



Issue Date: 30 September 2009

BALCA Case No.: 2009-TLN-00090

ETA Case No.: C-09193-45448

In the Matter of:

CABALLERO CONTRACTING & CONSULTING,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **JOHN M. VITTON**
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 ("the CO") 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 (2009). Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request that the Board of Alien Labor Certification Appeals ("the Board" or "BALCA") review the CO's denial of certification. § 655.33. The administrative review is limited to the appeal file, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and "such evidence as was actually submitted to the CO in support of the application." § 655.33(a), (e).

Statement of the Case

On July 2, 2009, the United States Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Caballero Contracting & Consulting ("the Employer" or "Caballero"). *See* AF 20, 146-196.¹ The Employer, a job contractor, requested certification for 100 welder fitters from October 1, 2009, through July 31, 2010.

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

AF 146. In the application, the Employer identified its need for the workers as “peakload” and provided the following explanatory statement:

Our clients have specific dates they need temporary, full time help. Since metal structures must be erected upon the engineered concrete and engineered support system before our clients can begin their work our Peakload time is directly affected by the completion of the concrete construction and engineering which is the event that our clients must follow. The Peakload need for this temporary help is due to the short-term demand caused by the timeframe our clients are required to complete their project and the time they demand the workers from us. We need 100 temporary workers to meet the increased demand on our company during our busiest time each year. The specific time that we need temporary Welders/Fitters is from 10/1/2009 to 7/31/2010.

Id. (formatting adjusted). The Employer also submitted a supplemental letter, dated July 1, 2009, addressing the nature of its need for temporary workers. AF 195. In the letter, the Employer described itself as a first-year “labor-staffing agency” that anticipates \$3,000,000 in sales during 2009 “based on current letters of intent.” *Id.* The Employer wrote that it attached a letter of intent from Gulf South Marine (“GSM”), which has requested 100 workers from Caballero to work in LaFourche Parrish, Louisiana, from October 2009 through July 2010. *Id.*² The Employer added, “We are also attempting to place permanent employees in these and other locations as well but find the demand for welders/fitters in our area highest from October 1, 2009 to July 31, 2010.” *Id.* The Employer reiterated that its client’s need for welder/fitters is “annually tied to the schedule that the engineered concrete and engineered support systems are completed” because “metal structures must be erected” upon the support system before Caballero’s clients can begin their work. *Id.* Since the Employer does “not require the additional laborers” from August 1, 2010, through September 30, 2010, it asserted that its need qualifies as temporary. *Id.*

On July 10, 2009, the Certifying Officer (“the CO”) issued a *Request for Further Information* (“RFI”). In the RFI, the CO identified several deficiencies requiring remedial action, only one of which relates to his final determination and therefore warrants discussion. AF 131-139. Specifically, the CO found that the Employer did not establish a peakload temporary need and requested additional attestations, explanations, and documentation. AF 133-134, 136-137.

On July 17, 2009, ETA received the Employer’s response. AF 55. The response included, *inter alia*, a July 15, 2009, letter addressing the nature of the Employer’s need for temporary workers, a May 19, 2009, letter from GSM, an undated agreement between GSM and the Employer, an attachment to the agreement, and a payroll summary chart indicating that the Employer did not pay wages to either permanent or temporary welder fitters during 2007 or 2008. AF 66-71. In the July 15, 2009, letter, the Employer reiterated much of its July 1, 2009, letter and the explanatory statement embedded in its application. AF 66. The Employer further explained, “We are applying using the peakload need

² A letter of intent from GSM does not appear in the Appeal File as an attachment to the Employer’s original application. In its July 1, 2009, cover letter, the Employer did not list a letter of intent from GSM as an enclosure. AF 154. In his July 10, 2009, *Request for Further Information*, the CO referred to a “letter of intent (justification letter).” AF 137. However, it appears from that discussion that the CO was referring only to the Employer’s July 1, 2009, supplemental letter and not GSM’s letter of intent. *Id.*

because of conversations and negotiations with various other employers that will require year-round full time welders/fitters and we anticipate finding those year-round full time employees domestically.” *Id.* The Employer also discussed how weather patterns dictate its dates of need:

While we realize the requirement of justifying temporary need is based on our need and not the need of our clients it is unavoidable that the needs of our clients become our needs – based on pre-established weather patterns. Specifically, because hurricane season in Louisiana is at its worst in August and September of each year and our clients [sic] work is performed outside on the docks in Lockport, Louisiana we must be cognizant of their needs – since their needs directly affect ours. Because the worst part of Hurricane season is both recurring and predictable and we only need temporary workers when our clients request them – which is during the least likely time of year that hurricanes hit and we intend to hire permanent year round welders/fitters, our need is justified under the peakload criteria.

Id. In its May 19, 2009, letter, GSM stated its intent to contract with the Employer for welding, fitting, and fabrication services at its Lockport, LA, docks from October 1, 2009, through July 31, 2010. AF 67. Regarding the timing of its need for contract workers, GSM explained:

We have made necessary arrangements for our vessels to be made available to [the Employer] for the necessary repairs. Based on seasons passed, we are expecting the jobs for these boats to be rather hectic during the upcoming hurricane season. We have chosen these dates as to not be interrupted by the unpredictable weather conditions. We are expecting a return to the normal schedule around September. Due to the number of vessels which will be in need of repairs and evaluations, we have estimated the workforce needed to properly complete our schedule at one hundred (100) welders and fitters.

Id. In the undated agreement, the Employer agreed to provide GSM with 100 welder fitters from October 1, 2009, through July 31, 2010. AF 68. The July 15, 2009, attachment to the agreement provides additional terms that include, *inter alia*, the Employer’s obligation to “properly supervise assigned employees performing its work.” AF 70.

On August 3, 2009, the CO issued a second RFI. AF 50-54. The second RFI identified deficiencies in the Employer’s response to the initial RFI. Again, the CO found that the Employer had not established a temporary need for the workers. AF 52-53. In particular, the CO explained that the Employer had “not established that its client has a peak need during the requested period.” AF 52. Rather, the Employer “only established that it has agreed to provide 100 Welder Fitters to its client.” *Id.* Citing data from the National Hurricane Center, the CO explained that the Employer’s “dates of need overlap with hurricane season,” and that the Employer “did not provide documentation that shows how hurricanes that occur in August and September impede its work and ones that occur in June, July, October, and November do not impede the employer’s work.” AF 52-53. The CO also explained that the Employer’s need did not qualify as a peakload need because Caballero had no staff of permanent welder fitters working at GSM’s Lockport facility that it sought to supplement with temporary workers. AF 53. Last, the CO found that the Employer’s agreement with GSM did not demonstrate that GSM has a peakload need for this labor. *Id.* Since the agreement established only that the Employer had agreed to supply 100 workers over a ten-month period, the CO observed, “It appears that the employer’s need

may be based on its ability to obtain certification from the Department and not an actual need.” *Id.* Accordingly, the CO requested another statement of temporary need along with additional supporting evidence and documentation. AF 52-53.

On August 10, 2009, ETA received the Employer’s response to the second RFI. AF 26-49. The response included, *inter alia*, an August 8, 2009, letter addressing the nature of the Employer’s need for temporary workers, an August 6, 2009, attachment to the Employer’s agreement with GSM, and attachments detailing hurricane activity in the Gulf of Mexico since 1998. AF 36-45. In the August 8, 2009, letter, the Employer explained that, since it does not currently employ permanent welder fitters at GSM’s Lockport facility, it has a seasonal rather than peakload temporary need. AF 36. The Employer reasoned that its need qualifies as seasonal because its client only requests workers from October through July since “hurricane season in Louisiana is at its worst in August and September of each year” and GSM’s “work is performed outside on the docks in Lockport, Louisiana.” *Id.* While acknowledging that hurricane season begins in June and ends in November, the Employer explained that its client does not request workers during the “worst part of Hurricane season,” which is “recurring and predictable.” *Id.*

The August 6, 2009, attachment to the Employer’s agreement with GSM addresses the nature of the latter’s temporary need for workers. AF 38. In particular, GSM’s vice president, Bruce M. Kennedy, Jr., explained how weather patterns dictate his company’s need for the Employer’s welder fitters:

Weather in the Gulf Region of Louisiana is most likely to be stormy and unpredictable during the months of August and September each year. This is evidenced by my years of observations and experience in this region and further by examining the past 10 years [sic] historical data on hurricanes and storms caused by tropical depressions in the Gulf Region – this information is available from the National Hurricane Center’s [sic] [www.nhc.noaa.gov]. Specifically, over 76% of all Tropical Disturbances (in the way of storms and hurricanes) have occurred in the months of August and September. While hurricane season is officially from June thru November – the time these storms tend [sic] cause disruptions onshore, in the Gulf region, is August and September. For a detail of the storms and data – please see the attached graph and hurricane maps.

Due to our familiarity with these disruptions, and the fact that we have had to shut down production for weeks at a time during August and September because of the onslaught of tropical storms and hurricanes, we have built into our schedule a focused deceleration of production for those two months out of each year. That does not mean that we completely shut down, but – because we know there is a high probability that we will have to stop production for extended periods during that time and production costs would go up as a result [sic] to non-planned production decrease – we purposefully do not schedule as much work to be performed during August and September.

Id. The attachments include a pair of pie charts of unclear origin. One chart indicates that, from 1998 through 2008, 29 “Hurricanes, Tropical Storms, and Depressions, etc.” (“events”) occurred in the Gulf of Mexico during the months of August and September, while only 9 occurred in June, July, October, and November. AF 39. The other indicates that 17 of those September and August events were

hurricanes, while 3 of the June, July, October, and November events were hurricanes. *Id.* The other attachments are National Hurricane Center Hurricane Tracking Charts for each of those years. AF 40-45. It appears that the Employer or GSM superimposed comments regarding which events affected Louisiana specifically. *See id.* According to these comments, Louisiana experienced a tropical storm in September 1998, no events in 1999 or 2000, a subtropical depression in June 2001, a hurricane in September 2002, a tropical storm in July 2003, a hurricane in August 2004, a hurricane in both August and September 2005, no events in 2006, a hurricane in September 2007, and an August tropical storm, an August hurricane, and a September hurricane in 2008. *Id.* Without providing a chart, the Employer or GSM reported that there has been only a single tropical storm in the Atlantic during 2009. AF 45. The writer did not indicate whether that June storm affected Louisiana. *Id.*

On August 28, 2009, the CO issued a *Final Determination* denying certification. AF 20-25. Citing 20 C.F.R. §§ 655.21(a), 655.6 and 8 C.F.R. § 214.2(h)(6)(ii)(B), the CO determined that the Employer had not established a peakload or seasonal temporary need. *Id.* After summarizing the RFIs and the Employer's submissions, the CO provided a lengthy analysis. AF 22-25. The CO began by explaining that establishing a seasonal need requires a showing that the Employer and all clients to whom it has agreed to provide workers have a need that it is both "recurring and traditionally tied to a season of the year." AF 24. The CO found that the Employer did not make such a showing:

The likely existence of more hurricanes or other tropical storms moving into the Gulf Coast Region during the months of August and September, as opposed to other months of the hurricane season, cannot be considered a series or pattern of events that occur or appear repeatedly in any predictable manner each year. Consistent with the Department of Homeland Security's regulation provisions at [8 C.F.R. § 214.2(h)(6)(ii)(B)], the Department has historically not considered employment to meet the seasonal standard if the period during which the services of labor is not needed is "unpredictable or subject to change or is considered a vacation period for the employer's permanent employees."

Id. The CO determined that the tracking charts "do not demonstrate any obvious pattern of hurricanes or other tropical storms that would support a determination that such climatic conditions are recurring, predictable, and not subject to change." *Id.* In particular, the CO noted that Louisiana experienced no storms in 1999, 2000, 2001, 2003, and 2006. *Id.* The CO also observed that, in 2001 and 2003, Louisiana experienced storms only during June and July, which are months during which the Employer has claimed a need for welder fitters. *Id.* The CO added that Department has historically rejected applications supported solely by weather charts. *Id.* (citing Training and Employment Guidance Letter ("TEGL") No. 21-06, Change 1, Attachment A, Section III.V.B (June 25, 2007)). Regarding the issue of predictability, the CO also found that Mr. Kennedy's statement that the region's weather is "most likely to be stormy and unpredictable during the months of August and September each year" contradicted the Employer's statement that hurricane season is both "recurring and predictable." *Id.* The CO asserted, "From one year to the next, it is impossible to predict whether or not hurricanes will disrupt production in a specific area of the Gulf Coast Region or any other part of the Eastern United States that abuts the Atlantic Ocean for that matter." *Id.* Indeed, it was observed that the National Oceanic and Atmospheric Administration ("NOAA") does not make seasonal hurricane landfall predictions and recently noted that "hurricane landfalls are largely determined by the weather patterns in place as the hurricane approaches, which are only predictable when the storm is within several days of making landfall." *Id.* (citing NOAA, *2009 Atlantic Hurricane Outlook Update* (Aug. 6, 2009),

<http://www.cpc.noaa.gov/products/outlooks/hurricane.shtml>). The CO therefore concluded that “it is impossible for the employer to claim with certainty each year that less welding-fitting services will be needed during just the months of August and September, since tropical storms, and hurricanes in particular, cannot be predicted far enough in advance; even by the tropical storm experts employed at NOAA.” *Id.*

The CO also discussed how the Employer’s agreement with GSM does not establish a temporary need:

Considering it is the nature of Caballero’s business . . . to supply workers to other employers engaged in welding production and repair operation on a year round basis, the mere existence of one finite work contract covering precisely a 10 month period beginning on October 1 through July 31 as well as a need statement indicating that Caballero’s client “purposefully does not schedule as much work to be performed during August and September” is not sufficient to prove temporary need and [it is] highly unlikely that the period of need is bona fide.

AF 25. The CO wrote that the Employer has offered no convincing evidence that the likelihood of hurricanes substantially impacts its client’s welding operations or that the practice of significantly decreasing welding work during August and September is customary to other employers in the region. *Id.* Given the extent to which weather impacts this industry throughout the year, the CO found it significant that the Employer presented “no evidence explaining how its client’s production levels or schedule of operations during the months of June, July, October, and November are not affected by the same types of unpredictable hurricanes or tropical weather conditions as that which are likely to occur in August and September.” *Id.* The CO noted that more than 87% of the applications filed by job contractors involving similar work in the region during fiscal year 2008 claimed periods of need that included both August and September and that all applications filed with dates of need listed as October through July were denied due to insufficient supporting evidence. *Id.*

Last, the CO explained how the Department could not “reconcile Caballero’s statement that 100 temporary workers are needed to meet the busiest time of each year when the company itself claims it had \$0 revenues last year and did not place any workers on its payroll.” *Id.* The CO found that the Employer “failed to adequately explain how it could possibly conclude that October through July is its busiest time of the year when it had zero (\$0) sales in 2008 and was unable to produce payroll reports to substantiate its ‘busiest time’” contention. *Id.* Accordingly, the CO denied certification. The Employer’s appeal followed.

Discussion

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b). To determine the temporary nature of work or services to be performed under applications filed by job contractors like the Employer, the CO must examine 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.” § 655.6(d).³ An applicant must maintain documentation evidencing the temporary need to submit in response to an RFI. §655.6(e). While an applicant need only submit a detailed statement of temporary need at the time of the application’s filing, failure to provide requested evidence or documentation substantiating the employer’s need “may be grounds for the denial of the application.” § 655.21(b). Given the vagueness of the Employer’s initial statement of temporary need, the CO reasonably requested additional information and supporting documentation.

After abandoning its claim of a peakload need, the Employer ultimately attempted to establish a seasonal temporary need. To establish a seasonal need, the Employer must demonstrate that “the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). Employment is not seasonal “if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.” *Id.* Based solely on the evidence submitted by the Employer, I find that the CO correctly determined that Caballero did not establish a seasonal need.⁴

The Employer seems to contend that an increase in seasonal storms during August and September has “traditionally tied” outdoor welding work in Lockport, Louisiana, to a ten-month season. As the CO outlined, the Employer’s weather data indicates that at least one of these events affected Louisiana during September or August in only six of the past 12 years. In two of the remaining years, an event affected Louisiana during the Employer’s claimed welding season.⁵ While the data does indicate that Louisiana experiences more of these events in September and August than in the other months of the hurricane season combined, Louisiana has averaged less than 1 event (.75) during this two-month period each year since 1998. The number for hurricanes (.583) is even smaller. The claim that the threat of less than a single storm over a two-month period warrants—or even actually results in—such a significant decrease in GSM’s welding operations is simply not credible. I note also that none of the data provided was specific to Lockport.

After reviewing the entire record, it seems more likely that GSM has a permanent need for welder fitters that it seeks to fill with foreign contract workers. While nothing in the regulations prohibits an employer from changing the type of temporary need it initially listed on its application, the manner in which Caballero’s theory evolved raised concerns about whether the parties truly have a need for only ten months, which is the maximum period allowed under the program. *See* 20 C.F.R. § 655.6(c). The Employer’s response to the second RFI did little to ease these concerns. Accordingly, the CO correctly found that the Employer has not established a seasonal need and properly denied certification.

³ A job contractor is an employer that provides temporary services or labor to one or more unaffiliated employers but does not supervise or control the performance of the services or labor provided beyond hiring, paying, and firing the workers. 20 C.F.R. § 655.4. While the July 15, 2009, attachment to the agreement between Caballero and GSM stated that it is the former’s obligation to “properly supervise assigned employees performing its work,” the parties do not appear to dispute that the Employer nevertheless qualifies as a job contractor. *See* AF 70.

⁴ In so doing, I express no opinion on the CO’s reliance on independently obtained data or ETA statistics regarding similar employers.

⁵ Again, it is unclear whether the June 2009 tropical storm referenced in the documents affected Louisiana. *See* AF 45.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge