



Issue Date: 23 April 2009

BALCA Case No.: 2009-TLN-00052
ETA Case No.: C-09008-44054

In the Matter of:

JIM CONNELLY MASONRY, 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).

Statement of the Case

On December 8, 2008, the Texas Workforce Commission ("TWC") received an application from Jim Connelly Masonry, Inc., ("the Employer") requesting temporary labor certification for 280 masonry laborers from February 15, 2009, through December 15, 2009. *See* AF 69-70.¹ The Employer attached, *inter alia*, a statement from its president that described its peakload need for workers during the period. AF 72. The statement included, in pertinent part, the following:

Our company is in need of 280 temporary peak-load employees for the dates indicated on the application of February 15, 2009 to December 15, 2009.

¹ Citations to the 77-page Appeal File will be abbreviated "AF" followed by the page number.

At Jim Connelly Masonry, Inc., we provide masonry services to residential and commercial clients. We are actively pursuing work in hardscape landscape, such as, concrete or brick patios, and retaining walls. Due to the nature of our business, the demanding schedule and access to commercial businesses, we have to work on Sundays.

The months of February through December are favorable for masonry installations and prove to be our busiest months. We employ permanent employees to perform year-round services, but due to a peak-load need, we have relied on the H-2B temporary worker program to supplement our staff.

AF 72. The Employer also submitted two letters, one from Solis Constructors, Inc., and one from Wurzel Builders, Ltd. AF 76-77. The letter from Solis Constructors, Inc., states that the companies have “an agreement in principle” to use the Employer’s services between February 15, 2009, and December 15, 2009. The letter cautions that it “is not a legally-binding document and that neither party will be bound by its terms unless and until a definitive agreement is executed.” Similarly, the letter from Wurzel Builders, Ltd., states that the companies have an “agreement in principle” that Wurzel Builders, Ltd., will solicit bids from the Employer between February 15, 2009, and December 15, 2009. The letter cautions that “[f]uture agreements will be made only through a subcontract agreement signed by both parties.”

After submitting its application, the Employer underwent supervised recruitment of U.S. workers, and TWC transmitted the application to the Department of Labor’s Employment and Training Administration (“ETA”). See AF 28-68. On February 4, 2009, the CO issued a *Request for Information* (“the RFI”). 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). In the RFI, the CO identified two deficiencies requiring remedial action that are relevant to this appeal. AF 27. First, the CO found that the Employer “did not submit supportive documentation that justifies its temporary need for alien labor certification.” The CO directed the Employer to submit “supporting evidence or documentation that justifies the chosen standard of temporary need” and included the examples listed in TEGL 21-06, Change 1, Attachment A, Section III.D.4. The CO bolded the third example, which reads:

Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, 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.

Second, the CO found that the Employer’s statement of temporary need did not satisfy TEGL No. 21-06, Change 1, Attachment A, Section III.D.3. Specifically, the CO found that the Employer did “not adequately explain the nature of the temporary need based on the employer’s business operations.” The CO directed the Employer to submit another statement of temporary need “explaining (a) why the job opportunity and number of workers being requested reflect a temporary need, and (b) how the employer’s request for the services or labor meets one of the standards of a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.”

On February 9, 2009, the CO received the Employer's response to the RFI. AF 10-24. The response included, *inter alia*, a letter explaining that, per ETA's published *Frequently Asked Questions*, the Employer is not required to submit payroll summary reports to document a temporary need. AF 11. The Employer argued that petitioners may instead "submit any combination of evidence or documentation" and asked that ETA accept the same two letters that the Employer initially submitted. AF 11. The Employer did not respond to the CO's request that it submit another statement of temporary need.

On February 20, 2009, the CO denied the Employer's application. AF 6-9. The CO observed that, in refusing to supply payroll summary reports in its response to the RFI, the Employer "failed to acknowledge" TEGL No. 21-06, Change 1, Attachment A, Section V.B. AF 9. The CO explained that "the Department cannot justify certification of this application based on the same two (2) 'letters of intent' that were deemed insufficient and remain the only documentation submitted by the employer in an effort to meet its burden of providing adequate documentation/evidence." AF 9.

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). 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. TEGL No. 21-06, Change 1, 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 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).

Based on the documentation the Employer initially provided, the CO reasonably issued the RFI to determine whether the Employer actually has a peakload need for the dates and number of workers requested. Specifically, the Employer's letters merely indicated that two potential clients may require the Employer's services between February 15, 2009, and December 15, 2009. The Employer's documentation provided no context with which to assess whether, between February 15, 2009, and December 15, 2009, a short-term or seasonal demand requires that the Employer supplement an unknown number of permanent employees with 280 temporary workers. Since the Employer failed to

provide additional documentation in response to the RFI, the CO properly determined that he could not grant certification.

The Employer correctly observed that the TEGL does not require a petitioner to submit any specific type of documentation in support of an application. *See* TEGL No. 21-06, Change 1, Attachment A, Section III.D.4 (“Examples of supportive evidence or documentation for the most common standards of seasonal and peakload need include, but are not limited to, the following . . .”). Likewise, the Employer correctly observed that it could support its application with “any combination of evidence or documentation.” While the Employer has flexibility in selecting the type of documents to submit in support of its application, that flexibility does not lessen the Employer’s ultimate burden to establish the existence of a temporary need under the chosen standard. In this case, the Employer failed to meet that burden.

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

For the Board:

A

JOHN M. VITTON
Chief Administrative Law Judge