



Issue Date: 26 March 2010

BALCA Case No.: 2010-TLN-00055

ETA Case No.: C-10021-48927

In the Matter of:

SOUTHERN PRECISION DEMOLITION, LLC,
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 20, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Southern Precision Demolition,

LLC, (“the Employer”). AF 47-103.¹ The Employer requested certification for 55 “Construction Laborers” from April 1, 2010, until November 30, 2010. AF 47. The Employer indicated on its application that it had a peakload need. *Id.* The Employer also explained that the company worked with schools and malls, both of which require the contractor to work around their schedule, which typically meant the Employer needed additional workers in the summer due to the holiday shopping season and the schools’ schedules. *Id.*

On January 27, 2010, the CO sent a *Request for Further Information* (“RFI”). AF 42-46. Citing to 20 C.F.R. § 655.21(a), the CO found that the Employer failed to “establish that the nature of the employer’s need [was] temporary.” AF 45. Specifically, the CO wrote: “the employer has not explained how the busy period, contractors it works for, and its sales justify a need for fifty-five (55) temporary workers.” *Id.* The CO requested that the Employer submit a description of its business activities and history and “an explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need. *Id.* (emphasis in original). The CO also requested that the Employer submit its signed contracts or work agreements “supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period.” AF 46.

The Employer responded to the RFI on February 3, 2010. AF 22-41. In its response, the Employer included payroll records from 2008 and 2009. AF 23-24. The 2008 records reflect that the Employer hired on average at least 85 workers per month, with a high in June of 223 and a low in September of 31. AF 23. However, the 2009 payroll records show a drastic downsizing from the previous year in both permanent and temporary workers. AF 24. On average, the Employer hired only 32 temporary workers in 2009, with a high in June of 110 and a low in September of only 8. AF 24. The Employer also noted in a statement to the CO that “in 2009 we did not have as many temporary workers as we could not find enough workers to support our contracts. This year with out current and pending contract[s] [,] we are expecting our needs to be where they were in 2008.” AF 25. The Employer also included six “letters of intent.” AF 35-41. The letters of intent are signed by six

¹ References to the 103-page appeal file will be abbreviated “AF” followed by the page number.

companies and simply agree with the Employer that the company and the Employer are in the process of negotiating a contract. *Id.* Specifically, the letter reads:

We are in the process of applying for our temporary workers. . . .Part of this process is justifying that we require temporary workers. . . .Since we have not yet finalized service contracts for the upcoming season[,] we are asking that you sign the following letter of intent. . . .It is understood that we still have to work out the final details of work to be performed along with costs associated, frequency of service and prepare appropriate contacts.

Id. The letters of intent do not discuss the amount of work to be performed, although each letter noted that the dates of the project were April 2, 2010, until November 30, 2010. *Id.*

On February 19, 2010, the CO denied the Employer's application. AF 17-21. Citing to 20 C.F.R. § 655.21(a), the CO found that the Employer failed to establish a temporary need. AF 19. The CO noted that the Employer had submitted letters of intent from six different companies, but "the employer has repeatedly made the point that these are not official contracts to perform the services requested." AF 20. Moreover, the CO also stated that based on the submitted documentation, he was "unable to determine if work, or even what type of work, will be available during the requested period of need." AF 21. Based on the Employer's failure to establish a temporary need, the CO denied certification. The Employer's appeal followed.

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). 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 payroll reports did evidence that the Employer has needed at least 55 temporary workers in the past, the most recent payroll records demonstrate that the Employer has a far smaller need. Moreover, had the Employer supplied valid contracts demonstrating an increase of work from the 2009 season, then perhaps it would have shown a temporary need. However, at this point, the Employer failed to submit a single valid contract. Each of the companies that signed the letters of intent could choose to not sign a subsequent contract if the company and the Employer cannot agree on terms. Further, even if all of the companies sign a valid contract, the CO had no basis for determining the amount of work each contract would produce, and by extension, how many workers the Employer would need.

The Employer argues in its request for review that if a contract were not available, letters of intent accompanied by payroll reports could be considered supporting evidence. AF 4. The Employer is correct that these types of documents may be used as support for a temporary need, but the documents presented in this case do not adequately establish a temporary need. The letters of intent fail to describe the amount of work needed, and the payroll report from the most recent year also did not support the Employer's request. Further, the Employer argued that the 2008 year was a more typical year than 2009, but again, the Employer did not evidence this claim. Had the Employer wanted to show that the 2008 year was more typical of the Employer's needs, then the Employer could have submitted payroll reports from prior years, demonstrating that every year, except for 2009, the Employer had a need for at least 55 workers. Ultimately, it is the Employer's burden to establish a temporary need, and the evidence before the CO falls short of this burden. 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**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge