



Issue Date: 14 May 2012

BALCA Case No.: 2012-TLN-00031

ETA Case No.: C-12062-58546

In the Matter of:

KIEWIT OFFSHORE SERVICES, LTD.,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Paul J. Zambie, Esquire
FosterQuan, LLP
Austin, Texas
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
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 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 March 2, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary peakload labor certification from Keiwit Offshore Services, Ltd. ("the Employer"). AF 1174-1207.¹ The Employer requested certification for 100 structural fitters (SOC occupation title "structural metal fabricators and fitters") from April 1, 2012 through January 31, 2013. AF 1176. The Employer provided the following statement of temporary need:

[The Employer] regularly employs Structural Fitters for the fabrication, assembly, and installation of structural steel products such as beams, braces, pipes, and plates for offshore drilling jackets and decks for both structural and process pipe applications, but requires the temporary services of Structural Fitters to supplement the permanent staff during its anticipated peakload period. This supplementation is due to its anticipated increase in demand for the company's fabrication services from April 2012 to January 2013. Once this seasonal demand subsides, the Company will no longer need these workers as the permanent workforce will be back to its normal operations which are sufficient to cover the regular periods of business.

Id. The Employer provided the following description of the job duties of this position:

Fabrication, assembly, and installation of structural steel products such as beams, braces, pipes, and plates for offshore drilling jackets and decks. Must have the ability to read blueprints, section and plan drawings, and weld symbols; cut plate pipe and beams using a cutting torch; trim and bevel in position using a burning torch; layout and fit equipment; adhere to

¹ Citations to the 1207-page appeal file will be abbreviated "AF" followed by the page number.

all safety rules and regulations, use crane signals and perform own rigging, climb and work in high places, read and derive measurements, dimensions, and quantity of material needed to fabricate a structure; frame skids, bends and elevation for jackets; use come-a-longs and install stop plates, dogs and play eyes; work in confined spaces.

AF 1178. With its application, the Employer submitted a chart showing the number of structural fitters needed between February 2012 through January 2014. The chart shows the following need for structural fitters:

February 2012	736	February 2013	131
March 2012	627	March 2013	151
April 2012	601	April 2013	127
May 2012	567	May 2013	141
June 2012	484	June 2013	115
July 2012	429	July 2013	77
August 2012	363	August 2013	45
September 2012	179	September 2013	14
October 2012	169	October 2013	18
November 2012	162	November 2013	11
December 2012	151	December 2013	24
January 2013	145	January 2014	23

AF 1191. The Employer also submitted a “Historical Yard Histogram,” showing fluctuations in the number of workers between January 2005 and March 2010. AF 1190. The Employer did not include any numbers on the y-axis. *Id.*

On March 9, 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 1163-1173. The CO determined that the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.21(a). AF 1167. The CO noted that the Employer’s chart summarizing its monthly need for structural fitters shows a steady decrease in structural fitting jobs from February 2012 to February 2013, and questioned how the Employer’s steady decrease in the number structural fitters needed is consistent with a peakload need from April 1, 2012 to January

31, 2013. AF 1168. Additionally, the CO found that the Employer provided inconsistent information regarding the number of positions that it is seeking for certification. *Id.*

The CO required the Employer to submit additional information to justify its temporary need for structural fitters. *Id.* The CO required the Employer to submit a description of the Employer's business history and activities (i.e. primary products and services) and schedule of operations though the year, an explanation 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. *Id.*

In addition, the CO required the Employer to submit the following supporting documentation: (1) 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; (2) 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; (3) summarized monthly payroll reports for 2010 and 2011 that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received; and 4) other evidence and documentation that similarly serves to justify the chosen standard of temporary need. AF 1168-1169.

The CO also found five other deficiencies, including a deficiency with the Employer's recruitment report. AF 1169-1173.

The Employer responded to the RFI on March 16, 2012. AF 50-1162. The Employer explained that it specializes in the custom fabrication of large steel structures and components for deep-water offshore oil and gas projects, and that it employs approximately 1,800 full-time workers at its facility. AF 50. The Employer stated that it regularly employs structural fitters to fabricate, assemble, and install structural steel products such as beams, braces, pipes, and plates for offshore drilling jackets and decks. AF 51.

