



**Issue Date: 02 April 2012**

**BALCA Case No.: 2012-TLN-00025**

ETA Case No.: C-12005-56922

*In the Matter of:*

**TARRASCO STEEL COMPANY,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Lynn Susser, Esquire  
Siskind Susser PC  
Memphis, Tennessee  
*For the Employer*

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, 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).

The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

### **STATEMENT OF THE CASE**

On January 5, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary peakload labor certification from Tarrasco Steel Company ("the Employer"). AF 208-321.<sup>1</sup> The Employer requested certification for 20 reinforcing iron and rebar workers from February 1, 2012 to November 30, 2012. AF 208. The Employer provided the following statement of temporary need:

Tarrasco Steel Company has a contract with Jensen Construction Company to install rebar at the Route 79 bridge in Clarendon, Arkansas. This same contract was in effect in 2010 when Tarrasco Steel Company originally filed for H-2B positions based on peakload. We applied for the workers to arrive at the beginning of April of 2011; however, a USCIS Request for Evidence, mistaken denial, and subsequent re-opening and approval delayed the workers' arrival in the United States until the end of September 2011. Due to this delay and continuing shortage of available and willing U.S. workers, we request that the H-2B workers be allowed to stay and continue to work on this project until November 30, 2012.

*Id.* The Employer included an addendum further describing its temporary need, which stated:

Tarrasco Steel is a sub-contractor providing "rebar" or reinforced concrete in roads and bridges. The company is typically hired by larger companies with road/bridge contracts. The company's need for additional workers is specific to each of the contracts it signs. [...] Once the job is over in that area, all the temporary workers (domestic and H2B) are let go. If the company is unable to hire a sufficient number of temporary workers locally, it applies for H2B workers to supplement its local workforce.

As required by 8 CFR 214.2(h)(6)(ii)(B)(3), Tarrasco Steel regularly employs U.S. workers to perform the labor it requires. The need for additional workers recurs each time Tarrasco signs a new contract. The need for H2B workers occurs when the company is unable to hire a

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<sup>1</sup> Citations to the 321-page appeal file will be abbreviated "AF" followed by the page number.

sufficient number of local workers for a specific contract that is not part of the company's regular operation.

[...]

Tarrasco Steel hopes that by supplementing its workforce with H2B workers for this 10-month period in 2012 that it can fulfill its obligations to the Jensen Construction contract.

AF 214. On January 12, 2012, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that it was unable to render a final determination for the Employer's application because the Employer did not comply with all requirements of the H-2B program. AF 202-208. The CO determined that the Employer had failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.6(b).<sup>2</sup> AF 203. The CO noted that on March 30, 2011, the Employer received a certification for 17 reinforcing iron and rebar workers based on a temporary peakload need stemming from its contract with Hill Brothers to perform work on the Route 79 Bridge in Clarendon, Arkansas from April 2011 to January 2012. AF 203. The CO noted that the justification for the Employer's 2011 application was that extreme weather conditions in 2010 prevented the Employer from completing the rebar project on the Route 79 Bridge in Clarendon, Arkansas, and therefore its H-2B workers were still needed. AF 204. The CO found that the nature of the Employer's need was unclear in light of the Employer's repeated need for rebar workers on the Route 79 Bridge in Clarendon, Arkansas. *Id.* Furthermore, the CO determined that based on the payroll records submitted by the Employer with its application, which showed that the Employer retains temporary workers all year, it was unclear if the Employer has a year-round need for workers. AF 204-205.

The CO required the Employer to submit a statement of how its request meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need. AF 205. In addition, the CO required the Employer to submit supporting documentation, including a description of the Employer's business history and activities and schedule of operations through the year; an explanation regarding why the nature of the Employer's job opportunity and number of foreign workers being requested reflect a

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<sup>2</sup> The CO also identified one other deficiency that is not at issue on appeal.

temporary need and how it determines its dates of need; an explanation of the Employer's request to extend its 2011 certification for workers to complete its Jensen Construction contract during a time that was meant for work on the Hill Brothers Construction contract; a detailed projection of the Employer's anticipated work schedule; and a detailed schedule specifying the type of work to be performed, the number of workers needed to perform and complete the work, and how long the work for the Jensen contract is anticipated to last. AF 205-206.

The CO also required the Employer to submit the following supporting documentation: (1) signed work contracts and/or monthly invoices for 2010 and 2012 clearly showing work will be performed for each month during the requested period of need; (2) annualized and/or multi-year work contracts or work agreements supplemented with documentation for work performed in 2010 and 2012, 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; and (3) summarized payroll reports for 2010 and 2011 that identify the total number of workers employed, total hours worked, and total earnings received. AF 206.

The Employer responded to the RFI on January 18, 2012. AF 24-201. The Employer explained that it has been performing rebar work on the Route 79 Bridge in Clarendon, Arkansas since 2009, but the project is still not complete. AF 24. The Employer stated that it has performed sub-contractor rebar work for both Hill Brothers Construction and Jensen Construction, two of the general contractors on the project, over the last few years. *Id.* The Employer further explain that to perform this work, in 2009, the Employer supplemented its workforce with an additional four H-2B workers, in 2010, it supplemented its workforce with nine H-2B workers, and in 2011, it supplemented its workforce with 12 additional H-2B workers. *Id.*

The Employer contended that it meets the regulatory definition of peakload need because it regularly employs permanent workers to perform rebar work, it needs to supplement its permanent rebar workers on a temporary basis, and the temporary additions to its staff will not become a permanent part of the company's workforce. AF 25. The Employer added that the rebar work that is the subject of this application will continue for as long as it takes to complete the Route 79 Bridge, and that it is impossible

to state with any certainty when that will be, given all of the factors beyond the Employer's control. *Id.* The Employer stated that its requested end date of November 30, 2012 is a good-faith estimate of its ending date of need for the H-2B workers on the Route 79 Bridge. *Id.*

On February 27, 2012, the CO denied the Employer's application, finding that the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.6(b). AF 13-20. The CO noted that absent unusual circumstances or where an employer's need is based on a one-time occurrence, it will deny an application for temporary employment certification if the need lasts longer than 10 months. AF 19. The CO found that because the Employer's need in this case is a continuation of the need described in its 2011 application, its need is not temporary because it lasts longer than 10 months. *Id.* Furthermore, the CO noted that the Employer conceded that it is impossible to state with any certainty when the Route 79 Bridge project will be finished. *Id.* The CO found that the Employer's filing history strongly suggested that the Employer's need for rebar workers was not truly temporary, but ongoing and year-round. *Id.* The Employer appealed to BALCA on March 8, 2012.

## **DISCUSSION**

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor 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). 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). 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 H-2B regulations provide that "[e]xcept where the employer's need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an Application for Temporary Employment Certification where the employer has a recurring, seasonal or peakload need lasting more than 10 months." 20 C.F.R. § 655.6(c). In this case, the Employer is seeking a continuation of its 2011 certification, and if the Employer's current application were certified, its H-2B workers would be performing the same rebar work from September 2011 to November 30, 2012, or 14 months. The Employer has not offered any unusual circumstances that would justify such an extension. By the Employer's own admission, it has been performing rebar work on the Route 79 Bridge in Clarendon, Arkansas since 2009. While the Employer's 2011 application stated that it anticipated that the rebar work would continue until January 2012, now the Employer describes its November 30, 2012 end date as a good-faith estimate of the end date. As such, not only is the Employer's need not temporary because it exceeds 10 months, but also because the Employer is unable to state with any certainty when the Route 79 Bridge project – and consequently the Employer's need – will end.

Based on the foregoing, I find that the CO properly denied certification because the Employer failed to establish that it has a temporary need for H-2B workers, as defined under 20 C.F.R. § 655.6.

### **ORDER**

Accordingly, 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

