



Issue Date: 08 May 2009

BALCA Case No.: 2009-TLN-00044
ETA Case No.: C-09034-44513

In the Matter of:

TAMPA SHIP, LLC,
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 29, 2008, the Florida Agency for Workforce Innovation ("FAWI") received an application from Tampa Ship, LLC, ("the Employer") requesting temporary labor certification for 20 carpenters from April 1, 2009, through February 1, 2010. *See* AF 350-52.^{1 2} The Employer described

¹ Citations to the 383-page Appeal File will be abbreviated "AF" followed by the page number.

² The Employer filed five applications for certifications in various occupations. In several places, the Appeal File contains copies of the ETA Form 750 the Employer filed requesting certification of electricians. *See, e.g.*, AF 351. The Employer's ETA Form 750 requesting certification of 20 carpenters appears within the Employer's response to the Certifying Officer's *Request for Information* at AF 274-75.

the job's duties as constructing, erecting, installing, and repairing "structures and fixtures of wood, plywood, and wallboard, using carpenter's hand tools and power tools." AF 274. The Employer also required that workers have two years of experience in the job offered. AF 274. The Employer included with the application, *inter alia*, its statement of temporary need based on a one-time occurrence. AF 353-54. According to the Employer's statement, it purchased a new shipbuilding and repair company ("TBSR") on December 1, 2008.³ As part of the purchase, the Employer agreed to loan approximately 300 of its employees to TBSR until December 2009 in order to complete pre-existing construction projects.⁴ Concurrently, the Employer also entered into new contracts for vessel construction and repair projects lasting through 2009. Between the loan of its workers to TBSR, and the growth resultant from its new construction projects, the Employer needed new employees. It hired 367 new workers, but deemed this number insufficient to meet all its obligations. The Employer claims that the purchase of TBSR, its new construction obligations, and administrative backup have combined to create the need for temporary workers. In support of its need statement, the Employer submitted copies of its Use Agreement ("Agreement"), which details its loan of workers to TBSR, and a Vessel Construction Contract ("Contract"). AF 356-81.⁵

After submitting its application, the Employer underwent supervised recruitment of U.S. workers, and FAWI transmitted the application to the Department of Labor's Employment and Training Administration ("ETA"). See AF 288-349. On February 11, 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). See 72 Fed. Reg. 38,621 (July 13, 2007). In the RFI, the CO identified several deficiencies requiring remedial action that are relevant to this appeal. AF 285-87. First, the CO found that the Employer "did not submit supportive documentation that justifies its temporary need for alien labor certification" or "adequately explain the nature of the temporary need." AF 285-86. Accordingly, the CO directed the Employer to submit a more-detailed statement of temporary need along with:

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 and on ETA FORM 750, Part A, Item 18b., **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 for each month during the requested period of need on the ETA Form 750, Part A, Item 18b., **AND** names and telephone numbers of clients with whom the employer is contracting for the performance of work under this petition:

³ Technically, it appears that the Employer did not exist prior to the purchase.

⁴ This statement suggests that the Employer actually purchased TBSR's assets rather than the company itself.

⁵ The parties named in the Agreement are TBSR and Galliano Marine Services. Though none of the documentation makes clear the identity and role of Galliano Marine Services, the documentation suggests a connection with TBSR's purchaser, and therefore indicates that Galliano Marine is the Employer's predecessor. The parties here appear to have no disagreement about the parties to the Agreement.

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 payroll reports.

AND

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

AF 285-86.

Second, the CO found that the Employer violated TEGL No. 21-06, Change 1, Attachment A, Section IV.G.3:

The employer denied employment for 6 applicants, as stated in the recruitment report dated 01/28/2009 "Interviewed 1/28/2009, no shipyard experience." However, in the ETA 750 Item 14 (Experience) Item 15 (special Requirements) it makes no mention as to the requirement of having 2 years shipyard experience. It does state that the applicants must have 2 years Carpentry experience which based on the applicants resumes; there is over 2 years of experience.

AF 287. The CO requested that the Employer submit a detailed recruitment report that, *inter alia*, explains "the lawful job-related reason(s) for not hiring each U.S. worker." AF 287. The CO also instructed the Employer to "re-contact any applicants that qualify for the position based on the requirements listed on the ETA Form 750 or give lawful job related reasons for rejection." AF 287.

On February 20, 2009, the Employer submitted multiple documents in response to the CO's RFI. AF 267-82. These documents included a modified application, another statement of temporary need, and a recruitment report.⁶ On March 13, 2009, the CO denied the Employer's application on several bases. AF 261-66. First, the CO found that the Employer failed to recruit "U.S. workers according to DOL policy." AF 263-64. In particular, the CO found that the Employer improperly rejected six applicants for lacking "shipyard experience" because, while the Employer required two years experience "in the job offered" on the application, the job duties described in the application are not specific to shipyard carpentry. AF 264. Citing TEGL No. 21-06, Change 1, Attachment A, Section V.A.2.b, the

⁶ Although the Appeal File's table of contents indicates that the Employer submitted a recruitment report, the report did not appear with the materials submitted in response to the RFI. The materials transmitted by FAWI contain a recruitment report dated January 28, 2009. See AF 291. The report reveals that the Employer rejected five applicants due to a lack of "shipyard experience" and one applicant due to a lack of "shipbuilding experience."

CO also determined that the Employer improperly refused to hire several of the U.S. applicants because they qualified for the position despite lacking “specific ‘shipyard’ experience.” AF 264. The CO explained that “several . . . had more than two years of the required experience.” AF 264.

Second, the CO found that the Employer failed to provide documentation to establish a temporary need. AF 265-66. In particular, the CO found that, because the Employer stated that it was scheduled to deliver barges through the fourth quarter of 2010, the Employer’s period of need exceeded one year and was therefore not temporary. AF 266. Likewise, the CO found that the Agreement and the Contract “both indicated a period of need lasting more than one year.” AF 266. The CO also observed that the Agreement and the Contract did not correspond to the job title or job duties listed in the application and that the Agreement’s term does not correspond to the dates of need listed in the application. AF 266.⁷ The Employer’s appeal followed.

Discussion

Jurisdiction

On December 19, 2008, the Department of Labor published new H-2B regulations that became effective on January 18, 2009. *See* 73 Fed. Reg. 78,020 (Dec. 19, 2008). These regulations create a right to BALCA review of the CO’s determinations on applications for non-agricultural temporary labor certification. 73 Fed. Reg. 78,020, 78,063 (Dec. 19, 2008). Previously, no such right existed. Rather, the CO’s decisions were advisory to United States Citizenship and Immigration Services (“USCIS”), an agency within the Department of Homeland Security (“DHS”), and employers who did not receive certification could continue to pursue visas after submitting “countervailing evidence” to USCIS. *See* 73 Fed. Reg. 78,045 (Dec. 19, 2008). In a departure from the previous procedures, the new regulations restrict BALCA’s review to the Appeal File and any legal briefs submitted by the parties. *See* 73 Fed. Reg. 78,063 (Dec. 19, 2008). Moreover, under the new regulations, an employer must have been granted certification from the Department of Labor before proceeding to USCIS. At the outset, the Employer argues that, despite the fact that the CO denied the Employer’s application after these regulations took effect, BALCA lacks jurisdiction to hear this appeal because the Employer filed the application before the regulations’ effective date. The Employer disputes whether BALCA has jurisdiction to entertain this appeal. Recently, in my decision in *Callabero Contracting & Consulting LLC*, 2009-TLN-15, slip op. at 11-13 (BALCA Apr. 9, 2009), I addressed the same argument. For the reasons stated therein, I find that BALCA has jurisdiction to hear the Employer’s appeal and reject the Employer’s contrary assertion.

⁷ The CO’s determination also references documents—a barge construction schedule and the Employer’s 2009 delivery schedule—that do not appear in the Appeal File. AF 266. The CO wrote that the Employer’s response to the RFI included these documents and based his denial, in part, on the fact that they “are not specific to” the worksite, job title, or job duties listed in the application. AF 266. When submitting its request for review, the Employer attached a document containing 2009 delivery information. *See* AF 42. It is unclear whether this document is the schedule referenced in the CO’s final determination. As I am unable to determine whether the Employer actually submitted the document at AF 42 to the CO—and therefore whether, under the regulation that will be codified as 20 C.F.R. § 655.33(a)(5), the Employer properly submitted it with its request for review—I will not consider it. *See* 73 Fed. Reg. 78,063 (Dec. 19, 2008). Since I will reverse the CO’s determination regarding the Employer’s documentation based on the record actually before me, any failure to include the documents referenced in the final determination when compiling the Appeal File will not prejudice the Employer.

Temporary Need

The CO erred in denying certification based on the documentation issues described in the final determination. Section 214(c)(1) of the Immigration and Nationality Act requires DHS to consult with “appropriate agencies of the Government” before granting an H-2B visa petition. 8 U.S.C. § 1184(c)(1). Pursuant to that charge, USCIS regulations require the petitioning employer to first apply to DOL for temporary labor certification. Specifically, the regulation promulgated by USCIS for this purpose, 8 C.F.R. § 214.2(h)(6)(iii), provides:

(A) Prior to filing a petition . . . the petitioner shall apply for a temporary labor certification with the Secretary of Labor The labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien’s employment will adversely affect the wages and working conditions of similarly employed United States workers.

Section 214.2(h)(6)(iii)(D) then empowers DOL to establish procedures for administering the temporary labor certification program. As such, it falls to DOL to determine whether the employer has demonstrated that it has a need for foreign labor that cannot be met by U.S. workers and that the need is temporary in nature. *See* ETA, *Final Rule, Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States* [“ETA Final Rule”], 73 Fed. Reg. 78020, 78025 (Dec. 19, 2008). “The controlling factor continues to be the employer’s temporary need and not the nature of the job duties.” *Artee Corp.*, 18 I. & N. Dec. 366, Interim Decision 2934, 1982 WL 190706 (BIA 1982); ETA Final Rule, 73 Fed. Reg. 78025-26; *see also* *Global Horizons, Inc.*, 2007-TLC-1 (Nov. 30, 2006). It falls to an employer to demonstrate the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

With regard to what the Employer must demonstrate to establish a one-time temporary need, the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) states:

(B) Nature of petitioner’s need. As a general rule, the period of the petitioner’s need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. . . .^[8]

(1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

⁸ USCIS recently amended these regulations, and the changes took effect in January 2009. Section 214.2(h)(6)(ii)(B) now states, “The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.” However, at the time of the filing of the application, the CO and Employer were operating under the previous version of the regulation, as quoted above.

Since the regulations provide no guidance as to precisely what documentation an employer should submit, ETA has published a list of Frequently Asked Questions (“FAQs”) to help guide applicants.⁹ Regarding the documentation required for establishing a one-time temporary need, the FAQs state, “Evidence that has been used in cases of one-time need includes contracts showing the need for the one-time services, letters of intent from clients, news reports, event announcements, and similar documentation.” See ETA, *H-2B FAQs – Round II* at 3, http://www.foreignlaborcert.doleta.gov/pdf/h2b_faqs_round2.pdf (last visited Apr. 30, 2009).

The CO’s finding that the Employer’s documentation is deficient because it lacks specific details corresponding to the job title or the job duties listed in the application does not support affirming the denial. Neither the regulations nor the TEGL require documentation to establish such specific details; the documentation need only support the petitioner’s theory as set forth in the statement of temporary need. See TEGL No. 21-06, Change 1, Attachment A, Sections III.D.3 & .4. Furthermore, the documents listed in the FAQs quoted above would not likely contain such details. For example, one would expect a shipbuilding contract to contain specifications and dates of performance; one would not expect it to contain details about the nature of the workforce the shipbuilder requires to deliver the ship. A purchaser likely has little concern about the particular types of laborers a shipbuilder will use during a given phase of construction and therefore has no reason to include such details in the agreement. In denying the certification because the documentation did not “correspond to” the job title and duties listed in the application, the CO appeared to question whether, in meeting its contractual obligations, the Employer required carpenters. It is unclear how the CO could seriously question whether carpenters are required for shipbuilding. Ultimately, the documentation submitted need only establish that an event has created a need for temporary workers, and that this need will not exceed one year, except in extraordinary circumstances.¹⁰ Based on the record before me, I find that the Employer has established a temporary need for workers.

The CO’s finding that the dates of need do not correspond to the timeframes listed in the documentation also does not support affirming the denial. The CO appears to have reasoned that the barge-delivery dates and the agreements’ effective dates dictate the Employer’s dates of need. The Employer’s documentation addresses the source and nature of the temporary need. The exact dates of performance under the contracts logically need not mirror the dates of need. The precise period of time during which the Employer must supplement its permanent workforce within the larger period circumscribed by its contractual obligations remains a fluid business decision made by the Employer. Absent extraordinary circumstances, the Employer need only show that, in attempting to respond to the events set off by its purchase of the shipyard, it requires temporary workers for less than one year. In its application, the Employer listed a period of need between April 1, 2009, and February 1, 2010. This

⁹ TEGL No. 21-06, Change 1, Attachment A, Section III.D.4, provides examples of supportive evidence justifying an employer’s temporary need but only provides examples pertaining to two of the need standards, seasonal and peakload. It provides no specific examples or guidance as to sufficient documentation for a one-time need.

¹⁰ The Employer’s need clearly does not qualify under the first clause of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) because the Employer has employed shipyard workers in the past and will presumably employ them in the future. One might argue that the Employer should have categorized its need as peakload rather than one-time. See 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). As the CO accepted the Employer’s classification as proper, I express no opinion on the propriety of the Employer’s categorization.

period is less than one year, and the documentation submitted supports the Employer's stated period of need. Accordingly, I cannot affirm the CO's denial on the bases for which he rejected the Employer's documentation.

Recruitment

The CO correctly denied certification due to the recruitment issues described in the final determination. The Employer's ETA 750 form required applicants to have a minimum of two years of experience in the job offered, and described how the position involves constructing, erecting, installing, and repairing "structures and fixtures of wood, plywood, and wallboard, using carpenter's hand tools and power tools." Ordinarily, an applicant qualifies for a job if she meets the minimum requirements specified in the labor certification application. *See In re Bel Air Country Club*, 1988-INA-223, slip op. at 4 (BALCA Dec. 23, 1988) (en banc) (interpreting similar permanent labor certification regulations). An employer may not reject an applicant who meets the minimum requirements listed in the application only because she lacks experience in the duties the employer listed in the job description. *Id.* (citing *In re Microbilt Corp.*, 1987-INA-635 (BALCA Jan. 12, 1988)). However, by requiring experience in the job offered in Item 14 of the application, an employer may incorporate as a job requirement experience in the job duties described in Item 13. *In re Latin American Enterprises, Inc.*, 2008-INA-82, slip op. at 5 (BALCA Mar. 3, 2008). In the instant case, the Employer required experience "in the job offered" but failed to describe duties specific to shipyard carpentry in Item 13. Thus, the Employer was prohibited from rejecting applicants for lacking shipyard or shipbuilding experience because the application did not require jobseekers to have such experience. The Employer nevertheless rejected six applicants due to their lack of shipyard or shipbuilding experience. AF 291. These applicants' resumes support the CO's assertion that they possessed two years of experience in the specific job offered, i.e., the job duties described in Item 13 of the Employer's application. AF 292-300, 304-09. I therefore affirm the CO's finding that the Employer improperly rejected six qualified U.S. applicants.

Affirming the CO's finding raises another issue: is the Employer nevertheless entitled to partial certification? Since the CO denied certification on other grounds, his determination did not address this issue. Likewise, TEGL No. 21-06, Change 1, is silent on whether the CO should deny certification or reduce the number of opportunities certified by the number of qualified domestic applicants improperly rejected by an employer. Section V.A.2 states that the CO "shall determine whether to grant or deny temporary labor certification" based on whether "[q]ualified U.S. workers are available for the job opportunity." By referring to the singular "opportunity," the TEGL does not contemplate that an employer might improperly reject fewer qualified domestic applicants than, if hired, would have satisfied the employer's temporary need. Although not applicable to the instant case, the regulation that will be codified at 20 C.F.R. § 655.32(f) permits the CO, in his discretion, to issue a partial certification "to ensure compliance with all statutory and regulatory requirements." *See* 73 Fed. Reg. 78,062-78,063 (Dec. 19, 2008). Even if I could order partial certification, I would decline to do so under the facts of this case. The record raises doubts about whether the recruitment report accurately reflects the labor market for these job opportunities. In particular, the Employer advertised the position as "Marine Carpenter," described the position as specific to shipbuilding in the advertisement's body, and required two years of experience in the job duties described in the advertisement. AF 313. As discussed above, the application required two years of experience in general carpentry, and the Employer therefore could not have made hiring decisions based on the more restrictive requirements set forth in the advertisement. It is impossible to determine whether qualified U.S. workers did not apply for the position due to the

more restrictive requirements listed in the advertisement's body. Accordingly, I cannot determine that qualified U.S. workers were unavailable for the other 16 opportunities offered by the Employer, and must affirm the CO's denial of certification. *See* TEGL No. 21-06, Change 1, Attachment A, Section V.A.2.

In light of the foregoing, it is hereby **ORDERED** that the decision of the Certifying Officer is **AFFIRMED**.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge