to the Request for Information

In response, the Employer submitted a new temporary needs' statement. (AF 22-23). The Employer argued that its customers' "needs become our needs as they look to us to add temporary support to their permanent workforce." The Employer wrote:

Our company has no general laborers, whether temporary, permanent, full-time or part-time, in its employ. However, occasionally or intermittently, we acquire a need for temporary general laborers to perform labor for our clients for short periods of time. In this case, our company has acquired a need for general laborers by virtue of agreements entered into between the company and the company's clients as described below. Prior hereto, our company did not require the services of 150 general laborers; however, these two occasions have arisen requiring these temporary workers for a period of time covering only approximately 6 months. Therefore, we contend that our need is an occasional or intermittent need.

(AF 22). The remainder of the new temporary needs' letter reiterated the description of the needs of the Employer's shipyard and landscaping customers.

The Certifying Officer's Final Determination

The CO issued a Final Determination denying certification for all 150 workers on February 27, 2009. (AF 13-17). The CO found that the Employer's new statement failed to adequately explain its need for intermittent temporary workers as a job contractor. The CO wrote:

The employer's business is to supply laborers for businesses of all types located in the South Central Louisiana area. At any given time the employer will enter into a contract whereby the employer would need to supply laborers for its clients. The employer, Caballero Contracting & Consulting, need for workers are constant due to its need to be able to supply its clients' need, whenever the clients' need arises.

(AF 16). The CO also found that the Employer's statement of need failed to meet the criteria for an intermittent temporary need. Finally, the CO found that the Employer's documentation of the need was deficient. The Employer had argued, that prior to the contracts at hand it did not require the services of 150 general laborers. The CO, however, was not convinced by that argument because it was not supported by documentation of what types of workers the Employer normally supplies "(e.g., typists, file clerks, stock clerk, store bagger, fast food workers, etc.)." (AF 9).

The Employer's Request for Review

By letter dated March 6, 2009, the Employer requested review by the Board of Alien Labor Certification Appeals ("BALCA"). (AF 1-12). The Employer's attorney wrote: "If it is the position of USDOL that a job contractor's need for workers is constant due to the nature of its business, then how can applications from job contractors for temporary workers EVER be accepted for processing?" The Employer's attorney challenged the CO's assessment that a job contractor has a constant need for workers, arguing that the nature of such a business "is to supply temporary workers to its clients to perform services of labor for short periods of time." Thus, the need for temporary

workers of any type, whether general laborers or laborers with more specific skills, “is always an occasional or intermittent need.” The Employer’s attorney stated that the Employer releases workers once the temporary job on which they were supplied is completed unless it had another client in wait needing the workers. The Employer’s attorney stated that the Employer has periods in which it has no workers in its employ other than the owners themselves “because it does not have a client needing the services of temporary workers.”

In regard to the CO’s finding that the documentation was insufficient because it did not identify what types of workers the Employer normally supplies, the Employer noted that the RFI did not ask for this information, argued that the absence of such documentation was not an indication that an employer did not occasionally acquire a need for general laborers, complained that under DOL rules it cannot now supply such documentation to BALCA, and finally stated that the fact that it had not needed general laborers in the past only cemented the fact that its need is occasional or intermittent.

The Employer argued that the CO had blurred the distinction between a job contractor and an employment agency. According to the Employer, the nature of a job contractor is to supply workers to perform temporary labor services to its clients for short periods of time. The nature of employment agency is to find jobs for workers of long duration or permanent work. In closing, the Employer argued that the only issue is whether the Employer has established a temporary need for workers that cannot be met by the domestic workforce.

Appellate Briefing

On March 12, 2009, the Board issued a Notice of Docketing providing the parties a briefing schedule. The Employer did not file an additional brief or statement of position in response to this Notice.

