



Issue Date: 23 June 2010

BALCA Case No.: 2010-TLN-00066

ETA Case No.: C-10112-49955

In the Matter of:

COVENANT HOSPITALITY,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **ROBERT RAE**
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 April 22, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Covenant Hospitality ("the

Employer”). AF 97-105.¹ The Employer requested certification for 31 “Maids and Housekeeping Cleaners” from April 1, 2010, until February 1, 2011. AF 95. The Employer also indicated that the nature of its temporary need was peakload. *Id.* The Employer explained that its need was temporary because “the hospitality employee needs in Florida is peakload based upon the increase of tourism during the months of December through August.” *Id.*

On April 28, 2010, the CO issued a *Request for Further Information* (“RFI”). AF 88-94. 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 90. The CO further asserted that the Employer had previous labor certifications that occurred as a peakload need during a different part of the year, and the Employer failed to “explain its change in period of need from its previous certification.” *Id.*

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; an explanation of why the number of workers requested decreased from the last certification; and an explanation regarding how the certification request met one of the aforementioned regulatory standards of temporary need. AF 91. The CO further instructed the Employer to submit the following: summarized and signed monthly payroll reports for a minimum of one previous calendar year which listed separately the number of temporary and permanent workers for each month, and also indicated the total number of workers employed, the hours worked, and the total earnings received. *Id.*

On May 5, 2010, the Employer submitted a response to the RFI. AF 58-87. In its response, the Employer asserted that it had trouble locating workers because the majority of occupants of Sarasota, Florida are retirees. AF 71. Further, the Employer argued that the drive into Sarasota was too costly for domestic workers, while the foreign workers did not mind the remote location since they had housing supplied on the island. *Id.* The Employer also noted that its business revolves around the tourist season, which occurs from April to February. *Id.* In explanation for the change in the date of need from the

¹ References to the 107-page appeal file will be abbreviated “AF” followed by the page number.

previous certification, the Employer stated that the change was due to “the economy” AF 75. Additionally, the Employer wrote that “the person whom we hired before held himself out to be an immigration practitioner and regrettably didn’t know what he was doing. He was mistaken and in this application we are seeking to cure those defects.” AF 67. The Employer also included a payroll statement, which detailed the hours worked between May 2009 and April 2010. AF 81. The report only included a total number of hours and does not delineate between permanent and temporary workers or include the total number of workers during each month. *Id.*

On May 19, 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 Employer failed to “justify its temporary need.” AF 54. More specifically, the CO stated that the payroll reports submitted by the Employer did not establish a temporary need because the report failed to delineate between the total number of temporary and permanent workers, the report failed to include the total number of workers or staff employed, and the report failed to include the total payroll paid during the previous calendar year. AF 56. Additionally, the CO noted that the payroll reports failed to list information for the months of January through March, “which makes it impossible to determine if the employer does in fact have a peakload need.” *Id.* The CO also stated that since the Employer “failed to provide a payroll report that identified, for each month separately [the] full-time permanent and temporary employment in the requested occupation . . . the employer’s statement is insufficient . . . to show that [the Employer] truly made a mistake in the dates it requested in its previous application.” AF 57. Since the CO determined that the Employer did not have a temporary need, the CO denied certification. *Id.* 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. Given that the Employer was amending its dates of need from the previous year, the CO properly requested payroll reports from the Employer, which detailed the number of permanent and temporary workers for the last calendar year. In its request for review, the Employer argued that not only was this an onerous task, but that it was also too vague and ambiguous. However, a review of the record reveals that the CO was very specific regarding what information should have been contained in the payroll report, and it is clear that the report submitted by the Employer falls short of the CO’s request. Based on the information submitted by the Employer, it is impossible to determine how many temporary and permanent workers are employed, and it is equally impossible to determine if the Employer’s need for workers increases during its dates of need. Ultimately, the Employer bears the burden to establish a temporary need. 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:

A

ROBERT B. RAE
Administrative Law Judge