



Issue Date: 26 September 2011

BALCA Case No.: 2011-TLN-00038

ETA Case No.: C-11200-55257

In the Matter of:

DIALOGUEDIRECT, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: John Assadi, Esquire
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For the Employer

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For the Certifying Officer

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, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO’s denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On July 19, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from DialogueDirect, Inc. (“the Employer”) for five door-to-door sales workers in New York, New York. AF 905-913.¹ The Employer stated that it provides fundraising solutions to non-profit organizations in order to secure long-term donors and has a peakload need for the H-2B workers from August 15, 2011 to May 15, 2012. AF 905. The Employer described its temporary peakload need, in pertinent part, as follows:

Our current charity partner, whom we have worked with for the last several years, is Children International (“CI”). Under the terms of our contract with CI, DD is requested to obtain up to 32,650 monthly sponsors during each fiscal year. The contract also prevents DD from obtaining additional clients, unless DD has met its sponsor target. CI’s fiscal year runs from October through September. During the past fiscal year, due to a shortage of labor, DD was only able to obtain 28,000 monthly sponsors. DD works year round in order to obtain sponsors for the charity. DD projects that without the assistance of foreign workers, it will again fall short of the contract numbers.

[...]

Face to face fundraising consists of street canvassing/fundraising in heavily populated areas of major U.S. cities. Our fundraisers approach members of the public, discuss the work the charity is involved in and ultimately seeks to obtain payment information in order to set up a monthly direct-debit sponsorship. DD offers full-time, year round permanent to all those willing and able to do the job. It also offers part-time permanent employment (minimum 3 full days per week), to those that are not able to work full-time.

¹ Citations to the 918-page appeal file will be abbreviated “AF” followed by the page number.

The nature of the fundraising job is difficult, as it entails working outside, in all weather conditions, stopping pedestrians on the street, and asking those pedestrians to become donors to the charity we are raising funds for. Few U.S. workers have experience in the field of face-to-face fundraising, and few are able to stay on the job for any reasonable length of time. Many of those that are interested in becoming fundraisers are students on summer break, who end up going back to school after the break ends.

[...]

Our request meets the regulatory standard of peakload need for the following reasons: In the past year (May 2010 – May 2011) while we have had and continue to have the same permanent employment needs year-round, and while we heavily recruited year-round, we employed two times more fundraisers each week during the summer months (mid May 2010 through mid August 2010) as we did each week in the non-summer months (mid August 2010 through May 2011). The following are statistics for the past year:

- 2710 average fundraising hours per week nationwide in the non-summer months, as opposed to 3837 average hours per week during the summer period
- In New York, we averaged 845 fundraising hours per week in the non-summer months, as opposed to 1381hours per week in the summer months

AF 905, 910-11. On July 25, 2011, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that the Employer failed to establish that its need for nonagricultural services or labor is temporary in nature and that it failed to satisfy all the requirements of the H-2B program. AF 899-904. The CO identified four deficiencies with the Employer’s application. First, the CO determined that the Employer failed to explain the nature of the temporary need based on the Employer’s business operations. AF 901. In particular, the CO found that the Employer’s dates of need encompass only the non-summer months from August 15, 2011 to May 15, 2012, and the Employer has failed to show an increase in its need for workers during these months. *Id.* The CO required the Employer to submit a description of the Employer’s business history and schedule of operations through the year, an explanation regarding why the nature of the Employer’s job opportunity and number of foreign workers requested reflect a temporary need, and an explanation regarding how the request for temporary labor

certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need. AF 902.

Additionally, the CO required the Employer to submit signed work contracts and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142, annualized and/or multi-year work 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 of need on the ETA Form 9142, and summarized monthly payroll reports for a minimum of one previous calendar year. *Id.* The CO instructed that monthly payroll reports must identify the number of full-time permanent and temporary employees in the requested occupation, the total number of workers or staff employed, the total hours worked, and the total earnings received. *Id.* The CO informed the Employer that this documentation must be signed by the Employer attesting that the information being presented was compiled from the Employer's actual accounting records or system. *Id.*

The CO also questioned why the Employer had a one-month experience requirement for the job opportunity, and required the Employer to submit a signed, written statement explaining why it requires one month of experience. AF 902-903. The CO required the Employer to explain why its terms and conditions of employment are: (a) normal to similarly employed U.S. workers in the area of intended employment, (b) not less favorable than those offered to the H-2B workers, and (c) are not less than the minimum terms and conditions required by the regulations. AF 903.

On August 1, 2011, the Employer responded to the RFI. AF 24-897. Included in the Employer's RFI response materials was the Employer's contract with Children International. The contract shows that the "campaign season" begins October 1, 2011 until September 30, 2011. AF 61-63. The Employer also submitted a copy of its New York payroll records from January 2010-December 2010, which show:

Month	Number of Workers²	Total Hours Worked	Gross Payroll
January 2010	38	2817	\$37,005.00
February 2010	49	3874	\$59,999.00
March 2010	48	4506	\$82,433.00
April 2010	49	3397	\$65,475.00
May 2010	48	3128	\$50,947.00
June 2010	110	8725	\$134,575.00
July 2010	112	6857	\$118,912.00
August 2010	94	5803	\$96,105.00
September 2010	75	6092	\$102,767.00
October 2010	60	4051	\$62,076.00
November 2010	53	3668	\$62,164.00
December 2010	48	4517	\$75,951.00

AF 87. The Employer also responded to the CO's inquiry regarding the need for a one-month experience requirement. The Employer provided the following explanation of its one-month experience requirement:

Candidates with no face-to-face fundraising require a longer training period and take longer to adjust to Dialogue Direct's practices, which require that Dialoguers adhere to a specific set of guidelines on how to conduct themselves around potential donors (personability, professionalism, etc.). By requiring a minimum of one month of experience, these candidates can begin work sooner in order to generate more donations. Also, because of the quick turnaround rate for many of our employees, it is more efficient and less time-consuming for our purposes to be able to field experienced face-to-face fundraisers within a relatively quick time after being hired.

AF 885. On August 24, 2011, the CO denied certification. AF 16-23. The CO found that the Employer failed to establish that the nature of its need was temporary, as required by 20 C.F.R. § 655.21(a). AF 19-21. The CO found that the Employer's

² The Employer did not separate workers based on permanent or temporary employment. The Employer stated that "[t]he percentages of full-time to temporary face-to-face fundraisers working during the year is about 60% and 40% respectively, but it is difficult to quantify either amount due to our high turnover rate, as well as the fact that both sets of fundraisers constantly change their schedules." AF 87.

monthly payroll report does not support its request for five H-2B workers from August 15, 2011 to May 15, 2012.³ AF 21. The CO found that the Employer's actual need for temporary workers is unclear. *Id.* Additionally, the CO found that the Employer failed to explain why its one-month experience requirement was necessary and failed to discuss whether the one-month experience requirement is normal to similarly employed U.S. workers in the area of intended employment. AF 21-23.

On September 6, 2011, the Employer requested BALCA review. AF 1-15. BALCA received the administrative file from the CO on September 12, 2011, and both Counsel for the CO and the Employer's attorney filed appellate briefs on September 19, 2011. On appeal, the Employer argues that its payroll records show that it needs more workers in non-summer months (*i.e.* August 15, 2011 to May 15, 2012) because it has approximately half as many workers during those months than the summer months. Therefore, the Employer argues that it has "an identifiable, legitimate need for additional, qualified Fundraisers in the non-summer months." Employer's Brief ("Emp. Br.") at 7. Additionally, regarding the one-month experience requirement, the Employer argued that CO never requested the Employer to provide documentation regarding the amount of experience required by other companies in the same industry. Emp. Br. at 10. The Employer also added that it filed a virtually identical application seeking temporary fundraisers in San Francisco that was approved. Emp. Br. at 10-11.

Counsel for the CO filed a Statement of Position, arguing that the Employer has a permanent need for the face-to-face fundraisers and therefore is ineligible for the H-2B program.

³ The CO's denial letter states that the Employer's payroll report shows only one worker during January 2010 and zero during February 2010. AF 21. It appears that the CO confused the Employer's New York payroll records at issue in this case with the Employer's Chicago payroll records, at issue in a different pending appeal, BALCA case number 2011-TLN-00039 and ETA Case number C-11200-55261. Nevertheless, I find that the CO's error did not prevent the Employer from understanding the issue on appeal or in any way prejudice the Employer. *See Jourose LLC d/b/a Tong Thai Cuisine*, 2001-TLN-30 (June 15, 2011) (*citing National Institute for Petroleum and Energy Research*, 1988-INA-535 (Mar. 17, 1989)(en banc); *Custom Card d/b/a Custom Plastic Card Company*, 1988-INA-212)(Mar. 16, 1989)(en banc)).

DISCUSSION

The DHS regulations provide that employment “is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). “It is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). In order to establish eligibility for certification under the H-2B program, an employer 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 basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). In order to establish a peakload need, the employer “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 to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The Employer is seeking five temporary face-to-face fundraisers from August 15, 2011 to May 15, 2012, *i.e.*, its “slow recruitment months.” AF 40. However, a peakload need is a supplement to the employer’s permanent employees and reflects an increased demand, over and above the employer’s normal, baseline staffing needs. The Employer in this case concedes that the months in which it is requesting temporary workers does not reflect a time period when it needs more workers beyond its permanent staffing needs. Rather, it is clear from the Employer’s contract with Children International and its payroll records that it has a year-round fundraising operation and needs face-to-face fundraisers on a year-round basis. Given that the Employer has a year-round need for the face-to-face fundraisers, the Employer has also failed to establish that the temporary additions to its staff will not become a part of its regular operation. The Employer in this

case is seeking to use temporary workers to fill a permanent need for face-to-face fundraisers, and therefore, has not established eligibility for the H-2B program.⁴

Accordingly, I find that the CO properly denied certification.⁵

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

⁴ Because I find that the Employer has not established a peakload need for face-to-face fundraisers, I need not reach the issue of whether the one-month experience requirement is a normal and accepted qualification.

⁵ While the Employer argues that the CO has certified an application nearly identical to this one, that determination does not govern the outcome of this case. The CO identified a legitimate deficiency in the Employer's application, and its past decision to certify does not constitute a waiver of the regulatory requirement that the Employer must demonstrate that its need is temporary.