

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 June 2009

BALCA Case No.: 2009-TLN-00067
ETA Case No.: C-09098-45010

In the Matter of:

CONSTRUCTOR SERVICES, INC.,
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 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).¹

Statement of the Case

On January 16, 2009, the Mississippi Department of Employment Security ("MDES") received an application for temporary labor certification from Constructor Services, Inc. ("the Employer"). *See* AF 3641-53; *see* AF 3302.² The Employer, a job contractor "dedicated exclusively to providing contract labor and materials to" United States construction companies, requested an extension of certification for 101 construction carpenters from February 2, 2009, through October 1, 2009. AF 3646.

¹ Citations to the regulations that became effective January 18, 2009, will contain only the provisions as they will appear when codified.

² Citations to the 3653-page Appeal File will be abbreviated "AF" followed by the page number.

The application materials included, *inter alia*, a letter from the Employer's president, a letter from one of the Employer's clients,³ and payroll summary reports. In his January 15, 2009 letter, the president explained that the Employer requested the extension because the projects for which it hired these temporary workers "are running behind schedule." AF 3646. He asserted that the Employer has a "peakload need" for temporary workers "to supplement the permanent workers for the short term demand." *Id.* In a January 14, 2009 letter, E. Cornell Malone Corporation's president wrote that his company "has committed to Constructor Services Inc to continue using their labor services to complete" an unnamed project that had "not been completed as expected." AF 3652. Malone also stated that it required the Employer's services "for a maximum of eight months through September 2009." *Id.* The payroll reports indicate that, from January 2006 through October 2008, with the exception of December 2007, the Employer maintained a permanent staff of 30 to 231 laborers. AF 3648-50. The reports also indicate that the Employer supplemented this staff with 46 temporary workers during November 2007 and with between 65 and 99 temporary workers from January through October of 2008. *Id.*

After the Employer completed its domestic recruitment for these positions, MDES transmitted the application to the United States Department of Labor's Employment and Training Administration ("ETA"). *See* AF 3302-3640. On February 27, 2009, the CO denied the application. AF 3298-3301. In the *Final Determination*, the CO wrote that a review of the Employer's "past filing history, including this application, reveals that [it] has a permanent, year-round need for the services to be performed." AF 3300. In particular, the CO observed that he previously certified the Employer's application for 58 laborers to perform work in Gulfport, Mississippi from April 1, 2009, to December 31, 2009. AF 3300-01. Since the Employer had applied for temporary laborers to work for a combined 11 months in the same city, the CO found that the Employer established "a clear pattern" demonstrating that its need for these carpenters is permanent rather than temporary. *Id.*

On March 10, 2009, the Employer filed a request for administrative review with the Board of Alien Labor Certification Appeals ("BALCA"). AF 3286-97. Therein, the Employer asserted that its need for foreign workers was not permanent. AF 3286. The Employer noted that its client requires the workers requested in both applications in order to complete its U.S. Naval Retirement Home project by December 2009. *Id.* The Employer added, "The project in question has run into unforeseen circumstances which have delayed the completion for 14 months. This delay in completion explains the need for the extension plus the filing of a separate temporary labor certification [application]." AF 3287. The Employer submitted with its request, *inter alia*, W-2 summary reports for 2006, 2007, and 2008. AF 3294-96. The reports indicate that the Employer issued 1709, 1549, and 1012 W-2s in 2006, 2007, and 2008, respectively. *Id.* In its review request, the Employer asserted that it issued 300 of these W-2s to H-2B workers in both 2007 and 2008. AF 3286. The Employer also included a January 14, 2009 letter from one of its clients, Aladdin Construction. AF 3297. In this letter, the vice president wrote that his company "has committed to Constructor Services Inc to continue using their labor services to complete the Naval Retirement Project and the Mississippi Gulfcoast Convention Center Expansion as these projects have fallen behind schedule." *Id.*

On March 12, 2009, I issued a *Notice of Docketing*. On March 24, 2009, I granted the CO's March 23, 2009 remand request. AF 3280. The CO asked that I remand the case to permit him "to

³ The cover letter states that there are two letters from clients included with the application, but there is only one attached. The "Aladdin letter" that the Employer refers to is included with the Employer's Request for Administrative Review.

