U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 May 2009

BALCA Case No.: 2009-TLN-00046
ETA Case No.: C-09034-44508

In the Matter of:

TAMPA SHIP, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **JOHN M. VITTONE**
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 80 pipe fitters from April 1, 2009, through February 1, 2010. *See* AF 534-35.[1] The Employer described the job's duties as laying out, fabricating, installing, maintaining, and repairing pipe systems on vessels or at the shipyard. AF 534. The Employer required that workers have six months of experience in the job offered. AF 534. The Employer included with the application, *inter alia*, its statement of temporary

[1] Citations to the 571-page Appeal File will be abbreviated "AF" followed by the page number.

need based on a one-time occurrence. AF 543-44. According to the Employer's statement, it purchased a new shipbuilding and repair company ("TBSR") on December 1, 2008.[2] As part of the purchase, the Employer agreed to loan TBSR approximately 300 employees to complete pre-existing construction projects.[3] Concurrently, the Employer also entered into new contracts for vessel construction and repair projects lasting through 2009. Between TBSR's commitments 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, administrative back-up, and its new construction obligations have combined to create the need for temporary workers. In support of its need statement, the Employer submitted, *inter alia*, copies of its Use Agreement ("Agreement"), which details its loan of workers, and a Vessel Construction Contract ("Contract"). AF 557-69, 544-56.[4]

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 480-533. 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 476-79. 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 476-77. Accordingly, the CO directed the Employer to submit a more detailed statement of temporary need along with:

> 1. **Signed work contracts** <u>clearly</u> 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 <u>clearly</u> 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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> 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

[2] Technically, it appears that the Employer did not exist prior to the purchase. *See* AF 281.

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

[4] 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.

> 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 476-77.

Second, the CO found that the terms of employment listed in the application were inconsistent with those listed in the advertisement the Employer used during recruitment of U.S. workers. AF 478-79. In particular, the CO noted that, in the advertisement, the Employer required 2 years of experience in the job offered. AF 478. The CO requested that the Employer modify the application to include the same terms of employment used in recruiting U.S. workers and to justify the increase in the amount of experience the Employer required. AF 478.

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

> The employer denied employment for applicant [name omitted] as stated in the recruitment report dated 01/28/2009 'Interviewed 1/28/2009, no shipyard experience.' However, in ETA 750 Item 14 (Experience) Item 15 (special Requirements) it makes no mention as to the applicants' requirement of having 6 months shipyard experience. It does state that the applicants must have 6 months Pipefitters experience, which based on [the applicant's resume]; there is over 6 months of experience.

AF 479. 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 479. 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 479.

The Employer submitted multiple documents in response to the CO's RFI. AF 260-473. These documents included, *inter alia*, a recruitment report, a modified statement of temporary need, and reports indicating that the Employer is scheduled to deliver five barges between the third quarter of 2009 and the fourth quarter of 2010. AF 261, 266-67, 268, 279. The recruitment report indicates that, following January 28, 2009, interviews, the Employer rejected two applicants due to their lack of shipyard experience. AF 261.[5] The modified need statement discusses a sixth construction project—a

[5] In an e-mail that accompanied some of the documents submitted in response to the RFI, the Employer's counsel observed that the applicant named in the RFI "did not apply for a Pipe Fitter position of which we know." AF 265. The same applicant's name appears in the recruitment report found in the Employer's response to the RFI, which also bears the FAWI

300-foot offshore supply vessel—that the Employer will begin constructing during the second quarter of 2009 and that the Employer expects to deliver during the first quarter of 2010. AF 267. The Employer added that the requested period of need "arises during the height of production, when three vessels will be constructed simultaneously, from the 2nd quarter of 2009, to the 1st quarter of 2010." AF 267. The Employer submitted a modified application, a copy of which appears in the Appeal File alongside the materials the Employer originally submitted to FAWI. AF 538-39. In the modified application, the Employer changed the experience requirement from six months to two years. AF 538.[6]

