

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 04 May 2009**

**BALCA Case No.:** 2009-TLN-00045  
**ETA Case No.:** C-09043-44715

*In the Matter of:*

**TAMPA SHIP, LLC,**  
*Employer*

**Certifying Officer:** William L. Carlson  
Chicago National Processing Center

**Before:** **JOHN M. VITTONI**  
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 40 electricians from April 1, 2009, through February 1, 2010. *See* AF 468-69.<sup>1 2</sup> The Employer described the job's duties as installing and repairing wiring, fixtures, and "all equipment for electrical services aboard vessels and [in] shipyard." AF 468. The Employer also required that workers have

<sup>1</sup> Citations to the 591-page Appeal File will be abbreviated "AF" followed by the page number.

<sup>2</sup> 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 carpenters. *See, e.g.,* AF 554. The Employer's ETA Form 750 requesting certification of 40 electricians only appears within the Employer's response to the Certifying Office's *Request for Information* at AF 468.

two years of experience in the job offered. AF 468. The Employer included with the application, *inter alia*, its statement of temporary need based on a one-time occurrence. AF 590-91. According to the Employer's statement, it purchased a new shipbuilding and repair company ("TBSR") on December 1, 2008.<sup>3</sup> 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. *See* AF 564-75. Concurrently, the Employer also entered into a new contract for vessel construction projects ending in 2010. AF 577-89. Between the loan of its workers to TBSR, and the growth resultant from its new construction projects, the Employer needed new employees. It hired approximately 300 new workers, but deemed this number insufficient to meet all its obligations. AF 590-91. 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"), loaning its workers to TBSR, and its Vessel Construction Contract ("Contract"). AF 564-89.

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 483-551. On February 13, 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 several deficiencies requiring remedial action that are relevant to this appeal. AF 478-82. First, the CO found that the Employer "did not submit supportive documentation that justifies its temporary need for alien labor certification." AF 480. 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, PAR 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:

**AND**

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<sup>3</sup> Technically, it appears that Employer did not exist at the time of the purchase; it was in fact created by the purchase. Some of the documentation included in the Appeal File reveals that the purchase of TBSR by a group of companies spawned Tampa Ship LLC. Accordingly, while the Vessel Construction Contract signed after the purchase involves Tampa Ship, the Use Agreement constituting part of the purchase of TBSR, exists between 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 the purchasing group, and therefore that Galliano Marine is the Employer's predecessor. The parties here appear to have no disagreement about the parties to these two agreements, so I will treat the Employer as functionally a party to the Use Agreement.

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 480-81.

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

The employer denied employment for 4 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 Electrician experience, which based on the applicants' resumes; there is over 2 years of experience.

AF 482. 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 482. 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 482.

Between February 20 and February 24, 2009, the Employer submitted multiple documents in response to the CO's RFI. AF 267-477. These documents included a recruitment report dated February 19, 2009, and documents indicating that the Employer is scheduled to deliver five barges between the third quarter of 2009 and the fourth quarter of 2010. AF 493, 459, 460. The recruitment report indicates that, following January 28, 2009, interviews, the Employer rejected four applicants due to their lack of shipyard experience. AF 493.

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 264. In particular, the CO found that the Employer "discouraged interested and unemployed U.S. workers from applying to the job" because the Employer used the more-specific title "Marine Electrician" when advertizing the position. AF 264. Citing TEGl No. 21-06, Change 1, Attachment A, Section V.A.2.b, the 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’s documentation indicated 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 Contact did not correspond to the job title or job duties listed in the application, that the construction and delivery schedules were not specific to the worksite, 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. 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.

### *Temporary Need*

Section 214(c)(1) of the Immigration and Naturalization 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. . . .<sup>[4]</sup>

(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.

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.<sup>5</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/h2b_faqs_round2.pdf) (last visited Apr. 30, 2009).

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<sup>4</sup> 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.

<sup>5</sup> Note that ETA set forth procedures for processing H-2B applications in TEGL No. 21-06, Change 1, 72 Fed. Reg. 38622 (July 13, 2007). TEGL No. 21-06 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.

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 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 electricians. It is unclear how the CO could seriously question whether electricians are required for modern shipbuilding. Equally unclear is why the CO found significant the fact that the delivery schedules do not "correspond with" the worksite listed in the Employer's application as, listing no worksite, they certainly do not conflict with the application. 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.<sup>6</sup> 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 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 period is less than one year, and the documentation submitted supports the Employer's 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 erred in denying the Employer's application due to the recruitment issues described in the final determination. The CO found that the Employer improperly rejected qualified U.S. applicants.

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<sup>6</sup> 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.

In the final determination, the CO wrote that, based on their education, training, and experience, several rejected applicants “would be able to perform the duties involved in the occupation” and therefore qualified for the position. *See* TEGL No. 21-06, Change 1, Attachment A, Section V.A.2.b (permitting the CO to deny certification for a job opportunity if he determines that, “by education training, experience, or a combination thereof,” a willing U.S. worker “can perform the duties involved in the occupation”). In explanation of this conclusion, the CO merely stated that “several of the U.S. workers applying for the position had more than the two years of required experience.” This rationale is slightly different from the reasoning the CO relied upon in his appellate brief and in the RFI. In both, the CO stated that the Employer improperly rejected applicants who lacked shipyard experience because the Employer’s application only required two years of experience as an electrician. Neither rationale justifies the CO’s denial.

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 performing electrical work aboard vessels and in the shipyard. In requiring “experience in the job offered” in Item 14 of the application, the Employer required experience in the duties described in Item 13 of the application rather than general experience as an electrician. *See Mcaravy Brothers*, 2009-TLC-23, slip op. at 3 (ALJ Feb. 5, 2009) (explaining how an H-2A employer incorporates the duties described in the application for labor certification when requiring experience in the job offered). The Employer rejected four applicants due to their lack of shipyard experience. AF 493. These applicants’ resumes support the Employer’s assertion that they lacked experience in the specific job offered. AF 501-04, 509, 516, 519-20. Accordingly, I find that the Employer rejected only applicants who lacked the experience the Employer required in its application.

In the final determination, the CO nevertheless concluded that, despite lacking shipyard experience, “several” applicants qualified for the position. The CO neither identified these qualified applicants by name nor explained how he determined that their experience qualified them for electrician work aboard vessels and in the shipyard. Similarly, the CO did not explain why the Employer’s requirement of two years of experience in the specific job offered was somehow inappropriate. *See* TEGL No. 21-06, Change 1, Attachment A, Section V.4.e (requiring the CO to deny certification if the “job’s requirements are unduly restrictive or represent a combination of duties not normal to the occupation”); *see also Houston Music Inst., Inc.*, 1990-INA-450 (BALCA Feb. 21, 1991) (holding that, in permanent labor certification cases, “the burden shifts to the CO to adequately explain why the U.S. applicant is qualified despite his failure to meet the [employer’s] stated requirements,” and finding that a similarly worded regulation “does not provide a basis for the CO simply to dismiss the Employer’s stated job requirements in the absence of a determination that such requirements are unduly restrictive”). Based on the determination’s lack of specificity and reasoning, I cannot affirm the CO’s denial on this basis either.

The CO also found that, when advertising the position, the Employer discouraged potential applicants by using the title “Marine Electrician” instead of using the title that the Employer listed in the application, “Electrician.” While employers generally should use the same job title in their applications and their domestic recruitment materials, the change in this case was harmless. Specifically, the title “Marine Electrician” could not discourage or mislead applicants because, as the Employer described in the advertisement’s body and in the application, the position actually entails performing electrical work aboard vessels and in the shipyard. *See* AF 486, 468. Moreover, the Employer required experience “in

the job offered.” Had the Employer advertised with a job title that was inconsistent with the job duties described in the application or in the advertisement’s body, denial might have been proper. Since the Employer’s change in title was not misleading, I cannot affirm the CO’s denial on this basis.

Accordingly, it is hereby **ORDERED** that the decision of the Certifying Officer is **REVERSED**

For the Board:

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**JOHN M. VITTON**  
Chief Administrative Law Judge