further examine and supplement the record upon which his decision was based.” *Id.* On April 10, 2009, the CO issued a *Request for Information* (“RFI”). AF 3275-79. In issuing the RFI, the CO relied upon Training and Employment Guidance Letter (“TEGL”) No. 21-06, Change 1, Attachment A, Section V.B (June 25, 2007). AF 3275; *see* 72 Fed. Reg. 38,621 (July 13, 2007). In the RFI, the CO identified several deficiencies requiring remedial action, only two of which are relevant to this appeal. Citing TEGL No. 21-06, Change 1, Attachment A, Section III.D.4, the CO wrote that the Employer “did not submit supportive documentation that justifies its temporary need for alien labor certification.” AF 3277. In particular, the CO wrote that the client letters do not “indicate the number of workers that are needed.” *Id.* Similarly, the CO wrote that the payroll summary reports do not “establish that 101 workers are needed.” *Id.* The CO explained that “there does not appear to be a clear pattern to the number of temporary workers employed” during 2006, 2007, and 2008. *Id.* The CO added that “it appears that the employer employed the exact same amount of construction carpenters (Drywall and Ceiling Installer) and construction workers (Laborers) for the same amount of hours and paid each the same wage during the calendar year 2008.” AF 3277. The CO included a detailed request for additional documentation:

The employer must submit supporting evidence and documentation that justifies the employer’s claim of peak load need for the dates to be submitted on the amended ETA Form 9142 application forms.

1. **Signed work contracts** clearly defining the services to be performed and also showing that the work will be performed for each month during the requested period of need on the ETA Form 9142, Part B.5 and B.6, **AND** names and telephone numbers of clients with whom the employer is contracting for the performance of work under this petition **OR** annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly defining the services to be performed and showing the work will be performed for each month during the requested period of need on the ETA Form 9142, Part B.5 & B.6., **AND** names and telephone numbers of clients with whom the employer is contracting for the performance of work under this petitioner:

AND

2. **Complete payroll reports** for a minimum of one previous calendar year that identifies [sic], for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system. The employer must also submit the documents it utilized to generate the summarized monthly payroll reports.

AND

3. **An IRS form W-2 for each permanent and temporary worker** employed during 2006, 2007 & 2008 as identified by the employer's previously submitted payroll and staffing summary chart.

All documents provided must be specific to, and listed separately for, each worksite address listed in Item F.c.1 of the submitted ETA 9142 application

AF 3277-78.

On April 20, 2009, ETA received the Employer's voluminous response to the RFI. AF 19-3274. In the response's cover letter, the Employer disputed the findings discussed above and noted that it had amended the period of need listed on the application by changing the end date to July 31, 2009, which the Employer asserted decreased its combined period of need to ten months. AF 21. The Employer further explained its temporary need:

Through our supporting documentation, we have indicated that the employer's need for these 101 Construction Laborers was for one specific account, Aladdin Construction Company, for one specific project, the US Naval Retirement Center in Gulfport, MS and for a specific time. The extension was requested by Aladdin Construction Company because the project was delayed and needed additional carpenters for the same Naval Retirement Center. Additionally, we have stated the need for the extension for the carpenters was due to the fact that Aladdin Construction Company and Construction [sic] Services, Inc. were unable to identify and hire American workers.

Id. The Employer's response included, *inter alia*, a January 30, 2009, subcontract between Aladdin Construction and the Employer. AF 23-32. The subcontract requires the Employer to provide skilled and unskilled labor to complete drywall and metal stud work at the Armed Forces Retirement Home in Gulfport, MS. AF 23. The subcontract provides that "[t]he duration of the project should be limited to the period February 2009 through September 1, 2009 due to scheduling changes and extensions." *Id.* The contract further provides that the employees provided "shall be competent, of the skill level and *number necessary* to perform the work of this Subcontract." AF 24 (emphasis added). The Employer also submitted an August 15, 2008, version of the subcontract that provides, "The duration of the project should be limited to the period August 2008 through January 31, 2009 subject to change due to owner's schedule and weather conditions." AF 28-32.

On May 8, 2009, the CO denied the Employer's application. AF 14-18. The CO again found that the Employer had not documented its need for 101 construction workers. AF 16. After describing his reasons for issuing the RFI, the CO explained how the Employer's response did not cure this deficiency. AF 16-17. In particular, the CO found that the contract submitted "fails to establish the need for 101 H-2B workers" in that "it does not contain sufficient information regarding the sized [sic] and scope of the project to support the number of workers requested." AF 17. The CO noted that the contract "does not contain information about the number of construction workers the parties anticipate the employer needing or using in order to complete the project nor does it contain information about the size and complexity of the building to be built for the NPC to infer that the number requested is supported by the contract." AF 17-18. The CO further observed that the Employer did not submit IRS W-2 forms or complete payroll reports but instead provided "quick reports for temporary and permanent

employees and W-2 summary forms.” AF 18. The CO noted that the reports “only show that the employer had permanent and temporary employees for the years 2007 & 2008” and “do not show what type of work the employees were engaged in nor where this work was being performed.” *Id.* Finally, the CO found significant the fact that, on January 23, 2009, “the employer was certified for 58 construction workers for a contract it has with Aladdin Construction to construct what appears to be the same Armed Forces Retirement Home” at the same Gulfport address from April 1, 2009, to December 31, 2009. AF 18. The CO explained that “[c]ertification of an additional 101 construction workers after certification of 58 construction workers, to work in the same location on the same project has not been justified.” *Id.*

On May 18, 2009, the Employer filed its second request for administrative review with BALCA. *See* AF 1-12. In its request, the Employer again explained that it requested an extension of the certification period for 101 laborers because “the project phase” for which it initially received certification “encountered numerous delays.” AF 11. The Employer reported that it had previously received certification for these workers from October 1, 2008, through February 1, 2009. *Id.* The Employer also clarified that it filed the application for 58⁴ laborers, which the CO referenced in his denial, in order to complete a different phase of the same Naval Retirement Center project. *Id.* The Employer emphasized that, while both groups of laborers will work for Aladdin on the same facility’s construction, they are “unequivocally unrelated” because they will work on separate phases of the project. *Id.*

On May 19, 2009, I issued a *Notice of Docketing* permitting the parties to file briefs. The notice also required the parties to confer regarding resolution of the matter and to provide a report on the status of their negotiations at the time they file any briefs. The Employer did not file a brief, and the CO’s brief contained no such report.

Discussion

TEGL No. 21-06 provides the procedures for processing the application at issue in the instant case. *See* 72 Fed. Reg. 38,621 (July 13, 2007); 20 C.F.R. § 655(b) (providing that applications filed with the state workforce agencies prior to January 18, 2009, will be processed “under the former regulations”). The Employer initially requested that the CO extend its four-month temporary labor certification by an additional eight months for a total of one year. In response to the CO’s RFI, the Employer altered its request to a six-month extension. TEGL No. 21-06 only provides guidance regarding extensions of labor certifications that would result in a combined certification period exceeding one year. In particular, TEGL No. 21-06, Change 1, Attachment A, Section II.C provides 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.” ETA published two sets of answers to frequently asked questions about the H-2B certification process, the second of which discussed extension requirements. ETA, *H-2B FAQs – Round II* at 2 (Dec. 12, 2007), http://www.foreignlaborcert.doleta.gov/pdf/h2b_faqs_round2.pdf. ETA wrote:

⁴ In the Employer’s brief, the Employer states that “Aladdin Construction Company requested an additional 56 laborers.” However, since this number is quoted as “58 laborers” everywhere else in the file, I assume the “56” was a typographical error by the Employer.

Question: What is the process if an employer needs to extend its period of need for H-2B workers?

Answer: If 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. However, an employer's season or peakload need of longer than 10 months, which is of a recurring nature, will not be accepted. Training and Employment Guidance Letter (TEGL) No. 21-06, Change 1; DHS regulations at 8 CFR 214.2(h)(6)(ii),) [sic]

Id. ETA's guidance has not addressed the requirements for the situation presented in this appeal: an extension request that, if granted, would not result in a combined extension period exceeding one year. Furthermore, it is not entirely clear from the denial letter that the CO realized that the Employer had requested a certification extension rather than an initial certification. Regardless, the CO analyzed whether the Employer had established a peak load need for temporary workers, which is a reasonable requirement for granting a request to extend the Employer's certification under the H-2B program.

As discussed *supra*, the CO provided three main bases for finding the Employer's response to the RFI insufficient to cure its alleged failure to document a peakload need. Since the CO correctly denied the request on the first of those bases, I affirm his denial of the extension request. TEGL No. 21-06, Change 1, 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. In 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 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.

TEGL No. 21-06, Change 1, Attachment A, Section II.D.3 (emphasis in original).

The CO denied the extension request due to the fact that the labor-services subcontract does not specifically state the number of workers that the Employer must supply. As noted *supra*, the agreement merely requires that the employees provided "shall be competent, [and] of the skill level and *number necessary* to perform the work of this Subcontract." AF 24 (emphasis added). The subcontract states that the Employer will provide all labor necessary to complete drywall and metal stud work at the Armed Forces Retirement Home in Gulfport, MS, "as defined by [Aladdin's] contract with the Contractor." AF 23. Thus, the agreement appears to contemplate that the Employer will determine the number of workers necessary to perform the drywall and metal stud work for the project based on the terms of the primary contractor's agreement with Aladdin Construction.

The Employer did not submit a copy of the contract detailing the work to be performed, nor did the Employer report how much of the work had not been completed under the August 15, 2008, subcontract. The Employer failed to explain why the project delays require such a large extension relative to the length of the initial contract and certification period. The Employer also did not explain why it requires all 101 temporary workers to complete what remains of this phase of the project. While the Employer did provide voluminous documentation, none of it meaningfully addressed why it requires an extension longer than the original certification period for all 101 workers in order to complete the same project phase. The RFI afforded the Employer adequate notice that it had not sufficiently documented a temporary need for the number of workers for the period requested. Since the Employer's response was inadequate, I find that the CO properly denied the extension request.

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