



**Issue Date: 10 August 2009**

**BALCA Case No.:** 2009-TLN-00074  
**ETA Case No.:** C-09121-45101

*In the Matter of:*

**WORKPLACE SOLUTIONS 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 ("the 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).

#### **Statement of the Case**

At the outset, I incorporate by reference the recitation of the facts contained in my April 22, 2009, decision, which was issued under case number 2009-TLN-49. AF 57-62.<sup>1</sup> In that decision, I found that neither of the bases relied upon by the CO on appeal warranted affirming his denial of the application. I also noted that the CO failed to properly analyze whether Workplace Solutions LLC ("the Employer"), a job contractor, had established a temporary need for the labor sought. Citing *Callabero Contracting & Consulting LLC*, 2009-TLN-15, slip op. at 14-17, (BALCA Apr. 9, 2009), I discussed how, despite a contrary statement in Training and Employment Guidance Letter ("TEGL") No. 21-06,

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<sup>1</sup> Citations to the 357-page Appeal File will be abbreviated "AF" followed by the page number.

Change 1, Attachment A, Section V.B (June 25, 2007), 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.<sup>2</sup> The CO did not assess the nature of the needs of the Employer's client, Bollinger Shipyards Inc. ("the Client"). Indeed, the CO explicitly requested documentation regarding the Employer's need alone. Since the record lacked sufficient information to allow me to determine the temporal nature of the Client's labor needs, I remanded the case so that the Employer could supplement the record with evidence of the nature of its client's need. The remand instructions directed the CO to receive additional evidence on this issue alone.

On May 19, 2009, the CO issued a Request for Information (RFI) identifying two deficiencies requiring remedial action. AF 53-56. First, the CO wrote, "In its temporary needs statement, the employer does not adequately explain the nature of the temporary need based on the employer's business operations." The CO therefore requested a statement explaining why the job opportunity and number of workers being requested reflected a temporary need, and how the Employer's request for the labor met one of the regulatory need standards. Second, the CO wrote, "The employer did not submit supportive documentation that justifies its temporary need for alien labor certification." The CO requested supporting evidence to justify the chosen standard of temporary need. The CO listed the following as possible examples of such evidence: signed work contracts, letters of intent, monthly invoices, and summarized monthly payroll reports identifying both full-time and temporary workers for previous years.

On May 26, 2009, the Employer submitted a response that included a revised statement of temporary need, a copy of the April 22 decision, and a chart prepared by the Client. AF 40-52. The chart lists the Client's "Scheduled and Forecasted Jobs" in order of the date of anticipated completion from April 2009 through February 2010. It includes the name of each vessel and the estimated number of weeks required to complete each job. The Employer noted that the RFI was "unduly broad in its request," and that the prior decision clearly stated that it should "supplement the record with evidence of the nature of the client's needs." The Employer stated that it was submitting evidence of its client's peakload need in the form of the attached chart. The Employer asserted that the chart "clearly shows work that ramps up in April 2009 and tapers off through the end of February and into March and April when the backlog of jobs are completed."

On June 12, 2009, the CO issued a second RFI. AF 36-39. The CO found that the chart submitted in response to the prior RFI "fails to demonstrate that the business activity represents a peak above and beyond the permanent activity and staffing levels of both the employer and its client(s)." The CO added that, "[w]ithout contextual information (including staffing or business activity information) for the period(s) during which the employer claims a peak does not exist, the Certifying Officer cannot determine whether the employer or its client(s) have a peak load need for the dates requested." The CO also found that the Employer's repeated statements that its temporary need is ultimately attributable to a severe energy crisis were "inadequate to establish that the need of the employer, a job contractor, or its client(s) is, in fact, temporary." The CO requested that the Employer submit additional evidence justifying how its and its clients' needs are directly affected by the energy crisis as asserted in its

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<sup>2</sup> The TEGL provide 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."

temporary need statements of November 19, 2008, February 9, 2009, and May 22, 2009. The CO asserted that the evidence must demonstrate that the number of worker positions being requested for certification represents bona fide job opportunities for the entire period of intended employment. The CO also wrote that the Employer “must provide documentation that the requested dates of need represent a peak period within the ongoing business operations of both the Employer and its client(s).”

On June 22, 2009, the Employer submitted a letter of explanation and a graph. AF 20-22. In the letter, the Employer explained that the graph depicts the number of workers directly employed by the Client versus the number of workers actually needed between December 2008 and February 2010. The Employer observed that the number of workers employed directly by the Client varied only slightly, while the number of workers needed for ship construction and repair peaks from April 1, 2009, through February 1, 2010. The Employer wrote that “[t]his labor shortfall trends upward for much of the period of the asserted peakload need and tapers off in February 2010, consistent with workload presented in the . . . forecasted job chart.” The Employer also noted that the Client “has no newly scheduled work for January, February or March of 2010.” The chart itself indicates that the Client projected directly employing 540 workers in December 2008, 543 in January 2009, 550 in February 2009, 567 in March 2009, 578 in April 2009, 586 in May 2009, 594 in June 2009, 602 in July 2009, 610 in August 2009, 616 in September 2009, 620 in October 2009, 628 in November 2009, and 630 from December 2008 through February 2009. The chart also indicates that the Client projected requiring a total of 1252 workers in December 2008, 1090 in January 2009, 1141 in February 2009, 1233 in March 2009, 1229 in April 2009, 1284 in May 2009, 1284 in June 2009, 1364 from July through September 2009, 1334 in October 2009, 1274 in November and December 2009, 1181 in January 2010, and 1088 in February 2010.

On July 6, 2009, the CO issued a Final Determination, denying the Employer’s application. AF 12-16. The CO stated that the reason for denial was the Employer’s “[f]ailure to submit adequate documentation to support the employer’s temporary need as a job contractor.” The CO contended that the Employer’s previously submitted letters, which asserted that a “severe energy crisis” caused an increased need for temporary workers in the oil and gas industry, were inadequate to establish that the Employer’s or the Client’s need was temporary. Regarding the Employer’s chart of forecasted jobs, the CO asserted that the document fails to demonstrate that the business activity from April 1, 2009, through February 1, 2010, “represents a peak above and beyond the permanent activity and staffing levels of both the employer and its client(s).” The CO explained that the documentation provided by the Employer was inadequate to establish that the Employer or its client has a temporary peakload need for the number of workers requested or for the dates of need identified. The CO contended that the graph listing the Client’s labor needs contains “no explanation as to the source of its data and no signature attesting to its validity or accuracy.” Additionally, the CO noted that the graph indicated that the Client would need more than 450 additional workers on a year-round basis. The CO found that “[t]he minimal documentation provided by the employer consists of unverifiable projections that reveal an excessive need for hundreds of year-round workers above and beyond the employer’s client’s permanent staff.” He further stated that “[t]his strongly suggests that the employer’s sole client is attempting to satisfy a permanent need for workers through repeatedly using short-term contracts with multiple job contractors to obtain temporary foreign labor.”

On July 16, 2009, the Employer requested administrative review. AF 1-6. In its request for review, the Employer asserted that the CO’s RFIs exceeded the scope of the remand instructions by requesting documentation that did not relate to the nature of the Client’s need. The Employer argued

that the CO unduly burdened it by requesting evidence to establish the temporal nature of the Employer's need instead of focusing solely on the Client's need. The Employer also claimed that the CO erred in concluding that the Employer failed to establish that the Client's need is temporary. The Employer explained that the vessel completion schedule "clearly shows the short length of time [the Client] expects to complete repairs for each vessel" to be April 2009 through February 2010. The Employer also asserted that the graph shows that the Client "maintains a full permanent workforce but requires to supplement its staff with temporary workers as it has a peakload period between April 2009 to February 2010 where an increase of manpower (welder-fitter) are needed to complete the repairs consistent with the workload presented in the vessel forecast completion schedule." Regarding the graph's authenticity, the Employer asserted that these graphs are not normally signed, and that the graph was consistent with the previously submitted vessel completion schedule prepared by the Client.

On July 27, 2009, BALCA issued a Notice of Docketing. On August 3, 2009, the CO filed a brief. In this brief, the CO reiterated his argument that the Employer did not establish that its need or its client's need for workers was a temporary peakload need.

### Discussion

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. *See* TEGL No. 21-06, Change 1, Attachment A, Section II.D.<sup>3</sup> In the instant case, the Employer has attempted to establish a peakload need for temporary labor. To establish a peakload need, an employer must demonstrate that:

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 that the temporary additions to staff will not become a part of the petitioner's regular operation.

8 C.F.R. § 214.2(h)(6)(ii)(3). Due to the Employer's status as a job contractor, it is necessary to evaluate the Employer's "own need for the services or labor to be performed in addition to the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement." 20 C.F.R. § 655.6(d) (2009).<sup>4</sup>

The CO properly denied certification based on the evidence submitted to establish the temporal nature of the Client's need.<sup>5</sup> The Client's chart of forecasted jobs is limited to the period for which the

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<sup>3</sup> The regulations that became effective January 18, 2009, do not govern the instant application, which the Employer filed on December 2, 2008. Rather, 20 C.F.R. Part 655, Subpart A (2008) and TEGL No. 21-06 provide the procedures for processing the Employer's application. *See* 72 Fed. Reg. 38,621 (July 13, 2007).

<sup>4</sup> In *Callabero Contracting & Consulting LLC*, *supra*, slip op. at 14-17, I discussed how, despite the contrary 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. 20 C.F.R. § 655.6(d) (2009) codified the CO's change in policy.

<sup>5</sup> I express no opinion on the Employer's argument that, by rejecting the denial bases relied upon by the CO on appeal, I found that the Employer had established its own peakload need in my April 22, 2009, decision. I also decline to address the

Employer has requested certification. *See* AF 44-45. The chart therefore lacks any context with which to evaluate whether the Client has an increased need for welder-fitter labor due to a seasonal or other short-term demand during the requested period.

By including data for the four months preceding the period requested, the Client's graph of projected labor needs offers some context. AF 22. Even assuming that a self-reported graph depicting projected labor needs could serve as supporting documentation, the Client's graph nevertheless fails to support the temporary need claimed here in several respects. For example, the Client's projections are not consistent with the number of workers or the period requested. In particular, the Client projected requiring 666 contract workers in March 2009 but only 651 in April 2009, the first month of the period in which the Employer claimed its only client would require 400 more welder-fitters than the Employer permanently supplies.<sup>6</sup> Based on the Employer's application, one would expect a sustained 400-man increase beginning in April 2009. Using March 2009 as a benchmark, the chart instead reflects a far more modest increase in the projected need for contract workers during only six of the ten months requested.

Furthermore, the graph does not appear to be specific to the type of labor sought by the Employer. The graph distinguishes only between the total number of workers directly employed by the Client and the Client's projections for additional labor needs. In failing to provide specific information regarding the client's need for welder-fitter labor, this document is too general to establish a temporary need for 400 welder-fitters.

Ultimately, the evidence submitted is insufficient to establish that there is a legitimate temporary need for the labor the Employer seeks to provide under the application. Accordingly, I must affirm the CO's denial.

### **ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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

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assertion that the CO's RFIs unduly burdened the Employer. Specifically, even if the CO had improperly exceeded the scope of the remand instructions, any error would have been harmless because the Employer made no attempt to comply with those portions of the RFI that it deemed to be excessive.

<sup>6</sup> In determining the number of contract workers required, I subtracted the value of the first column ("Bollinger Head Count") from the second column ("Needs"). I admit that this calculation method is imperfect in that it fails to provide for the possibility that the Client's contract labor needs in other occupations could decrease and skew these figures. Given the limited information provided by the Employer, this method will have to suffice.