



Issue Date: 31 March 2009

BALCA Case No.: 2009-TLN-00010
ETA Case No.: C-08325-42205

In the Matter of:

TGL MANAGEMENT, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER

On March 5, 2009, the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) received a letter requesting review of the Certifying Officer’s (“the CO”) determination in the above-captioned temporary labor certification matter. Thereafter, the CO submitted the appeal file to BALCA, and the parties filed briefs in support of their positions. In H-2B cases, the BALCA member or panel assigned to conduct the review may only consider the Appeal File and any legal briefs submitted by the parties. 20 C.F.R. § 655.33(e).¹

Statement of the Case

On October 6, 2008, the New Jersey Department of Labor and Workforce Development (“NJDLWD”) received an application from TGL Management, Inc., (“the Employer”) requesting temporary labor certification for 5 landscape laborers. *See* AF 90.² The Employer included a temporary need statement identifying a “peak load” need for workers from February 3, 2009, through December 3, 2009. AF 92. The statement explained that “[t]he climate is such that the vast majority of the work we do is completed during March through December” but that “[w]e begin to gear up our operations in February to allow enough time for employee orientation, safety training and equipment preparation.” AF 92. The Employer added that it requires temporary labor to supplement its permanent staff during

¹ When discussing the Department of Labor’s new regulations for this program, which can be found at 73 Fed. Reg. 78,052-78,069 (Dec. 19, 2008), I will cite the provisions as they will appear when codified.

² Citations to the 108-page Appeal File will be abbreviated “AF” followed by the page number.

the requested period and attached supporting documentation. AF 92; *see* AF 93-107. The documentation included a payroll summary report for all permanent and temporary landscape laborers employed from September 1, 2007, to August 31 2008, monthly invoices, and customer contracts. AF 93-107.

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 70-88. On December 12, 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 III.V.B (June 25, 2007) ("the TEGL"). The CO directed the Employer to submit "supporting 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 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 68-69. The CO noted that, according to the summarized payroll report, the Employer did not employ temporary workers in January, February, or March of 2008. AF 68. The CO also requested that the Employer change its requested dates of need to comply with 8 C.F.R. § 214(h)(6)(ii) and the TEGL, Attachment A, Sections II.C and III.F. AF 69. 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 69. 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. AF 69.

On December 19, 2008, the Employer filed a response to the RFI. *See* AF 17-65. In response to the CO's request for documentation used in generating the summarized payroll report, the Employer submitted quarterly federal and state tax reports. AF 26-65. Noting that, in previous years, it required temporary workers beginning in March, the Employer explained that its need for temporary workers "has occurred earlier in recent years." AF 18. The Employer presented 2008 as an anomaly and stated that it has "a peak load need for workers beginning in February for the same reasons [it] had a peak load need for workers beginning in March." AF 18. The Employer explained again that its customers require significantly more landscaping work from February through November than they do during December and January. AF 18. The Employer explained that it performs "significantly less landscape maintenance and installation" when "[g]rass isn't growing, flowers have already bloomed, and people in general are not concerned about their landscapes." AF 18. Finally, the Employer disputed the CO's interpretation of 8 C.F.R. § 214.2(h)(6)(ii) and the TEGL but nevertheless included an ETA Form 750 with a modified start date of February 15, 2009. AF 19; AF 25.

On February 20, 2009, the CO issued a *Final Determination* informing the Employer that he could not grant certification. AF 12. The CO provided several bases for the determination. *See* AF 13-15. First, the CO found the tax documents that the Employer submitted in response to the RFI "inadequate inasmuch as the employer was instructed to submit the documents it utilized in generating the monthly payroll report for temporary and permanent workers during calendar years 2007 and 2008, and IRS Form 941 does not contain sufficient detail to have been used to create" the payroll report. AF

14. The CO added that the TEGL, Attachment A, Section III.D.4.c, identifies IRS Form 941 as an example of “insufficient documentation” for this purpose. AF 14. Second, the CO explained that, under the TEGL, Attachment A, Section III.F, he could not certify the application because, due to the modified start date, the Employer filed the application more than 120 days before its period of need would begin. AF 14; AF 15. Third, the CO explained that, in its response to the RFI, the Employer failed to include “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 16. 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 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).

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. This rule encourages 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). 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 3, 2009. Specifically, the Employer's payroll summary report indicated that during February and March of 2008 the Employer paid wages to one permanent employee and zero temporary employees. AF 93. Similarly, the four contracts supplied stated that the Employer's 2008 obligations to its clients began in March. AF 104-107. These "12-month" contracts required the Employer's customers to pay an annual fee in 12 monthly installments. AF 104-107. While the Employer submitted a February 2008 customer invoice, the Employer issued the invoice to a customer whose contract required no February work and who paid for the Employer's services in 12 monthly installments. *See* AF 101, 104. At most, the Employer's documentation showed that it may have had a need for workers beginning in March 2008.

Furthermore, the Employer's initial documentation did not support its claim of a peakload temporary need, i.e., one for which "the temporary additions to staff will not become a part of the petitioner's regular operation." Notwithstanding the Employer's reference to a "peak load" and the fact that the documentation failed to support the dates claimed in the need statement, the Employer's submissions actually seemed to reflect a seasonal temporary need. Since the Employer submitted no documentation for the dates requested or the standard of temporary need claimed, the CO properly issued the RFI.

Despite the RFI's clear instructions, the Employer then failed to submit documentation justifying the chosen standard of temporary need for the dates of need asserted. The Employer also failed to submit a sufficiently detailed temporary need statement containing a thorough "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." While the Employer did respond to the CO's request to submit the documents used in preparing the payroll summary report, the report never supported the dates requested in the first place. Furthermore, the quarterly tax reports do not reveal anything that would change the analysis.

In its response to the RFI, the Employer suggested there was a legitimate reason that the documentation provided did not support its requested dates of need. Acknowledging that, in previous years, it had required temporary workers beginning in March, the Employer alleged that its need has occurred earlier "in recent years." AF 18. The Employer then offered several reasons why 2008 was anomalous in that it employed no temporary workers during February or March of that year. AF 18. It is unclear why the Employer did not also submit documentation from one of the more representative "recent years." Ultimately, the Employer did not provide a sufficiently detailed temporary need statement or supporting documentation for the dates requested in 2009. Instead, the Employer ignored the CO's explicit instructions and changed its start date to February 15, 2009, which is more than 120

days after the Employer submitted its application. *See* AF 69, 25.³ Assuming *arguendo* that the Employer could even do so without running afoul of 120-day rule, the Employer still has not provided documentation for a period of need beginning on February 15, 2009. The Employer has merely stated that, by mid-February, “actual ground work begins and is such that it becomes difficult to maintain.” AF 92. The documentation submitted does not support this statement. Rather, the Employer’s statement contradicts the documentation submitted as to the Employer’s actual period of need. The CO therefore properly determined that he could not grant certification because the Employer did not satisfactorily support its request.

Accordingly, it is hereby **ORDERED** that the Certifying Officer’s determination is **AFFIRMED**.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge

³ I express no opinion about the CO’s interpretation of 8 C.F.R. § 214(h)(6)(ii) and the TEGL, Attachment A, Sections II.C and III.F, in reliance upon which he instructed the Employer to change its dates of need.