



Issue Date: 22 April 2009

BALCA Case No.: 2009-TLN-00049
ETA Case No.: C-09007-44021

In the Matter of:

WORKPLACE SOLUTIONS 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 2, 2008, the Louisiana Department of Labor ("LDL") received an application from Workplace Solutions LLC ("the Employer") requesting temporary labor certification for 400 welder-fitters from April 1, 2009, through February 1, 2010. *See* AF 276-77.¹ The Employer attached, *inter alia*, a statement from its vice president that described its peakload need for additional workers during the period. AF 279-80. The statement included, in pertinent part, the following:

¹ Citations to the 285-page Appeal File will be abbreviated "AF" followed by the page number.

Workplace Solutions LLC (TIN 72-0449902), is a Louisiana Limited Liability Company, established in 1998. Our company is the supplier of labor for marine, petrol/chemical and most other industrial businesses located in the Southeast Louisiana area.

The United States is facing a severe energy crisis impacting both the natural gas and oil production industries. As a result, the businesses serving these industries are experiencing an increase in the demand for drilling and production of these natural resources. These are some of the main industries that we serve. Their needs become our needs as they look to us to add temporary support to their permanent workforce. Because of this upsurge in activity involving the oil and gas industry, we have received numerous requests to supply temporary workers to these companies to help them fulfill their many contractual obligations during this projected boom in production. In particular, we have received a written request from Bollinger Shipyard to fulfill an order for 400 welder-fitters for a 10-month period beginning April 1, 2009. Therefore, we contend that our need is a peak load need.

Due to our inability to locate U.S. workers to fill these temporary positions, we have been constrained from bidding on certain jobs for lack of workers to fulfill the workload necessary to complete the job under contract. Therefore, we have an urgent need for 400 welder-fitters covering the period of 04/01/2009 – 02/01/2010, in order to meet this peak load demand.

Our company employs permanent workers, however, we must supplement our permanent workforce with temporary workers because of the described need. These temporary workers will not become a part of our permanent workforce. They will work for the length of the prescribed dates of need, will be paid in accordance with the prevailing wage, and will return to their home country at the end of employment.

AF 279-80. The Employer also submitted monthly payroll summary reports for 2007 and 2008. AF 281-82. These reports indicate that the Employer maintains a small staff of between three and nine permanent welder-fitters. They also indicate that the Employer staffed between 82 and 136 temporary welder-fitters from April through October of 2008. Last, the Employer included its “Labor Supply Contract” (“the Contract”) with Bollinger Shipyards Inc. (“the Client”). AF 283-84. The Contract, which is quite brief, provides that the Employer will supply 400 welder-fitters to the Client between April 1, 2009, and February 1, 2010. AF 283.

After submitting its application, the Employer underwent supervised recruitment of U.S. workers, and LDL transmitted the application to the Department of Labor’s Employment and Training Administration (“ETA”). See AF 221-75. On February 2, 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 multiple deficiencies requiring remedial action. As several do not relate to the CO’s ultimate bases for denial, they do not warrant discussion here. Relevant to this appeal, the CO found that the Employer “did not submit supportive documentation that justifies its temporary need for alien labor certification.” AF 219. He wrote that the 2007 and 2008 payroll summary reports fail “to demonstrate a recognizable peak in activity for the period of need requested.” The CO also found that the Contract “is

likewise inadequate to establish temporary need because it is not a legally binding document establishing bona fide job offers and is not specific to the, [sic] job duties listed in Item 13, and fails to give specific work location[s] at which work will be performed.” Along those lines, he observed that neither the application nor the Employer’s statement of temporary need listed specific worksite locations. The CO also wrote that the Employer failed to “provide adequate documentation as a Job Contractor to determine the need of the job contractor, not the need of the job contractor’s clients.” Last, the CO wrote that the Employer failed to “adequately explain the nature of the temporary need based on the employer’s business operations.” AF 220. 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

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 2008 as identified by the employer’s previously submitted payroll and staffing summary chart.

AF 219-20.

On February 11, 2009, the CO received the Employer’s response to the RFI. AF 13-216. The response included a payroll summary report that included information for the balance of 2008, 2008 W-2 forms, and reports that included the total hours worked and wages earned by each permanent and temporary welder-fitter employed during each month of 2008. The monthly reports contained combined totals for both categories of workers. The Employer also provided an amended version of its statement

of temporary need. Therein, the Employer's vice president wrote that the company had "entered into a legally binding Labor Supply Contract with Bollinger Shipyards to supply them with a total of 400 welder-fitters to work at their facilities in Lockport, Larose and Amelia, Louisiana, for a 10-month period beginning April 1, 2009." AF 197. Last, the Employer provided an amended version of the Contract that provided greater detail about the services the welder-fitters would provide the Client. AF 203-04. The Employer attached documents containing locations, dates, number of employees required, and tasks to be performed for the various contract projects. *See* AF 205-16.

On March 12, 2009, the CO denied the Employer's application on two relevant bases. AF 7-12.² First, citing TEGL No. 21-06, Change 1, Attachment A, Section III.G, the CO explained that he denied the application because the Employer "requires temporary workers to engage in different services." AF 11. The CO observed that workers assigned to three of the locations would engage only in vessel repairs and workers assigned to the fourth location would perform both vessel repair and construction. AF 11. Second, the CO wrote that "the payroll reported and the IRS W-2 forms did not match." AF 12. As "an example," the CO cited "full time temporary employee F. Galdariez," whose W-2 allegedly indicates he earned approximately \$10,000 less than the Employer claimed he did in the payroll reports. AF 12. He therefore found that "the documentation is unverifiable and does not support the need for temporary workers." AF 12. 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, 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 requests that I remand the matter to permit an appeal to USCIS. 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 deny the Employer's remand request.

² The CO denied the application on additional bases but reported in his April 8, 2009, brief that, "[a]fter further consideration," he "concluded that he is no longer relying" on those bases.

The Certifying Officer's Bases for Denial

As discussed above, the CO urges affirmance based on two of the reasons set out in the final determination. First, the CO found that the Employer impermissibly requires welder-fitters “to engage in different services” because workers assigned to one of the project locations would engage in vessel construction in addition to vessel repair. The CO cited TEGL No. 21-06, Change 1, Attachment A, Section III.G, which allows employers to file a single application for multiple employees who would “perform the same type of work on the same terms and conditions, in the same occupation, in the same area(s) of intended employment during the same period.”³ Neither the final determination nor the CO’s brief addresses precisely how this provision applies to the instant application. It seems that welder-fitters who “[u]se hand-welding or flame-cutting equipment to weld or join metal components or to fill holes, indentations, or seams of fabricated metal products” engage in the “same type of work” regardless of whether they perform these tasks in support of vessel construction or vessel repair. *See* AF 199 (describing the position’s duties). As the CO failed to cite verifiable authority for his action, I cannot affirm his denial on the first basis.

Second, the CO found that the Employer’s payroll documentation “is unverifiable and does not support the need for temporary workers.” The CO described how the W-2 for “full time temporary employee F. Galdariez” suggests that he earned approximately \$10,000 less than the Employer claimed he did in the payroll reports. The Appeal File contains no documentation for a temporary employee by that name, although it does contain documentation for a *permanent* employee named Felipe Galdamez. *See* AF 44-45. While there is a \$9,022 discrepancy between Mr. Galdamez’s W-2 and the Employer’s entries on the payroll report, this was the only error I found for any of the temporary or permanent employees I randomly selected. A single error hardly invalidates the Employer’s otherwise thorough documentation. Moreover, the manner in which the Employer has used the payroll reports to establish a temporary need under the peakload standard undermines the CO’s decision. To establish a peakload need, the Employer must show 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 21-06, Change 1, Attachment A, Section II.D.3 (emphasis in original). The Employer used the payroll reports merely to demonstrate that it has a permanent staff that it sometimes supplements with temporary workers. That the Employer may have committed calculation errors in preparing its payroll reports hardly places these propositions in doubt. I therefore cannot affirm the CO’s decision on this basis either.

³ The TEGL provides the procedures for processing the application at issue in the instant case. *See* 72 Fed. Reg. 38,621 (July 13, 2007).

Special Analysis for Job Contractors

While I have found that neither of the bases relied upon by the CO warrants affirming his denial, the record raises another issue that ultimately requires that I remand this matter for additional proceedings. In *Callabero Contracting & Consulting LLC, supra*, slip op. at 14-17, I discussed how, despite the now-dated language of TEGL No. 21-06, Change 1, Attachment A, Section III.C, the CO must consider the temporal nature of both the job contractor's and its client's needs when evaluating a job contractor's application for temporary labor certification.⁴ In a supplemental brief filed in that case, the CO explained why ETA has historically considered the needs of both parties to a labor-services contract and why the TEGL's guidance on processing job contractors' applications was inadequate. *See Callabero Contracting & Consulting LLC, supra*, slip op. at 8-11.⁵ In short, failing to consider the nature of the client's need precludes the CO from determining whether the opportunity is truly temporary and whether H-2B certification is appropriate. Specifically, a job contractor's client could satisfy a permanent need for workers through repeatedly using short-term contracts with job contractors to obtain temporary foreign labor. In turn, this practice could deprive the domestic workforce of desirable permanent job opportunities.

In the RFI, the CO found that the Employer, who qualifies as a job contractor, "did not provide adequate documentation as a Job Contractor to determine the need of the job contractor, not the need of the job contractor's clients." AF 219. The CO's statement indicates that he did not assess the temporary nature of the Client's needs for the welder-fitters. Furthermore, the record lacks sufficient information to allow me to determine the temporal nature of the Client's labor needs. Since the CO explicitly requested documentation regarding the nature of the Employer's need alone—and the TEGL misleadingly states that the CO will evaluate only the job contractor's needs—the Employer should have an opportunity to supplement the record with evidence of the nature of the Client's need. Accordingly, I will remand this matter to the CO in order for him to receive additional evidence on this issue alone. After considering the Employer's additional evidence, he should either grant certification or issue another RFI.

It is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for further proceedings consistent with this decision.

For the Board:

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JOHN M. VITTON

⁴ The TEGL provides that "[j]ob contractors typically supply labor to one or more employers as part of signed work contracts or labor service agreements. The temporary or permanent nature of the work to be performed in such applications will be determined by examining the job contractor's need for such workers, rather than the needs of its employer customers."

⁵ Consistent with the manner in which the CO normally conducts this analysis, the regulation that will be codified as 20 C.F.R. § 655.6(d), available at 73 Fed. Reg. 78,055-56, requires consideration of both the job contractor's and the client's needs.

Chief Administrative Law Judge