The CO filed a brief on March 20, 2009. The CO observed that TEGl No. 21-06

directly addresses the question of job contractors, and makes it clear that the CO's inquiry is about the job contractor's need for workers, rather than the needs of its customers. The CO noted that this standard was consistent with the Board of Immigration Appeals' decision in *Matter of Artee Corp.*, 18 I. & N. Dec. 366, Interim Decision 2934, 1982 WL 190706 (BIA 1982). The CO also cited *Volt Technical Services Corp. v. Immigration and Naturalization Service*, 648 F.Supp. 578 (S.D.N.Y. 1986).

The Supplemental Briefing Order

At the time of filing of the application in this case, ETA had published proposed amendments to the H-2B regulations. In the proposed regulations, ETA used criteria for assessing the temporary nature of applications filed by job contractors that was similar to the criteria stated in the TEGL, to wit:

(d) The temporary nature of the work or services to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed, rather than the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.

Proposed 20 C.F.R. § 655.6(d), available at 73 Fed. Reg. 29962 (May 22, 2008). See also the preamble to the proposed rules at 73 Fed. Reg. 29956 (discussing the definition of a "job contractor," and the issue of defining a job contractor's need for temporary workers).

When the Final Rule was published, however, a different formulation of the criteria for assessing the temporary nature of applications filed by job contractors was stated:

The temporary nature of the work or services to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed in addition to the needs of each individual employer with whom the job

contractor has agreed to provide workers as part of a signed work contract or labor services agreement.

20 C.F.R. § 655.6(d), available at 73 Fed. Reg. 78055-78056 (emphasis added). I found nothing in the preamble to the Final Rule that explained why this change was made. Because it appeared that this change, which directs consideration of the needs of job contractor's client or customer, was inconsistent with the criteria for assessing a job contractor's temporary need as described in the TEGl or the proposed rule, I directed a supplemental briefing to try to identify the source of this change in the regulatory language during rulemaking, whether it was part of the regulatory environment prior to the filing of the Employer's application or publication of the new rule, and to determine whether the new criteria is applicable to the present appeal given the transition rule at 20 C.F.R. § 655.5(b)(2).³

The Certifying Officer's Supplemental Brief

The CO confirmed that there was no regulatory history or other published explanation available describing why new 20 C.F.R. § 655.6(d), was changed between publication of the proposed rule and the final rule; however, the CO argued that this change did not reflect a change in ETA's view on the criteria used to assess the temporary needs of a job contractor's H-2B labor certification application. The CO also argued that the transition rule at 20 C.F.R. § 655.5(b)(2) mandates that the instant appeal be decided under the regulations in effect when the application was filed.

Although the CO argued that the substantive provision of the new regulation would not have any impact at all on the instant appeal, it offered an explanation for the change language in the language between the proposed and final version of the new

³ Because the time frame for H-2B appeals is very short, a compressed time period for supplemental briefing was imposed. Both the CO and the Employer missed the deadline. Given the compressed time provided for supplemental briefing, the fact that both briefs were filed the same day as the deadline, and the importance of the issues being briefed to the resolution of this appeal, I have fully considered both briefs.

regulation. Because this explanation explains in part how the TEGL was actually applied under the old regulations, I quote this explanation in full:

The Department in its Final Rule incorporated language regarding the standard of review to be made in determining whether a job contractor's need for H-2B workers was temporary. The addition of the words "in addition to" which replaced the words "rather than" in the NPRM, was intended not to be a reversal as much as a clarification of the historical standard of review of these cases by the Department. It was intended to enunciate and improve upon the existing standard of review in examining whether the nature of a job contractor's need for the services or labor to be performed under the H-2B visa classification is temporary. It was needed to properly address some new contractor/customer relationships that have only recently begun to appear in the system.

Job contractors, by their very nature, establish temporary contractor labor service agreements to one or more employer-clients for finite periods. The seminal decision in *Matter of Artee* established the principle that a job contractor could not rely upon the temporary needs of its customers as justification for its temporary need. The assumption is that a job contractor operates year-round moving workers from one customer to another. The language in the NPRM reflected that analysis. Recent developments in business relationship have necessitated a somewhat more sophisticated approach.

The Department's experience suggests that it is difficult in case adjudication to disconnect the job contractor from the individual employer-client(s) to which the services or labor are to be supplied. In order to justify the need, job contractors typically present to the Certifying Officer signed work contracts covering only the employer(s) to which the workers will be supplied and/or summarized monthly payroll reports of the job contractor. For fixed-site employers, the presentation of such information is normal and reviewed within the context of only the fixed-site employer's need. However, job contractors pose a unique challenge in case adjudication in that those workers can and are supplied to various employer-client worksites within a local, regional, or national context throughout the year. Some of these employer-clients have temporary and permanent needs for the services or labor.

Historically, the analysis with respect to whether the nature of the job contractor's need was temporary occurred at two levels even within the context of TEGL 21-06, Change 1. First, the Department examined the nature of the contractor's need for the services or labor to be performed without regard to the individual employer-client(s) or, as listed on the application, the worksite(s) to which the contractor anticipates

supplying/placing the workers. If the job contractor was, by example, a staffing firm that placed workers with employer-clients on a year round basis, whether on a local, regional, or national level, which could not be justified under one of the standards of temporary need, the Department traditionally denied those applications. In those instances, the mere existence of a single work contract with an individual employer-client in an area of intended employment listed on the application could not overcome the determination by the Certifying Officer that the job contractor itself had a permanent need for the services or labor.

However, case adjudication has become more complex as more localized job contractors developed unique staffing contracts with discrete finite periods (mostly 10 months) to supply workers to employer-clients who themselves had no temporary need for the services or labor to be performed. For example, a job contractor would establish a unique staffing contract to only supply workers to a single shipbuilding company (welders or pipefitters) or poultry processing plant (meat cutters) for a 10 month period with no other similar contracts or labor service agreements anywhere in the country; even though the underlying need for the service or labor was year round at the shipbuilding or poultry processing company. Thus, if case adjudication stopped by simply examining the job contractor's need alone, without regard to the underlying employer-client's need as well, the job contractor itself would have satisfied one of the regulatory standards of temporary need.

With this in mind and despite what TEGL 21-06, Change 1 appeared to enumerate as the standard of review, case adjudication of job contractors historically included a second level examination of the underlying services or labor to be performed with the individual employer-client(s). As previously noted, this second level review became exceptionally important in denying temporary labor certification applications where the job contractor tried to establish a temporary need based on a single unique labor service agreement with an employer-client who otherwise had a permanent need for the services or labor. To ignore the underlying services or labor needed by the individual employer-client and focus exclusively on the job contractor's need would ultimately undermine the clear intent of the H-2B visa program and provide a disastrous incentive for employers to re-define what are otherwise permanent jobs filled by U.S. workers into temporary jobs to be filled by foreign workers.

In order to satisfy the terms of the statutory obligation with respect to H-2B workers, the Department must impose on the contractual relationship between a job contractor and its employer-clients a cumulative review of the need of the contracting parties. The Department must look at the relationship to determine the temporariness of the need in the context of the permanency of the work to which the H-2B worker will be forwarded.

Thus the client's need is not looked at alone (satisfying the "rather than" standard), but only as an adjunct to the consideration of whether it serves to confirm or contradict the temporariness of the job contractor's need. If the Department did not view the need of the contractor within the context of its individual employer-client(s), nearly every job contractor would be able to prove a temporary need by furnishing a finite work contract or labor services agreement to the Certifying Officer. The Department's intent was not to eliminate job contractors, but merely to review their relationships in order to fulfill its statutory responsibility with respect to the U.S. worker population, that such jobs and the nature of the need is truly temporary, thereby giving the potential U.S. worker applicant pool adequate and accurate notice of the job opportunities for which they might otherwise apply.

(CO's Supplemental Brief at 2-4).

The Employer's Supplemental Brief

The Employer argued that the application should be adjudicated solely under the old regulations. It argued, moreover, that the entire matter should be remanded to the CO to permit the Employer to appeal through USCIS pursuant to 8 C.F.R. § 214.2(h)(6)(iv)(2)(D).

DISCUSSION

Proper Forum for Appeal

Initially, it must be determined whether BALCA is the proper forum for the Employer's appeal.

The Employer cited the transition rule at 20 C.F.R. § 655.5(b)(2) for the proposition that the case should be adjudicated under the old regulations, and specifically therefore with a right to appeal to USCIS. But section 655.5(b)(2) only speaks to adjudication by the SWA and NPS. It does not define the appellate procedure.

In the first H-2B appeal docketed before BALCA, I found in an unpublished order⁴ that the Supreme Court decision *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), applies, and that BALCA does have jurisdiction pursuant to the new H-2B regulation at 20 C.F.R. § 655.33 over an H-2B application filed before the effective date of that regulation, but not denied by the CO until after that effective date. *Drenner's Carpet Gallery*, 2009-TLC-1 (ALJ Feb. 25, 2009). In this regard, I noted in an earlier unpublished briefing order that the decision in *Landgraf v. USI Film Products*, suggests that procedural rules that confer or oust jurisdiction may be applied even if jurisdiction did not lie when the underlying conduct occurred or suit was filed. *Drenner's Carpet Gallery*, 2009-TLC-1 (ALJ Feb. 19, 2009). This is because application of a new jurisdictional rule usually does not remove a substantive right, but only changes the tribunal to hear the case. *Id.*, citing 511 U.S. at 274. I noted, however, that there is one potentially substantive change to the H-2B appellate procedure that arguably would make USCIS review more advantageous to an employer. The old rule permitted an employer to take a denied application to USCIS, and submit countervailing evidence. *Id.* Section 655.33, in contrast, limits BALCA's review authority to record made before the CO. However, because BALCA can remand a matter for appropriate grounds, the scope of review rule is not itself grounds for denying jurisdiction over the matter. *Id.*

Furthermore, it is not clear that USCIS would accept the Employer's appeal. The Department of Homeland Security published amendments to its H-2B regulations on December 19, 2008, with an effective date of January 18, 2009.⁵ 73 Fed. Reg. 78103 (Dec. 19, 2008). These rules discontinue DHS's practice of accepting and adjudicating an H-2B petition that lacks an approved temporary labor certification from DOL. They, in fact, preclude DHS from approving H-2B petitions filed without an approved temporary labor certification issued by DOL.

⁴ Although this ruling was made in an unpublished order, it was referenced in the Notice of Docketing issued in the instant case on March 12, 2009.

⁵ In *Drenner*, the Employer apparently had first attempted to appeal to USCIS, but was turned away.

Based on the foregoing, I find that I have jurisdiction over this matter, and I deny the Employer's request for a remand specifically for the purpose of permitting an appeal to USCIS.

Application of 655.5(b)(2)

Another initial issue is whether the merits of this appeal should be adjudicated under the regulations in effect when the application was filed, or the regulations in effect when the application was denied. As noted above, the new regulations contain a different statement of the criteria for assessing the temporary needs of a job contractor than the definition found in the TEGL.

In their supplemental briefs, both the CO and the Employer contend that the transition regulation at 20 C.F.R. § 655.5(b)(2) compels adjudication of this matter under the old regulations. Recognizing that there would be a transition period in implementation of the new regulations, ETA provided rules on how applications that were filed prior to the effective date of the new regulations would be adjudicated. Specifically, the new regulation at 20 C.F.R. § 655.5(b)(2) states:

For applications filed with the [State Workforce Agencies] serving the area of intended employment prior to the effective date of these regulations that were completed and transmitted to the [ETA National Processing Center], the NPC shall continue to process all active applications under the former regulations and issue a labor certification determination.

In the instant case, the application was filed on December 2, 2008. The SWA transmitted the application to the NPC on December 31, 2008, and the application was received by the NPC on January 6, 2009. (AF 27).

Although the TEGL was not a regulation per se, it was part of the regulatory environment at the time the Employer filed its H-2B application. Moreover, the CO's

brief maintains that job contractor temporary needs standard has not changed, and both parties agree that TEGL should apply.

Accordingly, I will apply the TEGL as the applicable criteria for the issues presently on appeal rather than the new regulatory language.

The TEGL and the Artee Decision

In TEGL No. 21-06, Change 1, Appendix A, C., the Assistant Secretary for the Employment and Training Administration defined job contractors as employers which “typically supply labor to one or more employers as part of signed work contracts or labor services agreements.” The TEGL states that “[t]he temporary or permanent nature of the work to be performed in such applications will be determined by examining the job contractor’s need for such workers, rather than the needs of its employer customers”

The TEGL cites to *Artee Corp., supra*, in regard to the proposition that it is the nature of the petitioning employer’s need, not the nature of the duties, which is controlling.⁶ In *Artee*, the Board of Immigration Appeals (“BIA”) applied this ruling to the case of a temporary help service whose business was to provide skilled machinists to industries requiring such services. Although the petitioner’s clients’ need for the services fluctuated, the BIA found that the petitioner’s need did not. In that case the BIA concluded that the petitioner had a permanent cadre of employees available to refer to customers because there was at that time a wide-spread shortage of skilled machinists in the United States. The BIA found that “[b]y the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand.” The BIA, however, recognized that a temporary help service might, under different circumstances, offer employment of a temporary nature:

⁶ This was the central ruling of *Artee*, which was a departure from a longstanding holding in *In Re Contopoulos*, 10 I & N Dec. 654 (1964), which focused on the temporariness of the duties to be performed that than the intent of petitioning employer and alien. The need versus duties issue is not the focus here. Rather, it is the TEGL’s apparent interpretation of *Artee* to mean that a job contractor’s client’s needs cannot be used when assessing a job contractor’s temporary need.

This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hires workers for temporary positions.

Artee, supra at 367-68. The BIA concluded by holding that “[i]n the absence of evidence that the petitioner has a non-recurring or infrequent demand for skilled machinists” the petitioner’s H-2 petition would be denied.

The *Artee* decision has been applied in several federal court decisions. *See, e.g., Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084 (6th Cir. 1987) (General Motors was using specialized temporary service agencies to supply English design engineers to work pursuant to one-year contracts); *Volt, supra*, (supply of nuclear start-up technicians where the employer failed to establish that this need was not of a recurring nature).

The TEGL As Actually Applied and Making Sense of the TEGL Rule on Job Contractors

TEGL No. 21-06, was issued as a guidance letter to NPC Directors and SWA Administrators. The portion of the TEGL addressing job contractors was brief, and although seemingly unbending as to consideration of the job contractor’s clients’ need for the services or labor, the CO’s supplemental brief establishes that when adjudicating H-2B applications by job contractors under TEGL No. 21-06, C., the CO had not viewed the TEGL as barring consideration of the job contractor’s clients’ needs. Rather, it indicates that historically, as more complex job-contractor/customer relationships started presenting themselves, ETA found it necessary to conduct a two-level review of job contractor applications, “despite what TEGL 21-06, Change 1 appeared to enumerate as the standard of review....”

Thus, in view of the clarification contained in the CO’s supplemental brief, it is clear that the TEGL was only a baseline guide to consideration of the temporary needs of the job contractor, and that in actual practice its seeming absolutism about not

considered the needs of clients was not rigorously applied. And with good reason. I concur with the CO's argument in the supplemental brief that a more nuanced analysis is required to accommodate business models not before the BIA in the *Artee* case.

Artee was a fact-specific ruling. In *Artee*, the BIA's ruling was clearly premised on a finding that the petitioner had a permanent cadre of skilled machinists it supplied to businesses, and that there was such a wide-spread shortage of such workers in the U.S., that the need to supply machinists was on-going. The case before me does not involve a temp service with a permanent cadre of skilled workers, nor evidence of a wide-spread shortage of workers in which the petitioning employer specialized.

As relevant to the issue presently before me, I conclude that the main point of *Artee*, the federal court decisions that applied it, and its adoption in the Department of Labor's H-2B program, is that a job contractor cannot use its client's needs to define the temporary nature of the job where focusing solely on the client's needs would misrepresent the reality of application. Rather, a more reasonable standard is to look at both the job contractor and the job contractor's client's needs to determine the temporariness of the need. This, in fact, seems to be the main point of the CO's supplemental brief – that in practical application, consideration of the client's needs is required to fully understand the context of the application and to fairly determine whether the application actually presents work of a temporary nature.

If the Employer's argument in the instant case was accepted at face value, this case does not fit either the *Artee* model where the work was not temporary because the petitioning employer had a permanent staff to supply the ongoing needs of various clients, or the model described in the CO's supplemental brief where the work was not temporary because the temp service's client's need for engineers was not temporary. Rather, in the instant case, as I understand the petitioning job contractor's position, its business model is not a specialization in any one particular type of worker. Rather, it obtains laborers for temporary projects on an as needed basis. It has no permanent staff

of workers to take temporary assignments, and does not service a specialized set of clients.

Applying the TEGL, As Clarified, to the Facts of the Instant Case

In the instant case, the Employer temporary needs' statements suggested that the Employer's shipyard client has a discrete project to use general laborers to clean up a dock to prepare for retrofitting for new facilities and new shipbuilding activities. Similarly, the landscaping company also had a discrete project after which the temporary workers would no longer be needed.

The CO declined to consider the Employer's clients' needs at all, applying the strict language of the TEGL. But, as noted above, ETA did not historically apply the TEGL strictly in regard to the job contractor criteria, but in fact would look at the needs of a job contractor's client. Now, I recognize that ETA was doing so to prevent a job contractor's client from masking a permanent labor need by an artifice of short term contracts; but the fact that ETA did so establishes that the strict language of the TEGL was not adequately nuanced to handle the practical reality of business models not presented in *Artee*. Thus, I find that it was error for the CO to completely preclude consideration of the Employer's client's needs in consideration of the Employer's own needs given that the Employer's argument about the nature of its business did not fit the *Artee* scenario.

This, however, is not the end of the analysis. Rather, it is now necessary to consider whether, even considering the Employer's client's needs, the Employer proved its chosen standard of temporary need.

Intermittent Need Criteria

The Employer's temporary needs' statement was based on the assertion that it has an intermittent need for general laborers, and therefore the application qualifies for H-2B

temporary alien labor certification. The criteria stated in TEGL No. 21-06 for establishing temporariness based on an intermittent need is as follows:

Intermittent Need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

TEGL No. 21-06, Change 1, Appendix A, II.D.4.

In its response to the RFI, the Employer stated that it “has no general laborers, whether temporary, permanent, full-time or part-time, in its employ.” Thus, it meets the first part of the TELG intermittent need criteria. The second part of the criteria, occasional or intermittent need (or under the *Artee* test, a non-recurring or infrequent demand), is less certain.

Upon close reading of the Employer’s statements, it seems that it has in the past supplied general laborers and will probably do so in the future depending on client’s needs. The Employer maintained that that it does not keep temporary workers on the payroll after a client’s need for the labor is completed, unless another job is already lined up for the workers. This vagueness about its operations illustrates why it was reasonable for the CO to question whether the Employer actually has a temporary need. Indeed, it might appear upon initial consideration of this application that the Employer fits the scenario presented in the CO’s supplemental brief of a localized job contractor that developed unique staffing contracts with discrete finite periods to supply workers to employer-clients who themselves could not be characterized as having a temporary need for the services or labor to be performed. Alternatively, if the Employer’s actual business operation is to continuously supply general laborers for short term contracts with a wide variety of clients, then its own need for general laborers could be characterized as not intermittent or occasional.

The Employer has presented evidence that its shipyard client’s need for general laborers is a one-time occurrence. Presumably, once the shipyard was prepared for the

client's new expanded dock area and conversion of the yard for vessel building, the client's need for general laborers would dissipate and be replaced by a need for a different mix of skilled and unskilled labor. I note, however, that the letter from the shipyard used to supply the Employer's original temporary needs statement made reference to a hope that the Employer would be able to supply its future labor needs. (AF 56). This apparently is in reference to the Employer's needs once the shipyard is back in operation as a dock and new shipbuilding facility. Thus, although I find that the record shows that the petitioning job contractor's client has a temporary, one-time need for laborers for the specific project of preparing the old yard for the retrofitting of the dock and new shipbuilding functions, the record does not clearly establish that the petitioning Employer/job contractor does not supply general laborers to various clients on a more than occasional or intermittent basis.

The evidence concerning the landscaping client is also problematic. The Employer characterized the landscaping client as having a discrete project of tree planting along a highway. The landscaping company's letter describing the work, however, refers to its contracts for 2009, thereby implying – as one might expect from a landscaping business – that its need for general laborers recurs each year. Thus, the client appears to have a seasonal or peakload need for temporary laborers; but the record does not on this basis alone establish that the petitioning Employer/job contractor does not supply general laborers to various clients on a more than occasional or intermittent basis.

The Employer's response to the RFI included the statement that it occasionally or intermittently acquires a need for temporary general laborers to perform labor for our clients for short periods of time, but that it does not retain general laborers as permanent staff. The Employer only stated that it is a supplier of labor for "businesses of all types." But as the CO noted in the denial letter, it is not clear based on the documentation supplied what kind of workers the petitioning Employer normally supplies.

The Employer made a valid point in its request for BALCA review that the RFI did not expressly request evidence of the Employer's normal mix of workers, and that it

is prohibited under the new regulations from submitting new evidence to BALCA to address the deficiency in documentation identified in the CO's denial letter.

But the fact is, that upon the review of the record there is very little information about what kind of workers the Employer normally supplies to clients, who its clients are, and whether those clients repeatedly request general laborers. The two contracts supplied by clients for discrete short term projects, standing alone, are insufficient to determine whether, in view of Employer/job contractor's overall operations, its needs for temporary workers is also temporary in nature.

It is a petitioning employer's burden to establish eligibility for labor certification, and it is not the CO's responsibility to provide a detailed guide to the employer on how to achieve labor certification. *See Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996) (en banc) (BALCA decision under the permanent labor certification program); see also *Deboer Brothers Landscaping, Inc.*, 2009-TLN-18 (Apr. 3, 2009) (an employer must supply adequate documentation to establish its case for temporary need in response to a CO's RFI regardless of how duplicative or obvious the requested responses might seem).

However, in the instant case, given that the CO refused to even consider the Employer's client's needs in determining the Employer's temporary needs, that the RFI did not clearly request information on the job contractor's operations beyond the instant application, and the fact that the H-2B program is in a transitional period and the Employer filed its application at a time when the normal appellate procedure would have permitted it to submit countervailing evidence on appeal and the Employer could not have reasonably predicted that BALCA would be reviewing its application without the ability to accept new evidence, I find that a remand to permit the Employer to submit additional evidence regarding the nature of its need for temporary workers.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** for further proceedings consistent with the above.

For the Board:

A

JOHN M. VITTON
Chief Administrative Law Judge