



Issue Date: 15 March 2010

BALCA Case No.: 2010-TLN-00051; 2010-TLN-00052; 2010-TLN-00053

ETA Case No.: C-10007-48582; C-10007-48583; C-10007-48585

In the Matter of:

HOSPITALITY STAFFING SOLUTIONS GROUP, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF
CERTIFICATION**

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

On January 7, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Hospitality Staffing Solutions

Group, LLC, (“the Employer”). AF 182-205.¹ The Employer requested certification for 30 “Maids and Housekeeping Cleaners” from February 15, 2010, until December 15, 2010. AF 182.² The Employer also indicated that the nature of its temporary need was peakload. *Id.* The Employer explained that its need was temporary because “[The Employer] provides clients with the best people to the hospitality industry where and when they are needed. [The Employer] specializes in providing service personnel to the hotel industry and is headquartered in Atlanta, Georgia, with four regional locations.” *Id.* The Employer also explained that “due to the nature of the hospitality/tourism industry in Biloxi, MS, [the Employer]has an annually recurring peak load need to employ janitorial personnel in order to fulfill agreements executed with our clients within the hospitality industry. In this particular case, we entered into an agreement with Beau Rivage Resort & Casino (“the Casino”).” *Id.* Also attached to the application was a letter from the Casino verifying the amount of workers needed. AF 204.

On January 13, 2010, the CO issued a *Request for Further Information* (“RFI”). AF 175-181. In the RFI, the CO identified multiple deficiencies, only one of which will be addressed on appeal. Citing to 20 C.F.R. § 655.6, the CO stated that the Employer failed to “establish that the nature of the employer’s need is temporary.” AF 177. The CO further asserted that the Employer did not submit “adequate supportive documentation justifying that (1) the need for services or labor to be performed is temporary in nature based on a seasonal peak load standard, and (2) the number of worker positions being request for certification is justified and represents bona fide job opportunities.” *Id.* The CO wrote:

The employer’s client, Beau Rivage Resort & Casino did not submit adequate supportive documentation justifying that the number of worker positions being requested for certification on the application is true and accurate and represents bona fide job opportunities. In the client’s prospective statement of need, it specifically states ‘attached please find supporting documentation establishing our peakload need.’ However, there were no such attachments to support this peakload need.

¹ The Employer submitted three virtually identical applications. References to 2010-TLN-00051 (ETA case number C-10007-48582) will be abbreviated as AF followed by the page number. References to 2010-TLN-00052 (ETA case number C-10007-48583) will be abbreviated as AF2 followed by the page number. References to 2010-TLN-00053 (ETA case number C-10007-48585) will be abbreviated as AF3 followed by the page number. Where appropriate, only one page number reference will be given.

² In 2010-TLN-00052 and 2010-TLN-00053, the Employer requested certification for ten “Maids and Housekeeping Cleaners” from February 15, 2010, until December 15, 2010. AF2 174; AF3 71.

AF 177. The CO also noted that the Employer failed to attach the contract between itself and the Casino. AF 178.

The CO directed the Employer to submit a revised, detailed statement of temporary need containing 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. *Id.* The CO instructed the Employer to submit the following: 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. *Id.* The CO also indicated that the Employer should submit "additional evidence on behalf of its client . . . justifying that the need of [the Casino] . . . is temporary in nature." *Id.* As evidence of temporary need, the CO directed the Employer to submit payroll reports for a minimum of one previous year that identified, "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."³ *Id.*

On January 21, 2010, the Employer submitted a response to the RFI. AF 59-174. In its addendum to its statement of temporary need, the Employer asserts:

In support of [the Employer's] assertion of its peakload need . . . please find summarized monthly payroll reports for both [the Employer] and [the Casino], clearly demonstrating a temporary need for temporary workers by clearly delineating the tourist season in Biloxi, Mississippi. The charts demonstrate that generally, more employees are hired (on a temporary or permanent basis) or more employees work overtime during the period between February to December. . . . We also bring to your attention that a letter from [the Casino] was submitted along with the original petition. The letter, a copy of which is attached . . . provides sufficient detail to show that work will be performed each month during the requested period of need.

³ All three applications contained identical Requests for Information.

AF 61. The Employer included payroll summaries for the 2009 and 2010 Calendar years for permanent employees only:

Month	Total Workers	Total Hours Worked	Total Earnings Received
January 2009	102	17,280	\$151,201.80
February 2009	94	27,177	\$237,805.30
March 2009	113	14,280	\$124,954.20
April 2009	104	13,840	\$121,103.10
May 2009	107	13,941	\$113,238.90
June 2009	111	11,885	\$103,991.50
July 2009	89	16,650	\$145,685.00
August 2009	74	10,517	\$92,029.34
September 2009	82	9,835	\$86,063.73
October 2009	74	9,836	\$89,978.98
November 2009	85	11,286	\$98,754.23
December 2009	90	11,912	\$104,234.14
January 2010	135	22,808	\$199,574.85
February 2010	127	33,002	\$288,776.46
March 2010	146	19,718	\$172,539.83
April 2010	137	19,265	\$168,573.19
May 2010	140	18,339	\$160,473.07
June 2010	144	17,251	\$150,948.25
July 2010	122	22,159	\$193,892.55
August 2010	106	15,843	\$138,627.22
September 2010	114	15,140	\$132,482.64
October 2010	106	15,601	\$136,515.35
November	118	33,419	\$292,423.88
December	123	17,280	\$151,198.16

