



**Issue Date: 01 September 2010**

**BALCA Case No.: 2010-TLN-00072**

ETA Case No.: C-10194-50509

*In the Matter of:*

**EMERALD COAST HOSPITALITY SERVICE, 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 July 13, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Emerald Coast Hospitality Service, Inc.,

(“the Employer”). AF 52-195.<sup>1</sup> The Employer requested certification for 49 “Maids and Housekeeping Cleaners.” AF 52. On the application, the Employer indicated that the nature of its temporary need was peakload. *Id.* The Employer explained that its need was temporary because the Employer had “evolved into a cleaning staffing company” for hotels and businesses in Florida. *Id.* Accordingly, the businesses have a peakload need. *Id.* Specifically, the Employer explained that it was attempting to “satisfy only [the job contract with Doubletree Hotel]. . . . This contract is based on the labor shortage of the Doubletree Hotel.” AF 49. The Employer also attached its contract with Doubletree Hotel to its application. AF 79-83.

On July 15, 2010, the CO issued a *Request for Further Information* (“RFI”). AF 47-51. In the RFI, the CO identified three deficiencies, including a failure to establish that the need was temporary. AF 49-50. The CO stated 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 peak load standard, and (2) the number of worker positions being request for certification is justified and represents bona fide job opportunities.” AF 49. The CO wrote that “the employer’s statements suggest that the employer is basing its temporary peakload need on selected contracts rather than its overall need. Furthermore, a labor shortage, no matter how severe, does not constitute a temporary need.” AF 50.

The CO directed the Employer to submit “additional evidence and documentation justifying that its need, and the need of each individual customer with whom the employer has agreed to provide workers as part of a signed work contract . . . is temporary in nature.” *Id.* Additionally, the CO required 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 regulatory standards of temporary need. *Id.*

On July 21, 2010, the Employer submitted a response to the RFI. AF 17-46. In its response, the Employer included “payroll charts for years 2008, 2009, and 2010. . . . All charts indicated . . . that

---

<sup>1</sup> Citations to the 195-page appeal file will be abbreviated “AF” followed by the page number.

along with our permanent employees at this location every year[,] our company has hired temporary employees to cover our clients need for [peakload] season.” AF 34. The payroll records reflect the amount of temporary and permanent employees at the Doubletree location only. AF 42-44.

On August 2, 2010, the CO issued a *Final Determination* denying the Employer’s application on a single ground. AF 12-16. 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 14. Accordingly, the CO noted that the Employer must satisfy the following conditions:

(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.

AF 14. The CO found that the Employer “continu[ed] to base its need as temporary due to one of its many contracts, which admittedly, continues throughout a calendar year. The employer acknowledges that its business and need to supply employer-clients with this type of labor is a permanent, year-round need, rather than a temporary need.” AF 16. Further, the CO wrote that “the Employer’s need for workers is constant due to its need to be able to supply its employer-clients’ need, whenever the clients’ need arises.” *Id.* Having found that the Employer failed 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). An applicant must maintain documentation evidencing the temporary need to submit if requested by the CO. § 655.6(e). 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).

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. In order to establish a peakload need, the Employer needed to 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.

8 C.F.R. § 214.2(h)(6)(ii)(B). Because the Employer is a labor contractor, it properly supplied the payroll from its employees at Doubletree Hotel. However, the Employer failed to establish that it has a general need for workers. In its request for review, the Employer suggested that "it [would be a mistake] to provide company's payroll records outside of this location, which will mislead CO from [identification] of peakload period." AF 5. Certainly, if the Employer's contracts covered a large geographic locality, the Employer's argument might have merit. However, by its own admission, the Employer is only dealing with Florida locations. Further, the Employer failed to provide information about whether it has other contracts in the Orlando area, where the Doubletree Hotel was located, and where the peakload need is not likely to differ so greatly between different Orlando hotels as to confuse the CO. Moreover, it is the Employer's burden to prove that certification is appropriate, and as a job contractor, it must show that it has a general need for workers based on its entire business, not a single contract out of many. Rather than refuse to submit the requested documentation in an effort to not "confuse the CO," the Employer should have submitted the proper documentation, along with an adequate explanation of the differing peakload seasons of each locality. Ultimately, the Employer bears the burden to establish a temporary need. Since the Employer failed to meet its burden, 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

**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

Washington, D.C.  
WSC:ARH