



**Issue Date: 07 October 2009**

**BALCA Case No.: 2009-TLN-00097**

ETA Case No.: C-09211-45998

*In the Matter of:*

**TRIANGLE MAINTENANCE SERVICE, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Daniel Campbell  
Workforce Compliance Services  
Brandon, Mississippi  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Vincent C. Costantino, Senior Trial Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

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 ("CO") 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 (2009). Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). § 655.33. The administrative review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and "such evidence as was actually submitted to the CO in support of the application." § 655.33(a), (e).

### **STATEMENT OF THE CASE**

On July 30, 2009, the Employment and Training Administration ("ETA") received an application from Triangle Maintenance Service, LLC, ("the Employer") requesting temporary labor certification for 25 Cement Masons and Concrete Finishers from October 1, 2009, through May 31, 2010. (AF 60-108).<sup>1</sup> The application contained the following statement of temporary need:

Triangle Maintenance Service is in desperate need of 25 temporary, fulltime concrete finishers so we can fulfill our contractual obligations. We have not been able to find workers to supplement our permanent workforce, and it is critical that we do as soon as possible in order for us to have the workforce needed to complete many jobs we have, as of yet, been unable to complete, and in some cases, even start the jobs. The need for these temporary workers stems from the drastic weather patterns we have seen in Mississippi. It was extremely wet this winter which caused us to get behind, now it has been extremely humid, neither of which are the best conditions for pouring concrete. Therefore, we are in need of temporary assistance from additional full time workers.

We were aware that hiring additional temporary, full time workers was necessary, however we had no idea that weather conditions would postpone job start dates for such an extended period of time. This fact has magnified our needs because we now must find that these temporary, full time workers did not exist locally. We have advertised state wide in excess of two weeks using the internet, MDES, and newspaper classifieds. We received only two applications.

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

We have only been able to begin a few of our projects due to our workforce shortage and the weather. Without these 25 temporary, full time positions being filled quickly, we will lose or be forced to forfeit contracts, and, in turn, lose future business. People in our line of work rely on the reputation of contractors, such as Triangle Maintenance Services, to complete jobs in a professional, timely manner. If we are unable to fulfill these 25 temporary, full time positions, it is very possible that the reputation which has taken us many years to build will be extremely tarnished, if not destroyed. We work almost exclusively for local, state, and federal entities (as seen in the attached contracts and itinerary). Not only do we need these contracts to stay in business, but our local communities, state, and nation are relying on us.

(AF 60, 71).

On August 5, 2009, the CO issued a *Request for Further Information* (“RFI”), finding that the Employer “failed to include an adequate attestation that justifies the employer’s requested temporary need.” (AF 55-59). Upon review of the Employer’s application history, the CO noted “the employer previously applied for and received certification C-09111-45063 for 24 Cement Masons and Concrete Finishers in the same area of intended employment for the dates of May 1, 2009 through December 31, 2009.” (AF 57). The CO contended, “The employer’s requested dates of need in the current application in combination with the employer’s previous application history shows a continuous year round need, and does not justify a temporary need.” (AF 58).

The CO directed the Employer to submit evidence that established that the nature of its need was temporary. The CO specified that the detailed statement of temporary need contain: a description of the Employer’s business history, activities, and annual schedule of operations; an explanation regarding why the nature of the job opportunity and number of workers requested reflect a temporary need; and an explanation regarding how the certification request meets one of the aforementioned regulatory standards of temporary need. (AF 57). Additionally, the CO instructed the Employer to submit supporting evidence and documentation justifying the chosen standard of temporary need, which must include: signed work contracts; letters of intent from clients or previous monthly invoices showing work will be performed for each month during the requested period of need; annualized or multi-year work contracts or agreements, specifying the

actual dates of work; and summarized and signed monthly payroll reports for a minimum of one previous calendar year, which indicate the total number of workers employed, the hours worked, and the total earnings received. (AF 58). The CO also asked for evidence that the Employer complied with the regulatory recruitment requirements.

The CO received the Employer's response to the RFI on August 25, 2009. (AF 16-54). The Employer's response included: evidence of the Employer's job order, including a screen shot of the job order; a copy of the Employer's newspaper advertisement; documentation showing examples of rainfall in various parts of Mississippi; copies of subcontract agreements between the Employer and several construction companies; a contractor's certificate; a copy of a purchase order; a certificate of liability insurance; and copies of e-mails between the Employer and the Department of Labor discussing receipt of the RFI. *Id.* The Employer did not provide any documentation relating to its temporary need.

On September 11, 2009, the CO issued a Final Determination denying certification for the job opportunities. (AF 11-15). The CO stated that the Employer failed to establish that the nature of its need was temporary. Specifically, the CO stated, "the employer's requested dates of need in the current application create a need beyond ten (10) months in combination with the employer's previous application history, which does not justify a temporary seasonal need." (AF 13). The CO further asserted:

The aggregate period of need is one (1) year and thirty (30) days for which the employer has applied and/or advertised for temporary labor certifications for the position of Cement Masons and Concrete Finishers/Concrete Stone Finishers in the same are of intended employment. The employer's past and present filing activity, therefore, establishes a clear pattern which demonstrates that the nature of the employer's need for the services or labor to be performed is permanent; not temporary.

(AF 15). The CO also contended that the Employer's RFI response failed to adequately explain why the application does not create a permanent, year-round need for temporary workers. The CO explained that even if the weather did prevent the employer from being able to fulfill its contractual obligations, this does not negate the fact that the employer

applied for and received labor certification therefore establishing a temporary need during its previously requested dates of need. *Id.*

On September 22, 2009, BALCA received the Employer's request for administrative review. (AF 1-10). In this request, the Employer argued that its need for temporary workers did not create a need beyond 10 months. Specifically, the Employer asserted:

TMS agrees that, if the previous ETA Form 9142, which was submitted in April 2009, would have been approved, then the total number of months, if one includes the time for which temporary workers were unable to be hired due to the statutory cap limit being reached, would exceed 10 months.

(AF 2). The Employer noted that it applied for 25 visas in April because it had received information that visas were available; however it turned out that there were no H-2B visas available since the cap had already been reached. (AF 3).

The Board issued a Notice of Docketing on September 24, 2009. The Employer filed a brief on October 5, 2009, arguing that the nature of its positions is indeed temporary. The Employer contended:

The Certifying Officer's assessment does not reflect that the workers, for which the company was initially granted temporary labor certification, were never hired by the employer due to the fact that there were no temporary work visas available for the dates of the intended employment reflected in the initial approval.

The CO filed a brief on October 6, 2009, arguing that the Employer failed to document its temporary need. The CO asserted that there was a clear pattern by the employer which showed a need for permanent workers, not temporary workers. Additionally, the CO contended that the Employer did not show a comparison between its permanent work force and its need for temporary workers.

## **DISCUSSION**

Since the Employer failed to provide sufficient evidence that established a temporary need, the CO correctly denied certification. Because my review is limited to the record before the CO when he made his Final Determination, I am unable to consider the Employer's additional arguments in its request for review and appellate brief. 20 C.F.R. § 655.33(a)(5).

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b). Absent unusual circumstances, the Secretary will deny an application where the employer has a recurring, seasonal or peakload need lasting more than 10 months. 20 C.F.R. § 655.6(c). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

Upon reviewing the record and the parties' legal arguments, I concur with the CO that the Employer failed to provide sufficient evidence or documentation that established a temporary need for Cement Masons and Concrete Finishers in response to his RFI. The RFI clearly notified the Employer that it had failed to establish the nature of its temporary need. Moreover, the CO specifically referred to the Employer's application history, which showed that the Employer's requested dates of need in its current application in combination with the Employer's previous application showed that the Employer had a continuous year round need, as opposed to a temporary need. The Employer's response to the RFI included several of the requested documents but did not address the CO's concern regarding the nature of its temporary need. Accordingly, under 20 C.F.R. § 655.6, the CO denied certification.

Although the Employer asserted in its request for review and its appellate brief that it never actually hired workers subsequent to its H-2B certification in April due to the fact that there were no temporary work visas available, I am not able to consider this

information in my review.<sup>2</sup> Under 20 C.F.R. § 655.33(a)(5), my review is limited to the record before the CO when he made his Final Determination. Therefore, I find that the Certifying Officer's denial of labor certification was proper.

**ORDER**

Based on the foregoing, **IT IS ORDERED** that the CO's denial of certification is **AFFIRMED**.

For the Board:

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

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<sup>2</sup> Had the Employer made this argument in its response to the CO's RFI, I would be able to consider it.