AF 80⁴. The Employer did not indicate if it employed any temporary employees during the period covered. *Id.* The Employer also included payroll information from the Casino. The payroll for the 2009 year indicated that the Casino employed temporary workers in January and February only.⁵ AF 81. During the summer peakload, the Casino did not use temporary workers. *Id.* Further, the Casino's busiest month in terms of total workers and total earnings was April. *Id.* The other months, including the non-peakload month of January were relatively stagnant and held within the same range. *Id.*

On February 9, 2010, the CO issued a *Final Determination* denying the Employer's application on a single ground. AF 53-58. Citing 20 C.F.R. § 655.6, the CO noted that "the temporary nature of the services or labor to be performed in applications filed by job contractors will be determined by examining the job contractor'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." AF 55. The CO found that the Employer failed to "submit adequate documentation to justify that (1) the need for services or labor to be performed is temporary in nature based on a peakload standard, and (2) the number of worker positions being requested for certification is justified and represents bona fide job opportunities." AF 55. The CO stated that "the burden of establishing that its need for nonagricultural services or labor is temporary based on a . . . peakload need . . . lies solely with the employer." AF 57. Although the Employer submitted payroll summaries, the CO found that they did not satisfy the requirements of § 655.6 because "the employer's payroll report does not provide any information

⁴ The Employer provided slightly different data for 2010-TLN-00052 and 2010-TLN-00053. The payroll information for 2010-TLN-00052 demonstrated that the highest total numbers of workers used as well as the most total hours worked occurred in the non-peakload month of January. AF2 82. This trend is evident in both years that the Employer submitted payroll information. *Id.* The remainder of the year, the total number of workers and the total number of hours worked remained virtually the same. *Id.* The payroll information for 2010-TLN-00053 demonstrated that the highest total numbers of workers used as well as the most total hours worked occurred in July. AF3 31. However, with the exception of June-September, the number of workers needed and the number of hours worked were virtually identical. *Id.* The non-peakload month of January used one less worker than the "peakload" months of March and April. *Id.* In February, the Employer actually used one less worker than in the month of January. *Id.* Taken as a whole, the Employer used the same average number of employees and hours throughout the year, with the exception of June-September. *Id.* This trend is evident in both years that the Employer submitted payroll information. *Id.*

⁵ The Employer indicated in the chart for 2010-TLN-00052 that the Casino did not use any temporary workers for the calendar year 2009. AF2 83. However, for the calendar year 2008, the Casino used temporary workers in January, February, March, October, November, and December. *Id.* Additionally, the Casino employed the fewest workers in 2008 during January–March, although the difference in the months is minimal. *Id.* The Employer indicated in the chart for 2010-TLN-00053 that the Casino did not use any temporary workers for the calendar year 2008. AF3 81. However, for the calendar year 2008, the Casino used temporary workers in January, February, March, October, November, and December. *Id.* Additionally, the Casino used the fewest employees in January through March. *Id.* In January, during the non-peakload season, the Employer only used 10 workers. *Id.* At its highest point during the peakload months, the Employer used 18 employees. *Id.*

regarding temporary employment by the company.” *Id.* The CO further noted that although the Casino’s report did indicate whether it used temporary workers, the “payroll report provided by [the Casino] does not support that it has a temporary need.” *Id.* Since the CO determined that the Employer did not have a temporary need, the CO denied certification. *Id.* The Employer’s appeal followed.

The Employer asserted in its brief and in its request for review, that the CO failed to view the “totality” of the payroll reports but rather placed too much emphasis on the amount of temporary workers used by the Employer and the Casino. AF 3. Instead, the Employer urged the board to focus on the total number of hours worked and the total payroll expenses. *Id.*

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. 20 C.F.R. § 655.6(b). While an applicant need only submit a detailed statement of temporary need at the time of the application’s filing, failure to provide substantiating evidence or documentation in response to the CO’s RFI “may be grounds for the denial of the application.” § 655.21(b).

In the present case, the Employer attempted to establish a peakload need. To establish a peakload need, “the petitioner must establish 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 staff will not become part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). To determine the temporary nature of work or services to be performed under applications filed by job contractors like the Employer, the CO must examine the “job contractor’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). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

The documentation provided by the Employer failed to establish a peakload need. While the CO did focus on the fact that the Employer did not indicate that it used temporary laborers in the past during the peakload months, even if the Board looks only to the total workers, total hours worked, and total earnings received, the Employer has failed to clearly delineate that it has an increase in business, and therefore a need for additional labor, from February 15 to December 15. For the chart labeled Calendar Year 2010,⁶ the total number of workers used is actually more in the non-peakload month of January than for the rest of the “peakload” period. Additionally, while the total hours worked are the most in November (33,419 hours), the rest of the chart indicates that again, the difference between the peakload months and the non-peakload months is very little. In fact, the month of January has more total hours worked than the majority of the “peakload” months. The information for the 2009 Calendar Year indicates that the same pattern occurs. The busiest month in terms of total workers was from January through June. Likewise, the total hours worked was highest in January, February, and July. The overall difference between any given month is slight.

Based on the Employer’s application, to qualify for a peakload need, the Employer would have to show that it had a short term demand or need for workers from February to December. However, the Employer’s payroll charts indicate that the Employer does not have a short term demand for workers during the time period requested but rather a general need for employees year round.⁷ Because the Employer failed to submit adequate documentation to evidence a temporary need, the CO properly denied certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

⁶ It is hard to determine which year the 2010 chart covers, since it lists data for months that have not occurred. However, I will assume that the 2010 chart is really for the year 2009, and the 2009 chart is really for the year 2008. It does not really matter since neither indicated that the Employer had a peakload need.

⁷ Since the Employer has failed to evidence a temporary need, it is irrelevant whether the Casino has a temporary need.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge