



Issue Date: 03 April 2009

BALCA Case No.: 2009-TLN-00018
ETA Case No.: C-08330-42444

In the Matter of:

DEBOER BROTHERS LANDSCAPING, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER

This case arises from a request for review of a United States Department of Labor Certifying Officer's denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. *See* 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. 78,020 (Dec. 19, 2008) (effective Jan. 18, 2009).

Statement of the Case

On October 6, 2008, the New Jersey Department of Labor and Workforce Development ("NJDLWD") received an application from DeBoer Brothers Landscaping, Inc., ("the Employer") requesting temporary labor certification for 32 landscape laborers. *See* AF 81.¹ The Employer included a temporary need statement identifying a "peakload" need for workers from February 1, 2009, through December 1, 2009. AF 84. The Employer's statement included, in pertinent part, the following:

¹ Citations to the 120-page Appeal File will be abbreviated "AF" followed by the page number.

This letter is to describe the temporary peakload nature of our landscaping business. During the warmer months lawns and properties require constant maintenance. The temporary need we are experiencing is traditionally tied to the recurring pattern of nature/weather. We will need temporary landscape laborers from February 1, 2009 to December 1, 2009 to supplement our permanent staff. The cold weather during the winter slows our business considerably making it extremely difficult to find enough workers that are willing to accept temporary employment.

The Employer also attached documentation that included a payroll summary report for all permanent and temporary landscape laborers employed from January 2007 through August 2008, three letters from customers stating an intention to use the Employer services during the period requested, an invoice summation report for 2008, and “samples” of invoices issued from February through December of 2008. AF 85-119.

After submitting its application, the Employer underwent supervised recruitment of U.S. workers, and NJDLWD transmitted the application to the Department of Labor’s Employment and Training Administration. *See* AF 44-80. On December 11, 2008, the CO issued a *Request for Information* (“the RFI”). In issuing the RFI, the CO relied upon Training and Employment Guidance Letter No. 21-06, Change 1, Attachment A, Section V.B (June 25, 2007) (“the TEGL”). The CO noted that, according to the summarized payroll report, the Employer did not employ temporary workers in January or February of 2007 and employed between 6 and 37 temporary workers from March through December of 2007. AF 42. For those reasons, the CO found the payroll report inadequate to justify that the Employer’s request for workers during February. AF 42. The CO also found that the Employer failed to identify “why it has a peakload need” during the period requested. AF 42-43. The CO directed the Employer to submit “supporting evidence and documentation that justifies the chosen standard of temporary need, the number of workers requested, and the dates of need listed,” the documentation the Employer used in generating the 2007 portion of the summarized payroll report, and a more detailed statement of temporary need that included, *inter alia*, “a detailed explanation of the business activities and the duties to be performed by workers in the occupation . . . during each calendar month for which workers have been requested.” AF 42-43.

In the RFI, the CO also requested that the Employer change its requested dates of need to comply with 8 C.F.R. § 214.2(h)(6)(ii) and the TEGL, Attachment A, Section II.C.. AF 43. Specifically, the CO found that these provisions precluded the Employer from requesting a period of need that, “alone or in combination with previously certified H-2B application(s) for the same occupation and area of intended employment, create a peakload or seasonal need exceeding 10 months [within a one year period], and is of a recurring nature.” AF 43. Based on the Employer’s 2008 certification dates (March 10 through December 10), the CO found that granting certification for the dates requested for 2009 would violate this rule. AF 43; *see* AF 13. The CO cautioned, however, that the Employer should not change its start date so that the period of need would begin more than 120 days after the Employer initially filed its application with NJDLWD to avoid running afoul of TEGL, Attachment A, Section III.F. AF 43.

On December 22, 2008, the Employer filed a response to the RFI. *See* AF 15-39. In response to the CO’s request for documentation used in generating the summarized payroll report, the Employer submitted payroll records. AF 18-39. Noting that, in previous years, it had requested certification for a

period beginning March 10, the Employer explained that its need for temporary workers “has occurred earlier in recent years.” AF 15. The Employer cited its 2008 payroll records for this premise and explained that no temporary workers appear on the February 2007 payroll records because the Employer lacked a labor certification covering the period and could find no domestic workers. AF 15. In response to the CO’s determination that the Employer had “failed to identify why it has a peakload need” during the requested period, the Employer wrote:

We have a peakload need for workers beginning in February for the same reasons we had a peakload need for workers beginning in March. We regularly employ permanent landscape laborers and need to supplement our permanent staff on a temporary basis due to a seasonal demand. We experience an increased demand for landscaping services beginning the first week of February that we do not experience during the months of December and January. Grass isn’t growing, flowers have already bloomed, and people in general are not concerned about their landscapes at this time. Although temperatures are still low in February, our clients begin requesting services in February because they want their properties to be ready for spring.

AF 15. Finally, the Employer disputed the CO’s interpretation of 8 C.F.R. § 214.2(h)(6)(ii) and the TEGL, Attachment A, Section II.C, arguing that the phrase “alone or in combination with previously certified H-2B application(s)” does not appear in the regulation or the TEGL. AF 16.

On March 3, 2009, the CO denied the Employer’s application. AF 11-14. The CO provided two bases for his denial. First, the CO found that the Employer failed to modify its requested dates of need to comply with his interpretation of 8 C.F.R. § 214.2(h)(6)(ii) and the TEGL, Attachment A, Section II.C. AF 13-14. Second, the CO found the Employer’s response to the RFI “inadequate inasmuch as the employer has failed to submit any supporting documentation that supports the dates of need requested . . .” AF 14. The Employer’s appeal followed.

Discussion

On December 19, 2008, the Department of Labor published new H-2B regulations that became effective on January 18, 2009. *See* 73 Fed. Reg. 78,020 (Dec. 19, 2008). These regulations create a right to BALCA review of the CO’s determinations on applications for temporary labor certification in fields other than nursing and agriculture. 73 Fed. Reg. 78,020, 78,063 (Dec. 19, 2008). Previously, no such right existed. Rather, the CO’s decisions were advisory to United States Citizenship and Immigration Services (“USCIS”), an agency within the Department of Homeland Security, and employers who did not receive certification could continue to pursue visas after submitting countervailing evidence to USCIS. *See* 73 Fed. Reg. 78,045 (Dec. 19, 2008). In a departure from the previous procedures, the new regulations restrict BALCA’s review to the Appeal File prepared by the CO and any legal briefs submitted by the parties. *See* 20 C.F.R. § 655.33(e). Moreover, under the new regulations, an employer must have been granted certification from the Department of Labor before proceeding to USCIS. The TEGL provides the procedures for processing the application at issue in the instant case. *See* 72 Fed. Reg. 38,621 (July 13, 2007).

As mentioned above, the CO offered two bases for his denial. For the reasons that follow, I find that the CO erred in denying on both grounds and reverse the certification’s denial.

Temporary Need

At the outset, I recognize that Congress caps the number of visas available for these workers, and that USCIS issues them on a first-come, first-served basis. The cap and USCIS's policy create an incentive to apply for H-2B visas as early as possible. The TEGL, Attachment A, Section III.F, however, forbids filing an application with the state workforce agency more than 120 days before the employer's period of need begins. The 120-day rule, the cap, and USCIS's policy together encourage obtaining certification for a period with as early a start date as possible. The risk is obvious: a later start date precludes an early filing, which jeopardizes the employer's chances of obtaining timely visas for temporary workers. Understandably, the CO must be vigilant against employers who might claim to need workers earlier than they actually do.

The TEGL, Attachment A, Sections III.D.3 and .4, require the employer to provide a detailed statement with supporting documentation and evidence in order to establish a temporary need for the specific job opportunity, number of workers, and dates requested. Likewise, the TEGL No. 21-06, Attachment A, Section V.B, permits the CO to issue one RFI to permit the employer to correct any deficiencies or provide additional documentation or evidence. In Attachment A, Section II, the TEGL requires that "[t]he employer's need for temporary non-agricultural services or labor must be justified to the NPC Certifying Officer under one of the following standards: (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need." In this case, the Employer has attempted to establish a peakload temporary need for landscape workers. To establish a peakload need, the Employer must show 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.

The TEGL, Attachment A, Section II.D.3 (emphasis in original). One might interpret this provision's plain language as precluding employers from filing applications based on a peakload need year after year. Specifically, if an employer adds temporary staff due to the same peakload each year, the practice eventually becomes part of that employer's "regular operation."

The Employment and Training Administration ("ETA") appears to have interpreted the peakload definition differently. Specifically, ETA has suggested that a landscaping business has a peakload need if it requires more workers every spring, summer, and fall than it does during the winter. ETA, *Frequently Asked Questions: H2-B Processing (Round 1)* 4, http://www.foreignlaborcert.doleta.gov/pdf/h2b_faqs_round1.pdf. ETA also explained that a landscaping business that completely shuts down during the winter, and therefore presumably has no permanent landscape laborers, has a seasonal need. *Id.* Likewise, the TEGL, Attachment A, Section II.C, suggests that a peakload need can recur. ("However, an employer's seasonal or peakload need of longer than 10 months, which is of a recurring nature, will not be accepted."). Under the standard ETA has published in its *Frequently Asked Questions*, and upon which the public may rely, the Employer may establish a peakload need because it

maintains a permanent staff of landscape laborers during a season for which it has not requested temporary workers.

Based on the documentation the Employer initially provided, the CO reasonably issued the RFI to determine whether the Employer actually has a peakload need beginning February 1, 2009. Specifically, the Employer's payroll summary report indicated that during February of 2007 the Employer paid wages to zero temporary employees. AF 85. The Employer employed six temporary employees during February 2008. AF 85. The Employer received certification for 32 workers from March 10, 2008, through December 10, 2008. *See* AF 13. At most, the Employer's documentation and 2008 certification dates were ambiguous regarding the Employer's past needs for temporary workers during the month of February.

In its response to the RFI, the Employer presented credible reasons for the fact that the 2007 payroll records did not support its requested dates of need: the Employer neither obtained domestic workers nor was granted certification for February of that year. The Employer's 2008 payroll records, which show wages paid to temporary workers in February, support the change in the certification period requested for 2009. That the Employer did not employ 32 workers during February of 2008 does not invalidate its request for 32 for February of 2009. The Employer indicated that it would have hired far more than six temporary workers in February 2008 had additional domestic workers been available. *See* AF 3-4.

Other than providing payroll records used in generating the payroll summary report and a barely adequate statement of temporary need, however, the Employer did not approach compliance with the RFI. Generally, noncompliance with an RFI seriously endangers an employer's chances of securing reversal on appeal. Understanding that it is neither the CO's nor BALCA's role to sort through an employer's filings in order to make a case for temporary labor certification, an employer should comply fully with an RFI regardless of how duplicative or obvious the requested responses might seem. Since BALCA may not receive additional evidence when hearing an H-2B appeal, and the CO may only issue one RFI, an employer gambles by providing incomplete documentation or curt explanations when responding to an RFI. Although the Employer in this case failed to comply fully with the RFI, the record reveals that the Employer has met its burden of establishing a peakload need for the period and number of landscape laborers requested. For example, while the Employer did not provide "a detailed explanation of the business activities and the duties to be performed by workers in the occupation . . . during each calendar month for which workers have been requested," the Employer persuasively argued that the sample invoices that accompanied its original statement of temporary need "are more than adequate to establish and describe the kinds of services performed" by its landscape laborers during the requested period. AF 4. Although the Employer did not provide additional documentation in response to the RFI, the letters of intent, invoices, and payroll report established a peakload need and are among the examples of acceptable forms of documentation described in the TEGL, Attachment A, Section D.4. Likewise, the Employer's credible explanations cured any ambiguities or inconsistencies therein. I note that this is a very close case—one made far closer than it had to be because of the Employer's noncompliance with the RFI. Nevertheless, I find that the CO erred in denying certification due to the Employer's failure to establish a peakload need from February 1, 2009, to December 1, 2009.

The CO's 10-in-12 Rule

The CO also denied the Employer's application based on the contention that 8 C.F.R. § 214.2(h)(6)(ii) and the TEGL, Attachment A, Section II.C, preclude the Employer from requesting a period of need that, "alone or in combination with previously certified H-2B application(s) for the same occupation and area of intended employment, create a peakload or seasonal need exceeding 10 months out of any given 12 month period, and is of a recurring nature." AF 13. Neither provision relied upon by the CO contains the phrase "in combination with previously certified H-2B application(s)" or "out of any given 12 month period."² As the CO failed to cite verifiable authority for denying the application on this basis, I cannot affirm his decision.

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **REVERSED**.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge

² 8 C.F.R. § 214.2(h)(6)(ii) provides, in relevant part, "As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year." The TEGL, Attachment A, Section II.C, provides that the period of need may not exceed a year, "although there may be extraordinary circumstances where the temporary services or labor might last longer than one year" but that "[i]f there are unforeseen circumstances where the employer's need exceeds one year, a new application for temporary labor certification is required for each period beyond one year."