On March 13, 2009, the CO denied the Employer's application on several bases. AF 254-59. First, the CO found that the Employer failed to recruit "U.S. workers according to DOL policy." AF 256-58. In particular, the CO found that the Employer improperly rejected an applicant for lacking "shipyard experience" when the applicant's resume indicated that "he clearly had well over the 2 years of requested 'shipyard experience' in the offered position." AF 257. The CO added that the Employer's claim that the applicant did not apply for the position conflicted with the recruitment report submitted by the Employer and the documentation transmitted by FAWI. AF 257.[7] Second, the CO found that the Employer failed to provide documentation to establish a temporary need. AF 258-59. 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 259. Likewise, the CO found that the Agreement and the Contract "both indicated a period of need lasting more than one year." AF 259. The CO also observed that the Agreement and the Contract 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 259. 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

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case number listed on the CO's final determination and FAWI's transmittal form. AF 261, 254, 480. The FAWI transmittal form also indicates that the application associated with that case number is for pipe fitters. AF 480.

[6] In Item 13 of the modified application, the Employer actually indicated that it required two months of experience in the job offered by entering a "2" in the column for "Mos." rather than the column for "Yrs." AF 538. In Item 15, reserved for "Other Special Requirements," the Employer entered, "2 Year Minimum." AF 538.

[7] The Employer appears to have abandoned its claim that this individual did not apply for a pipe fitter position. In its appellate brief, the Employer defended its rejection of the applicant. *See Memorandum of Law in Support of Petitioner's Appeal of the Determination of the Certifying Officer to Deny Temporary Labor Certification for 80 Pipe Fitters* at 9.

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

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 the 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.

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 pipe fitters. It is unclear how the CO could seriously question whether pipe fitters are required for 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

[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.

[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.

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 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 erred in denying the Employer's application due to the recruitment issue described in the final determination. The Employer's modified ETA 750 form required applicants to have a minimum of two years of experience in the job offered, and described how the position involves laying out, fabricating, installing, maintaining, and repairing pipe systems on vessels or at 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. *See Mcaravy Brothers*, 2009-TLC-23, slip op. at 3 (ALJ Feb. 5, 2009) (applying this principle to an application for an H-2A visa). The Employer rejected two applicants due to their lack of "shipyard experience." The CO found that one of these applicants possessed the experience required by the Employer. The applicant's resume contains, in pertinent part, the following:

2004-Present	Shipyard repair, welder, mechanical, crane rigger forklift and bucket leader operator.
1999-2004	Tractor Trailer mechanic and welder fabricator for asphalt plant. Also responsible for plant maintenance which included piping and oversea container repair.
1998-1999	Installed piping for new home foundations, street connections for water, sewer and electric.
1997-1998	Installing overhead cranes, welding and mechanical maintenance.

[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.

From 1969 to 1998 I had knowledge and experience in the following arenas.

Landscaping equipment, mowers, vehicles and small engine maintenance.

Mechanic on the following vehicles

Personal vehicles.
Army Corps of Engineers equipment and vehicles
Autotrak equipment, welder, repair and rebuilding
Forklift, tractor trailer and welder for food warehouse.
Header-machine shop maintenance, and electrical.
Water filtration systems builder, installer, including threading stainless steel, PVC pipe and hueprint assembly.
Heating and air conditioning technician, including ductwork.

AF 497. In the final determination, the CO concluded that the applicant's experience from 1999 to the present satisfied the Employer's requirement of "'shipyard experience' in the job offered." AF 257. Other than quoting the experience described in the resume and the Employer's description of the position's duties, the CO offered no explanation for this finding. AF 257. While the applicant reported over four years of experience in "shipyard repair," his resume does not indicate that this experience included laying out, fabricating, installing, maintaining, or repairing pipe systems aboard vessels or at the shipyard. While the applicant's experience in maintaining piping at an asphalt factory, installing piping for new homes, and building water filtration systems appears relevant to the position, his resume does not indicate that he possesses experience in the specific job offered. Based on the limited information in the record, I find that the CO erred in concluding otherwise.

The CO could have found that, notwithstanding the Employer's requirements, the applicant qualified for the position. *See* TEGL No. 21-06, Change 1, Attachment A, Section V.A.2. Similarly, the CO could have found that the Employer's requirements were "unduly restrictive or represent a combination of duties not normal to the occupation." *See* TEGL No. 21-06, Change 1, Attachment A, Section V.A.4.e. The CO did neither. Since he based his determination solely on the fact that the applicant met the Employer's experience requirement, I cannot affirm his denial.

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

For the Board:

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JOHN M. VITTONE
Chief Administrative Law Judge