

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 28 July 2009 BALCA Case No.: 2009-TLN-00073

ETA Case No.: C-09161-45218

In the Matter of:

EAGLE INDUSTRIAL PROFESSIONAL SERVICES,
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 review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). § 655.33. The administrative review is limited to the appeal file prepared by the CO, 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 June 10, 2009, the United States Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Eagle Industrial

Professional Services (“the Employer” or “Eagle”). AF 231.¹ The Employer requested certification for 140 welder-fitters from August 1, 2009, through May 31, 2010. *Id.* The application contained the following statement of temporary need:

Eagle Industrial Professional Services, Inc. has a peak load need for 140 temporary welder-fitters from August 1, 2009 to May 31, 2010. Our Company’s services are required in the industrial and maritime construction business. Being a key element in the industry, our company, Eagle Industrial Professional Services, Inc. provides essential manpower to clients in the industrial construction sector. We have a need for temporary workers from August to May. Our demand for workers reaches its peak between these months. We have contractual obligations with our client to provide the necessary workforce for its projects. We must provide a permanent crew and supplement temporary workers when needed. As our client’s planned projects come into effect, a demand for additional staff is created. At this time we must supplement our client with the required additional manpower. Our welder-fitters lay out, fit, and fabricate metal components to assemble structural forms at the worksite located at 5993 Rangeline Road, Theodore, AL 36582. Our recruitment efforts have been very unsuccessful in finding welder-fitters for our industry. Because of our unsuccessful efforts to recruit workers and the growing demand for our services, this program can become an essential part in helping us keep fully staffed during our peak load period. The success of our business depends highly on re-staffing during the start of our busy period which in past years has become a difficult task.

Looking for workers is a difficult challenge. Acquiring reliable, dependable applicants who are willing to perform the duties of this position in this area have proven to be difficult. There are not sufficient U.S. workers in the areas that are able, willing, qualified and available for this job. No U.S. workers have or will be rejected for other than lawful, job-related reasons.

Employment of foreign workers will not adversely affect wages and or working conditions of similarly employed U.S. workers. In numerous occasions, we have solicited workers in our area to meet our demand but there has been a slim response. I am requesting 140 unnamed workers for temporary labor certification to obtain H2B visas from August 1, 2009 to May 31, 2010.

Id.

On June 17, 2009, the CO issued a *Request for Further Information* (“RFI”) that identified several deficiencies requiring remedial action, only one of which warrants discussion. AF 225-230; *see generally* 20 C.F.R. §§ 655.21(a), 655.23(c). In particular, the CO wrote that Eagle failed “to establish that the nature of the employer’s need is temporary.” AF 228. Observing that 20 C.F.R. § 655.6(d)

¹ Citations to the 242-page appeal file will be abbreviated “AF” followed by the page number.

requires the CO to 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,” the CO found that the Employer did not submit “adequate supportive documentation justifying that (1) the need for services or labor to be performed is temporary in nature based on a seasonal peak load standard, and (2) the number of worker positions being request for certification is justified and represents bona fide job opportunities.” *Id.* Specifically, the Employer’s statement that its temporary need arose out of “contractual obligations” was deemed insufficient. *Id.* The CO wrote that the Employer “failed to explain and document how the nature of its business results in a peak load contractual obligation requiring temporary workers.” AF 228-229. Likewise, the Employer “failed to explain and document how the nature of its clients’ business results in a temporary need requiring the employer’s services.” AF 229.

The CO directed the Employer to submit a detailed statement of temporary need containing a description of the Employer’s business history, activities, and annual schedule of operations; an explanation regarding why the nature of the job opportunity and number of workers requested reflect a temporary need; and an explanation regarding how the certification request meets one of the aforementioned regulatory standards of temporary need. AF 228. The CO also directed the Employer to submit additional evidence and documentation justifying that Eagle and the clients to which it sought to provide temporary workers have a peakload temporary need during the requested period. *Id.* The CO added that the evidence and documentation must also “demonstrate that the number of worker positions being requested for certification represents bona fide job opportunities for the entire period of intended employment, as specified on the ETA Form 9142.” *Id.*

On June 24, 2009, the CO received the Employer’s response to the RFI. AF 119. Eagle’s response included, *inter alia*, the following statement:

Eagle Industrial Professional Services, Inc. located in Saraland, Alabama was founded in 2003; specializing in shipbuilding, construction, and design. Our primary service is required in the industrial and marine construction industry. Our services include providing essential manpower to clients in this sector. This sector is a complex industry making a necessity for its players to outsource their human resources’ needs. Job contractors are essential to improve the level of efficiency and process cost reduction in the shipbuilding, marine, and construction industries.

Our client has the need for year round workers; however, as new, short, temporary projects come in effect, the need for temporary workers becomes a necessity. It is necessary to understand that major marine construction projects could take from two to three years to be completed. Most repairs and partial shipbuilding are considered smaller, shorter projects that are completed in a few months and less than a year. Eagle Industrial has the contractual obligation to provide manpower both for the year round operations and the short projects that require temporary workers creating a peak load on our schedule of operations. Our request for 140 welder-fitters is based on the need of personnel that our client requires for its temporary need from August 1, 2009 to May 31st, 2010 making their demand for workers our need as well.

Our request for temporary labor certification meets the “peak load” regulatory standard.

AF 119-120. Eagle also submitted its May 18, 2009, *Labor Agreement* with Nature’s Way Marine, LLC (“NWM”). AF 130-132. Therein, Eagle agreed to provide NWM with “an average crew of 25 welder fitters” to fill its year-round positions during the 2010 fiscal year. AF 130. Eagle also agreed to provide 140 welder-fitters to fill NWM’s temporary positions each month from August 1, 2009, until May 31, 2010. *Id.* The document lists the agreement’s term as July 1, 2009, through June 30, 2010. AF 132.

On July 2, 2009, the CO denied the Employer’s application on two bases, only one of which warrants discussion. AF 113-118. In particular, the CO explained that Eagle did not provide proof of its temporary need as a job contractor under 20 C.F.R. § 655.6(d). AF 115-117. The CO found that the Employer’s submissions “failed to provide a context discussing how the employer’s client experiences a peak in production during the period stated in the labor agreement.” AF 117. The CO also found that, since Eagle did not “provide the context of the requested peak production during the labor agreement,” its statement did not support its “requested peak need either.” *Id.* Observing that the *Labor Agreement* will be effective for a year, the CO denied the application because the only documentation submitted “states a need of at least one year with no proof of a peak in production.” *Id.* On July 10, 2009, the Employer filed its request for review. AF 1. Subsequently, the Employer and the CO timely filed briefs.

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). An applicant must maintain documentation

evidencing the temporary need to submit if requested by the CO. § 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 substantiating evidence or documentation in response to the CO's RFI "may be grounds for the denial of the application." § 655.21(b).

In the instant case, the Employer attempted to establish a peakload temporary need. To establish a peakload need, an employer must demonstrate that "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 that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(3). 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." 20 C.F.R. § 655.6(d).² The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

Given the vagueness of the Employer's initial statement of temporary need, the CO reasonably requested additional information and supporting documentation.³ Upon reviewing the record and the parties' legal arguments, I concur with the CO that the Employer failed to provide sufficient evidence or documentation in response to the CO's request. Accordingly, I find that the denial was proper under 20 C.F.R. § 655.21(b).⁴

² 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 *Labor Agreement* provides that Eagle will "furnish and supervise qualified employees," the Employer identified itself as a job contractor on its amended ETA Form 9142 and in its narrative response to the RFI. AF 130, 122; *see* AF 119.

³ I note that the CO erred in issuing the RFI on the basis that the Employer failed to submit supporting documentation with its initial application. Under 20 C.F.R. § 655.21(b), a petitioning employer need not submit evidence or documentation until the CO requests it.

⁴ In its brief, the Employer correctly observed that that the CO mistakenly relied on the length of the *Labor Agreement's* term in concluding that the evidence established an impermissible need "of at least one year." *See* AF 117. Since the CO also correctly concluded that the evidence does not establish a peakload need, his error was harmless.

The only documentation submitted was the *Labor Agreement* between Eagle and NWM. The agreement does not establish that the Employer regularly employs a staff of permanent welder-fitters that it must supplement due to a seasonal or other short-term demand. It instead establishes that Eagle has agreed to supply an average of 25 welder-fitters for 12 months and 140 additional welder-fitters for 10 months during NWM's fiscal year 2010 alone. Without context, it is impossible to evaluate whether the Employer's need qualifies as temporary under the peakload standard. Regarding the nature of Eagle's client's need, which I must evaluate under § 655.6(d), the agreement does not demonstrate that NWM's welding operations will "peak" during this period, much less that it will require nearly seven times as many welder-fitters than it will for the other two months of the fiscal year. The *Labor Agreement* also does not establish the significance of the particular ten-month period—the longest generally allowable under 20 C.F.R. § 655.6(c)—for which the Employer has requested temporary workers. Without more information, it is impossible to determine whether these are legitimate temporary job opportunities or permanent positions that the parties would merely prefer to fill with alien workers.

In arguing that the CO should have accepted the *Labor Agreement* as sufficient documentation of a peakload need, the Employer wrote, "The submitted Labor Agreement is a legal [sic] binding contract that is worded, revised, and detailed to fulfill the agreement between both parties. It is not worded in a specific order to fulfill the criteria of the Department of Labor's CO."⁵ Neither the regulations nor the RFI specified the type of documentation that the Employer could have submitted to establish a temporary need. *See* AF 228; § 655.6(e). If, as here, an employer's standard contract proves insufficient on its own to establish a temporary need, nothing prohibits the employer from using other types of documentation or evidence to carry its burden under 8 U.S.C. § 1361. Since Eagle did not do so, I affirm the CO's denial.

⁵ The Employer's brief, dated July 20, 2009, lacks internal pagination.

ORDER

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

For the Board:

A

JOHN M. VITTON
Chief Administrative Law Judge