

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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**BALCA Case Nos.: 2009-TLN-00032
2009-TLN-00033
2009-TLN-00034**

ETA Case Nos.: C-09014-44222
C-09020-44264
C-09020-44262

In the Matter of:

MAXUM SERVICES, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Belinda Rodriguez
Pro Services
Agent for the Employer

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Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

These cases arise from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its applications for temporary alien labor certification under the H-2B non-immigrant program, which permits employers to hire foreign workers to perform temporary nonagricultural work within the U.S. on a one-time occurrence, seasonal, peakload, or intermittent basis. 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. 78020 (Dec. 19, 2008) (new regulations effective Jan. 18, 2009). Because the issues on appeal for all three applications involve the same or a substantially similar set of operative facts and issues, I have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

BACKGROUND

On December 15, 2008, the Employer filed its ETA Form 750A applications for temporary alien employment certification for 48 laborers, 55 welders, and 45 pipefitters. The applications stated that the Employer expected to employ the Aliens from January 1, 2009 to November 1, 2009 at a worksite located at 111 Bunge St., Jennings, Louisiana. (AF32 – 215-216; AF33 – 504-505; AF34 - 515-516).¹

The Employer attached essentially identical letters for each application justifying a peak load need for the workers. (AF32 – 217-218; AF33 – 505-506; AF34 - 517). The Employer stated that its business is industrial marine construction, building and repairing oil rigs. Although the company is located in New Iberia, Louisiana, the work site will be 111 Bunge Street, Jennings, Louisiana. In support of its temporary needs statement, the Employer submitted similar letters in all three applications from the Personnel Manager at Leevac Industries, LLC ("Leevac"), stating that Leevac had contracted with the Employer to assist in the fabrication and repair of supply boats and oilfield specialty

¹ Citations to the Appeal File will be abbreviated as "AF" followed by the page number. AF32 = Case No. 2009-TLC-00032; AF33 = Case No. 2009-TLC-00033; AF34 = Case No. 2009-TLC-00034.

vessels, with the work to be performed at 111 Bunge St., Jennings, Louisiana. (AF 32 – 219; AF33 – 507; AF34 - 519).

Following recruitment supervised by the State Workforce Agency, the applications were transmitted to the federal CO. (AF32 - 196-214; AF33 – 398-502; AF34 - 390-519). On February 6, 2009, the CO issued similar letters on all three applications stating that upon initial review, he had concluded that the Employer appeared not to be eligible for H-2B temporary labor certification. (AF32 – 191-195; AF33 – 393-397; AF34 - 386-389). The CO found that the letters of intent from Leevac were insufficient to establish a temporary need because they were not legally binding documents establishing bona fide job offers; that the Employer – as a job contractor – had not adequately documented its temporary need for the workers, as opposed to its client’s need; the temporary needs statement did not adequately explain the nature of the temporary need based on the Employer’s business operations; and the Employer failed to complete Item 19 (Local Union information) on the ETA Form 750A.² The CO therefore in each case issued a “Request for Information” (“RFI”), directing the Employer to submit (1) signed work contracts; (2) complete payroll records for the previous calendar year; and (3) an IRS W-2 form for each permanent and temporary worker for 2007. The RFIs stated that “**All documents provided must be specific to, and listed separately for, each worksite address listed in Item 7 of the submitted ETA 750 application.**” (AF 32 – 194; AF33 -396; AF34 - 389) (emphasis as in original).³ The CO also directed the Employer to submit a new temporary needs statement, and two new original ETA Form 750As.

The Employer filed responses to the CO’s Request for Information that included Summarized Payrolls for calendar years 2007 and 2008 for each job type; a contract with Leevac for welders, pipefitters and laborers; revised ETA Form 750As; and W-2 forms

² In the application for welders, the CO’s February 6, 2009 initial denial letter also found the application deficient for failure to enclose a recruitment report. (AF33 -396). In its response to the RFI, the Employer stated that ½ of the referrals were duplicates. (AF33 – 165). This was not a ground cited for denial of application in the CO’s later final determination. (AF33 -160-164).

³ In Case No. 2009-TLN-00032, this language was italicized rather than boldfaced and underlined.

for the Employer's permanent and temporary workers. (AF32 – 112-190; AF33 – 166-392; AF34 - 281-385). In each response, a letter was supplied from the Employer's manager explaining that the W-2s list a management company that the Employer uses for payroll – Priority Management Services. (AF32 – 112; AF33 -166; AF34 - 282).

The CO issued Final Determinations denying certification for all workers on all three applications on March 9, 2009. (AF32 – 102-106; AF33 – 160-164; AF34 - 272-276). The CO found that the Employer's responses to the RFIs were insufficient because the Employer had still not established a temporary peakload need. The CO stated that the "payroll documentation was requested in order to verify that the employer does, in fact, have permanent employees at the worksite [at 111 Bunge Street in Jennings, Louisiana] and that it needs to supplement those permanent employees due to a short-term demand." Because the payroll summaries only listed the Employer's New Iberia address, the CO found that the Employer had ignored the CO's request that the payroll be specific to the Jennings location. The CO found that he could not, therefore, ascertain whether the Employer has a peakload need "because the employer has failed to demonstrate that it employs permanent workers at the worksite location." The CO also found that the responses were inadequate because the W-2 forms showed the employer on the tax forms as Priority Management and not Maxum Industries, and those companies had different Federal Employer Identification Numbers ("FEIN").

On March 19, 2009, the Board of Alien Labor Certification Appeals ("BALCA" or "the Board") received essentially identical letters from the Employer requesting review of the CO's denial of certification for the three applications. The Employer argued that it had complied with the RFI because its payroll records come from an accounting system at its corporate address in New Iberia, and because the W-2s were issued by Priority Management System for the Employer under a contract for payroll services. The Employer stated that "the employees are 100% Maxum employees."

The Board issued a briefing schedule, and the CO timely filed essentially identical briefs in all three cases noting that the RFI clearly stated that all documents, including

payroll records, must be specific to the worksite addressed listed in item 7 of the ETA Form 750A. The CO argued that this information was requested in order to determine whether the Employer employed permanent workers at the worksite, as required to establish a temporary need under the peakload criteria.

On April 9, 2009, the Employer was granted an extension of time to file its appellate brief because of a problem with service of the Employer's agent, who had to be re-served at a temporary address. The CO was granted leave to file a supplemental brief.

Subsequently, the Employer filed essentially identical briefs in all three cases in which it stated that "[t]he summarized payroll graph was printed on our company letterhead but the source used to create the payroll graph were our accounting records for the labor position located at 111 Bunge Street, Jennings, LA 70546.... Our submitted ETA 750 has only one worksite address listed on [ETA Form 750A] item 7 therefore the graph created was specifically for this address." The Employer reiterated that Priority Management Services is an independent contractor hired solely for payroll purposes.

DISCUSSION

At the time of the filing of the applications in these matters, the CO and petitioning employers were operating under procedures set forth in *Training and Employment Guidance Letter No. 21-06, Change (1), Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations* (hereinafter "TEGL No. 21-06"), 72 Fed. Reg. 38622 (July 13, 2007). TEGL No. 21-06 required the petitioning employer to attach to its application a detailed, signed statement under its own letterhead, 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." The application was also required to include "[s]upporting evidence and documentation that justifies the chosen standard of temporary need"

In the instant cases, the Employer chose to justify its temporary need based on a peakload standard. The TEGL defined a peakload need as follows:

Peakload Need. The petitioner must establish 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.4. Thus, under the TEGL's peakload standard it was important that the Employer's documentation accurately reflected the place of employment of the Employer's permanent staff.

In the instant cases, the payroll summaries provided in Response to the RFIs did not affirmatively state that they reflected only workers at the 111 Bunge St., Jennings, Louisiana work site. But the CO's argument on appeal that the RFIs specifically stated this requirement is not borne out by the language of the RFIs. What the RFIs stated was that "[a]ll documents provided must be specific to, and listed separately for, each worksite address listed in Item 7 of the submitted ETA 750 application." This language does not state that the payroll record must have the address of the worksite written on its face, but only that it must be (1) specific to the worksite listed on the Form 750A, and (2) provide a separate list for each worksite listed on the Form 750A. In the instant cases, there was only one worksite listed on the Form 750A. Therefore the Employer may have reasonably believed that the CO would know that the payroll summaries it provided, which were specific to the occupations at issue, would be for the worksite stated in the Form 750A. I concur with the CO that this was not certain on the face of the payroll summaries, but I also concur with the Employer that since the payroll summaries were clearly responsive to the RFIs and specified the occupations at issue, it was implicit that they were for the worksite listed in the Form 750As. Thus, I decline to affirm the CO's denial insofar as it was based on the fact that the payroll summary was printed on the Employer's corporate letterhead and did not affirmatively identify it as being related to the Jennings worksite. However, for reasons explained below, I find that more

information is needed to determine whether the Maxum Services actually has a worksite at 111 Bunge Street, Jennings, Louisiana, where it engages permanent employees.

The second ground for denial stated by the CO – that the W-2 forms did not have the FEIN of the petitioning Employer on them – failed to acknowledge the Employer’s letters, submitted with the responses to the RFIs, explained that Priority Services is a company with which the Employer contracted to provide payroll services. Such a payroll services contract is hardly unusual. Moreover, I take official notice that The *2008 Internal Revenue Service Instructions for Forms W-2 and W-3, Wage and Tax Statement and Transmittal of Wage and Tax Statement* states:

Agent reporting. Generally, an agent who has an approved Form 2678, Employer Appointment of Agent, should enter the agent’s name as the employer in box c of Form W-2, and file only one Form W-2 for each employee. ... On each Form W-2, the agent should enter the following in box c of Form W-2:

(Name of agent)
Agent for (name of employer)
Address of agent

Each Form W-2 should reflect the EIN of the **agent** in box b.

(www.irs.gov/pub/irs-pdf/iw2w3_08.pdf) (emphasis as in original). Thus, the IRS requires a properly appointed agent to be listed on the W-2 and that the W-2 bear the agent’s FEIN. Thus, assuming that Priority Services is in fact Maxum Services’ payroll agent, there may be nothing amiss about the W-2s.

I note, however, that there is nothing on the W-2s indicating that Priority Services is Maxum Services’ agent, as the IRS instructions require. Thus, I do not find the W-2s to be unassailable as evidence. Nonetheless, the CO’s outright rejection of the W-2s records without any consideration of the Employer’s explanation was arbitrary.⁴

⁴ I note that the CO did not make any reference to this ground for denying the application in his appellate briefs.

The CO never reached the ultimate question of whether the Employer's documentation of temporary need met the TEGL's peakload criteria, but denied solely on technical grounds relating to the quality of the Employer's documentation. These were slim grounds for denial.

Nonetheless, upon review of the Appeal Files, I found it striking that the Employer's temporary needs statements and supporting documentation was greatly lacking in detail, and may have been misleading.⁵ For reasons explained below, the Employer's documentation in some respects raises issues concerning whether the Employer's applications actually present a temporary need for workers within the requirements of the H-2B program.

For example, the records are highly ambiguous as to what the Employer's actual business is. Although the temporary needs statements and other documentation suggest that the Employer is an industrial construction company and that it builds and repairs oil rigs, other aspects of the record strongly suggest that it is job contractor, whose actual business is to supply skilled construction labor to companies.⁶ On its surface, the labor agreement between the petitioning Employer and Leevac stated that Leevac is hiring independent contractors. (AF32 – 114-116; AF33 – 172-174; AF34 - 283-285). But upon review of its terms, it is clear that the contract only discusses supply of labor, responsibility for payment of the laborers, and responsibility for compliance with federal and state labor and tax laws. It does not describe a contract for the petitioning Employer to build anything or to be responsible for overseeing the worker's day-to-day construction duties.

Moreover, given the way the construction worksite is described in much of the Appeal Files, one might conclude that the petitioning Employer's headquarters is in New Iberia, but that it has a construction facility in Jennings, Louisiana. However, I am not

⁵ I also note that the Employer's responses to the RFI did not include a revised temporary needs statement as directed in the RFI.

⁶ In the RFIs, it is clear that the CO assumed that the Employer is a job contractor.

certain that this is the actual situation. The labor agreement presented in the response to the RFIs referred in paragraph 3(a) to provision of laborers “to work at our yard located on 111 Bunge Street, Jennings, LA 70546.” (AF32 – 114; AF33 – 172; AF34 - 283) (emphasis added). It is not clear which party to the contract is claiming ownership of the yard. This ambiguity about whose facility constitutes the worksite also suggests that the CO was on to something when he questioned whether Maxum Services had any permanent employees located at the Jennings facility. In order to qualify under the TEGL’s peakload criteria, the petitioning employer must have permanent employees stationed at the worksite identified in the Form 750A.

Although it is not entirely clear based on the information contained in the Appeal Files, it seems likely that the petitioning Employer is, in fact, a job contractor rather than a construction company.

In *Caballero Contracting & Consulting LLC*, 2009-TLN-15 (Apr. 9, 2009), the issue of the regulatory environment governing job contractors under the TEGL was explored in detail. As noted in *Caballero*, the portion of the TEGL addressing job contractors, although seeming to bar consideration of the job contractor’s clients’ needs for the services or labor, in practice was not so limited. I ruled that in the context of the Department of Labor’s H-2B program

... a job contractor cannot use its client’s needs to define the temporary nature of the job where focusing solely on the client’s needs would misrepresent the reality of application. Rather, a more reasonable standard is to look at both the job contractor and the job contractor’s client’s needs to determine the temporariness of the need. ...[I]n practical application, consideration of the client’s needs is required to fully understand the context of the application and to fairly determine whether the application actually presents work of a temporary nature.

Slip op. at 16. The *Caballero* decision quotes a long passage from the CO’s supplemental brief that describes how the job contractor applications were reviewed under the TEGL. *Caballero*, slip op. at 9-11. In sum, as presented with different business models, the CO over time became concerned that if a job contractor’s client’s

circumstances were not considered, it could mask what is actually an underlying permanent need for the service or labor. The CO's supplemental brief stated: "To ignore the underlying services or labor needed by the individual employer-client and focus exclusively on the job contractor's need would ultimately undermine the clear intent of the H-2B visa program and provide a disastrous incentive for employers to re-define what are otherwise permanent jobs filled by U.S. workers into temporary jobs to be filled by foreign workers." *Caballero*, slip op. at 10.

In the instant cases, it appears that Maxum Services is primarily engaged in providing Leevac with workers for Leevac's shipyard. More needs to be learned about Leevac's use of such workers, and the history of Maxum Services' provision of labor to this client to determine whether there is an actual need for temporary workers within the meaning of the H-2B program requirements. *See, e.g., Workplace Solutions LLC*, 2009-TLN-49 (Apr. 22, 2009) (remand based on *Caballero* where record was not fully developed on temporary needs issue).

In sum, I decline to affirm the denial of certification on the precise grounds cited by the CO in the denial determinations. Because the records are not adequately developed to make a determination on whether the Employer's applications fit within the peakload criteria for establishing a temporary need, or even whether the Employer is a job contractor, I will remand these matters to permit the Employer to submit additional evidence regarding the nature of its need for temporary workers.

On remand, the Employer must note that it is a petitioning employer's burden to establish eligibility for labor certification, and it is not the CO's responsibility to provide a detailed guide to the employer on how to achieve labor certification. *See Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996) (en banc) (BALCA decision under the permanent labor certification program); *see also Deboer Brothers Landscaping, Inc.*, 2009-TLN-18 (Apr. 3, 2009) (an employer must supply adequate documentation to establish its case for temporary need in response to a CO's RFI regardless of how duplicative or obvious the requested responses might seem). The Employer should review the TEGL and provide

evidence sufficient to establish that it has a temporary peakload need for these workers. If the Employer is a job contractor rather than a construction company, it should also review the *Caballero* decision (available at www.oalj.dol.gov), and provide evidence to show that its client's need for workers is temporary in nature, and therefore qualifies under the H-2B program.

SO ORDERED.

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JOHN M. VITTON
Chief Administrative Law Judge