



**Issue Date: 22 January 2015**

**BALCA Case No.:** 2015-TLN-00016  
**ETA Case Nos.:** H-400-14335-672351

*In the Matter of:*

**TARILAS CORPORATION**

*Employer.*

**Certifying Officer:** William L. Carlson  
Chicago National Processing Center

**Appearance:** Leon R. Sequeira, Esq.  
Prospect, Kentucky 40059  
For the Employer

**Before:** Kenneth A. Krantz  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL  
OF TEMPORARY LABOR CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. 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, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 C.F.R. §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(ii)(B); 20 C.F.R. §655.6(b)<sup>1</sup>. Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 C.F.R. §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration

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<sup>1</sup> The proposed revisions to federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, published in Vol. 77 Fed. Reg., No. 34 at 10038-10109 and 10147-10169 (Feb. 21, 2012) were stayed on May 16, 2012 following a U.S. District Court decision, Vol. 77 Fed. Reg., No. 95 at 28764 (May 16, 2012). See also *Bayou Lawn & Landscape Services, et. Al. v. Sec. of Labor*, 713 F3d 1080 (11<sup>th</sup> Cir. 2013) affirming the U.S. District Court for Northern Florida. Accordingly, the regulations promulgated at Vol. 73 Fed. Reg., No.245 at 78020-78069 (Dec. 19, 2008) apply in this matter.

(“ETA”). 20 C.F.R. §655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. §655.33(a).

## BACKGROUND

The Employer, Tarilas Corporation, specializes in structural metal fabrication in the commercial construction industry. (AF at 42).<sup>2</sup> On November 30, 2014, the employer filed an H-2B application with the Department seeking 125 full time workers to be employed as Solderers and Brazers for the period from January 1, 2015 to October 31, 2015. (AF at 42 & 53). The Employer provided the following explanatory statement:

This temporary, peak-load, seasonal need is expected, recurring annually, to supplement our permanent staff at the place of employment. Winter weather conditions limit the amount of work that can be done during the months of November and December each year, the fabrication process is diminished, and we reduce our staff to our permanent workers who are tasked with completing other projects, tying up loose ends or maintaining equipment, preparing for the heavier work load during the peak load periods.  
(AF at 54).

On December 8, 2014, the Certifying Officer (CO) issued a *Request for Further Information* (RFI), in part, because the Employer failed to establish the nature of the employer’s need is temporary. (AF at 36). The RFI directed, “The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need.” The Employer’s response must include: (1) a chart detailing lost contracts from 2014, the scope of work, and contracted dates of need; (2) a chart detailing 2015 contracts broken out by month; (3) a summarized monthly payroll for 2014, separated by full-time permanent workers and temporary workers, that identifies each month the number of workers employed, the total hours worked, total earnings received, IRS form 941, Employer’s Quarterly Tax Return covering all quarters for the past two years; and (4) a written explanation as to how the employer determined its dates of need. (AF at 37).

On December 18, 2014, the employer responded to the RFI and attached: (1) a payroll chart for 2014; (2) payroll estimates for 2015; (3) a copy of its work project contract with start and stop dates; and (4) the following statement, “[T]he need for 125 workers is based upon a review of the itemized projects to be completed, the time frame that the job must be completed, and the employers (sic) best estimate of need based upon prior experience in the industry. (AF at 10 & 26-32).

On December 30, 2014, the CO denied certification because the employer failed to show that:

- There are not sufficient numbers of qualified U.S. workers available for the job opportunity for which temporary labor certification is sought and/or

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<sup>2</sup> Citations to the Appeal File are abbreviated as AF followed by the page number.

- The employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.  
(AF at 3)

Specifically, the CO denied certification based on 20 CFR §§ 655.6 and 655.21(a) for failure to establish that the nature of the employer's need is temporary. (AF at 5).

The employer sent a Request for Administrative Review on January 9, 2014. The Employer argues its application meets the regulatory standard for certification: it provided extensive information in response to the RFI, the CO requested extensive additional information without citation to any regulatory standard authorizing such requests, and the CO's denial is arbitrary, capricious and contrary to law in violation of the Administrative Procedure Act 5 U.S.C. 551 *et seq.* (AF at 1-2). The Notice of Docketing was issued on January 15, 2015. The Appeals File was received on January 16, 2015.

### **STATEMENT OF THE CASE**

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden of establishing eligibility. The Employer must show that there are not sufficient numbers of qualified U.S. workers available for the job opportunity for which temporary labor certification is sought. The Employer must also show that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. § 655.1(b).

Where an employer has submitted an application for temporary labor certification, and that application fails to meet all the obligations required by 20 C.F.R. §655.22 or other requirements of the H-2B program, "the CO must issue a RFI [Request for Further Information] to the employer" setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. Failure to comply with a RFI, including not providing all documentation within the specified time period, may result in a denial of the application and also result in the CO requiring supervised recruitment in the future. 20 C.F.R. §655.23(c).

Upon appeal to BALCA, only that documentation upon which the CO's final determination was made (the Appeal File), the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration in the underlying determination), and submitted legal briefs may be considered. 20 C.F.R. §655.33.

### **DISCUSSION**

At issue in this case is whether or not the employer established that its labor need is temporary per 20 CFR 655.6(b):

The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 CFR 214.2(h)(6)(ii)(B).

As attestation, the CO requested a detailed statement of temporary need establishing the dates employer requested, as well as information regarding the employer's business cycles and their

relationship to the requested dates and need for 125 workers per §655.21. (AF at 15 & 16). The CO found the Employer did not adequately justify its chosen standard of temporary need, nor did the Employer sufficiently establish the dates of need requested. Accordingly, the CO denied the application. (AF at 7).

Upon review of the record, I find the information sought in the RFI was reasonable and necessary for the CO to determine whether the Employer was entitled to certification. The Employer failed to provide the requested information. Failure to comply with an RFI, in and of itself, may result in a denial of the application. 20 C.F.R. § 655.23(d). The employer did provide some documentation; this evidence was evaluated by the CO and found to be insufficient to carry the employer's burden. Upon review of the record, I agree.

The RFI asked for information regarding the Employer's business cycles and their relation to the dates of employment. The Employer submitted a client services agreement with Keppel AmFELS. The agreement states the Employer will be working on the construction of nine different "jack-up platforms" beginning January 1, 2015. The Employer's portion of the projects is to be completed by October 31, 2015. (AF at 27). The service agreement lists the names of the nine platform projects, but there is no description of the size and scope of work to be performed. The CO requested a chart detailing business operations for 2015 including the number of contracts broken out by month for the year. (AF at 37). The Employer submitted a chart for its anticipated 2015 Payroll. The chart lists 125 Temporary Total Workers for each month, January through October. (AF at 26). The chart does not break down the Employer's contracts by month per the CO's request. Thus, the Employer's Response to the RFI did not explain how the service agreement equated to a need for 125 Solderers and Brazers for each month, January through October. (AF at 30). In its response to the RFI, Employer wrote, "[T]he need for 125 workers is based upon a review of the itemized projects to be completed, the time frame that the job must be completed, and the employers (sic) best estimate of need based upon prior experience in the industry." (AF at 21).

The Employer's "review of the itemized projects" was not explained to the CO. The documentation submitted did not explain the breakdown of each project: *e.g.* whether each project requires the same number of workers and hours; and whether each project will be worked on simultaneously from January through October. The Employer did not explain why it could not provide the information the CO requested. As such, the Employer failed to submit information that was necessary for the CO to determine if the request would adversely affect the wages and working conditions of U.S. workers similarly employed. § 655.1(b).

Additionally, the Employer's ETA Form 9142B lists the rate of pay offered as \$12.36 per hour. (AF at 46). This is also the wage advertised in the local newspaper. (AF at 24 & 25). However, an examination of the payroll chart submitted in response to the RFI shows all hours worked by temporary workers paid at \$9.11 per hour.<sup>3</sup> (*see* AF at 26). If this chart were to be relied upon as supporting evidence, then the Employer's application should be denied for violation of §655.20.

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<sup>3</sup> The column "Total Payroll Received" divided by the column "Employment Total Hours Worked" equals \$9.10 - \$9.11 per hour for every month January through October.

Assurances and obligations of H-2B employers. (a) *Rate of pay*. (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* granted by OFLC.

Rather than delving into an additional basis for denial, the Employer's payroll chart will be treated as insufficient evidence to overcome the deficiencies cited by the CO, *i.e.* failing to show the need is temporary. The chart does not detail the number of contracts broken out by month per the CO's request, nor did the Employer submit IRS Form 941. Failure to provide the information requested may be grounds for the denial of the application. §655.21. I find denial is appropriate based on the Employer's failure to show that its need is temporary and for failing to submit the requested additional information.

Assuming *arguendo* the Employer did overcome the deficiencies previously addressed, the CO also requested the Employer to submit evidence justifying its chosen standard of temporary need. (AF at 37). The Employer's ETA Form 9142B shows the Employer selected the "peakload" standard. (AF at 42). To meet this standard:

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 to staff will not become a part of the petitioner's regular operation.  
214.2(h)(6)(ii)(B)(3).

The Employer's payroll records show it had two permanent workers for 2014 and anticipates having three permanent workers and 125 temporary workers for 2015. (AF at 26). Nothing in the record shows that the three permanent workers regularly "perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment..." In this case the labor is welding, cutting, soldering, and brazing, *i.e.* assembling metal parts for the construction of off-shore oil-rigs. (AF at 44). The place of employment listed on the application is a worksite in Brownsville, Texas. (AF at 45). The Employer, however, is located in Pharr, Texas. (AF at 43). There is nothing in the record showing the three permanent employees work in Brownsville. Thus, the Employer did not establish that its temporary need meets the peakload standard.

Though the Employer's application shows "peakload", its *Statement of Temporary Need* states, "This temporary, peak-load, seasonal need is expected, recurring annually to supplement our permanent staff at the place of employment." (AF at 54). Some confusion between the peakload and seasonal standards may be understandable since the peakload definition includes a need for labor "due to a seasonal" demand. 214.2(h)(6)(ii)(B)(2). In its *Statement of Temporary Need*, the Employer wrote: "Winter weather conditions limit the amount of work that can be done during the months of November and December each year, the fabrication process is diminished, and we reduce our staff to our permanent workers..." (AF at 54). To meet the seasonal standard the Employer must establish that the service or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. 214.2(h)(6)(ii)(B)(2). The

Employer did not provide a written explanation, per the CO's RFI, as to how it determined its dates of need. The application claimed the temporary need was due to "winter weather conditions." The CO found this reason was not credible. The CO's denial letter states:

[T]here is little weather differentiation in Brownsville, Texas between November and February, with average highs in the stated down time of November (79 degrees F) and December (72 degrees F) being similar, and even warmer than, the average highs in January (71 degrees F) and February (74 degrees F). Average lows for this period are lower during the stated peak months of January and February than they are during the time that the employer stated it undergoes "winter weather conditions" in November and December. The lows during the entire winter period remain well above freezing.  
(AF at 7).

The CO denied the application because the Employer did not provide sufficient documentation supporting its temporary need. The CO's denial is valid. The Employer submitted a service agreement that indicated the projects had to be completed by October 31, 2015, but without further explanation as to the significance of that deadline, the CO is left with the Employer's "winter weather" explanation. The RFI asked for evidence to support the chosen temporary standard as well as a written explanation for the dates of need. The Employer did not provide the requested information. The CO is not responsible for making inferences based on a vague services contract. I find denial is appropriate based on the Employer's failure to show that its need is temporary and for failing to submit the requested additional information.

Contrary to the Employer's assertion, the CO's request for additional information was not "vague and conflicting." (AF at 2). The CO cited the applicable regulation for each deficiency and listed what was expected to remedy the deficiency. The Employer failed to provide the specific and standard requested documentation, and the Employer failed to explain why said information was not, or could not, be provided.

## **CONCLUSION**

In conclusion, it is this court's opinion that the employer did not provide enough additional documentation to demonstrate that there are not sufficient numbers of qualified U.S. workers available for the job opportunity, and that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

**ORDER**

It is hereby **ORDERED** that the Certifying Officer's **DENIAL** of the Employer's December 30, 2014 Application for Temporary Employment Certification is **AFFIRMED**.

KENNETH A. KRANTZ  
Administrative Law Judge

KAK/jpd/mrc