The Employer stated that it is a party to contracts with Anadarko Petroleum Corporation on the Lucius Project, Shell Offshore, Inc. for the Olympus Project, and Chevron North America for the Jack & St. Malo Project, and that given its scheduled workload from April 1, 2012 to January 31, 2013, the Employer needs to supplement its existing workforce with 100 structural fitters. *Id.* The Employer explained that each of these contracts is entering a new stage, during which the Employer needs additional structural fitters to complete its contractual obligations. *Id.* The Employer indicated that it will not need the 100 additional structural fitters after the peakload period ends on January 31, 2013. *Id.*

With respect to the chart that it submitted with its application, the Employer stated that:

[The chart] summarizes the perfect scenario of [the Employer's] workload by contract or project. However, based on the Employer's experience, and as evident from the historical yard histograms, the workload is usually delayed by 3 or 4 months from the "perfect work schedule." Therefore, the actual peak load, as evident from the historical data, shifts to later in the year covering the listed periods of employment. The delays that the Employer experiences are most commonly due to a variety of reasons including hurricanes, strong winds and strong rains at the Gulf of Mexico, material delivery delays (e.g. earthquake and tsunami in Japan) as well as other transportation events. Therefore, the actual peak need is shifted to the months [of] April through January, with an increase in the work in the months [of] May through December.

AF 51-52. The Employer explained that its need for structural fitters meets the regulatory definition of peakload need, because it regularly employs structural fitters at its facilities but is temporarily in need of additional structural fitters to supplement its existing workforce due to the anticipated increased demand for its fabrication services from April 2012 through January 2013. AF 59. The Employer stated that 100 pipe fitters are needed in order to meet the Employer's contractual obligations and construct massive structures by January 2013. AF 52. The Employer also submitted copies of its current contracts and schedules.

The Employer submitted its contract with Chevron North America for work on the Jack & St. Malo Project. AF 78. The parties entered into the contract on February 15, 2011 and work was commence immediately. AF 78-94. The entire project was to be

completed by October 1, 2011. AF 94. The contract schedules submitted for the Jack & St. Malo Project indicate that the work will be completed by February 5, 2013. AF 95-142. The Employer entered into a contract with Shell Offshore for the Olympus Project on September 15, 2010. AF 535-537. The contract provides that work will commence on September 15, 2010 and be completed by June 1, 2013. AF 537. The scheduled mechanical completion dates for the modules are as follows: 1) Wellbay Module: November 10, 2012; 2) Power Module: November 17, 2012; 3) Drilling Module: November 24, 2012; 4) Process Module: November 28, 2012; 5) Quarters Module: December 2, 2012. *Id.* The Employer's contract with Anadarko Petroleum Corporation for the Lucius Project, entered into on December 15, 2011, provides that work will commence immediately. AF 657-678. The contract schedule indicates that the project will be completed by January 14, 2014. AF 680-730.

The Employer submitted a backlog histogram by craft, showing the following past and projected need for structural fitters.

September 2010	190	April 2012	78
October 2010	158	May 2012	61
November 2010	159	June 2012	48
December 2010	138	July 2012	23
January 2011	176	August 2012	28
February 2011	198	September 2012	19
March 2011	285	October 2012	15
April 2011	324	November 2012	8
May 2011	430	December 2012	11
June 2011	487	January 2013	23
July 2011	530	February 2013	34
August 2011	526	March 2013	30
September 2011	521	April 2013	49
October 2011	437	May 2013	55
November 2011	408	June 2013	51
December 2011	326	July 2013	17
January 2012	247	August 2013	15
February 2012	193	September 2013	0
March 2012	114	October 2013	0

AF 144. The Employer submitted the following information regarding the number of hours worked and wages earned by its permanent and temporary structural fitters in 2011.

	Permanent structural fitter: hours worked	Permanent structural fitters: wages earned	H-2B structural fitters: hours worked	H-2B structural fitters: wages earned
January 2011	25,923	\$537,592	0	0
February 2011	27,633	\$557,884	0	0
March 2011	38,116	\$771,577	0	0
April 2011	31,329	\$624,227	6,688	\$136,089
May 2011	31,420	\$629,120	21,083	\$437,190
June 2011	28,893	\$577,862	27,819	\$571,427
July 2011	35,905	\$714,705	34,794	\$712,955
August 2011	32,717	\$673,811	31,600	\$672,132
September 2011	40,836	\$825,948	36,483	\$766,932
October 2011	34,267	\$700,248	29,251	\$632,099
November 2011	30,876	\$632,131	27,190	\$601,953
December 2011	32,775	\$671,687	28,627	\$630,311

AF 731-734. The Employer also provided copies of its payroll records for structural fitters, but did not provide information regarding the number of permanent and temporary structural fitters employed in 2010 and 2011. AF 735-1132.

On April 12, 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. § 655.21(a). AF 40-46. The CO found the Employer's three contracts do not support the Employer's asserted peakload need, noting that the Employer submitted these contracts as part of its previously certified application for 150 structural metal fabricators and fitters from April 1, 2011 to January 31, 2012. AF 45. Additionally, the CO found that the contract schedules show that some work has been completed prior to the Employer's starting date of need, and that work will continue beyond the Employer's ending date of need. *Id.* Based on the evidence provided, the CO determined that it was unclear how the Employer's need constitutes a peakload need lasting fewer than ten months. *Id.* The CO also found that the Employer did not sufficiently explain why it does not need the structural fitters in February and March. AF 46.

In addition, the CO denied certification based on the Employer's failure to include the Employer's ending date of need in its newspaper advertisements and job order in violation of 20 C.F.R. §§ 655.15(e)(2) and (f)(3). AF 46-49.

The Employer appealed the CO's determination to BALCA on April 20, 2012, and the Board received the administrative file on April 30, 2012. In its request for review, the Employer stated that it meets the definition of peakload need because it employs 182 permanent structural fitters and has a temporary need to supplement its workforce with 100 structural fitters due to its obligations under three large contracts. The Employer filed a brief on May 4, 2012, explaining that each contract contains multiple steps which are extraordinarily distinct in their technical requirements and that as each specific phase of the contract ends, the peakload need for structural fitters ends.

The Employer also contends that the CO's assertion that the same contracts were cited last year in support of the temporary peakload need is incorrect. The Employer points out that it entered its contract with Anadarko Petroleum Corporation on December 15, 2011, after its previous filing.

The Employer also submitted a timeline of showing the need for workers on the Anadarko Petroleum Corporation project and the Shell Offshore project. The Employer's timeline indicates that: 1) the Employer entered into the contract with Anadarko in December 2011; 2) from December 2011 to March 2012, the Employer was in the "Production Deck Phase," which it staffed with permanent employees; 3) from April 2012 to January 2013, the Employer will be in the "Cellar Deck Phase," which it cannot complete with permanent workers; 4) from January 2013 to July 2013, the Employer will be in the "Sub-cellar Deck Phase," which it will staff with permanent workers. The Employer's Shell Offshore timeline indicates that: 1) the Employer entered into the contract with Shell Offshore on September 15, 2010; 2) from October 2011 to July 2012, the Employer was assembling the modules, which was performed by permanent staff; 3) from April 2012 to January 2013, the Employer will be working on the mechanical completion of the modules, which cannot be completed by permanent staff; and 4) from January 2013 to the end of the project, the Employer will be loading-out the modules, which can be completed by permanent staff.

Counsel for the CO filed a brief on May 7, 2012, arguing that the Employer did not establish a temporary peakload need for 100 structural fitters and that the Employer's advertisements and job order did not contain all of the information required by the regulations. The CO contends that the Employer's own chart shows that the Employer had a substantial need for structural fitters in February 2012, but by September 2012, the permanent structural fitters that the Employer has on staff outnumber the Employer's anticipated need for structural fitters. As such, the CO argues that the Employer's documentation does not support a peakload need between April 2012 through January 2013.

Additionally, the CO argues that the Employer cannot establish a temporary need because the Employer has an ongoing need for workers for its many projects. The CO contends that there is no evidence that the three projects referenced by the Employer as the cause of its temporary peakload need are any different than the other projects the Employer undertakes or plans to bid on in the future. Finally, the CO asserts that temporary labor certification was properly denied because the Employer failed to include an end date for the job opportunity in its advertisements and job order.

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 Employer states that it has 182 permanent structural fitters on its staff, and that it needs 100 additional structural fitters due to a peakload need for structural fitters related to the Employer's obligations under three contracts. The contracts themselves provide little support for the Employer's contention, as they show that work has been performed prior to the Employer's beginning date of need, and that work will continue to be performed after the Employer's ending date of need. The Employer argues that the specific phase of the contract that the Employer is currently entering has prompted its peakload need. However, the Employer has not explained why more structural fitters are needed for the cellar deck phase than the production deck phase and the sub-cellar deck phase on the Anadarko project, or why more structural fitters are needed for the mechanical completion of the modules phase than the assembling modules or loading-out modules phases of the Shell Offshore project. Moreover, neither the contracts nor their accompanying work schedules indicate how many structural fitters are needed for each phase of the project.

Furthermore, the Employer has provided inconsistent information regarding its past and projected need for structural fitters. The backlog histogram provided with the Employer's application shows that the Employer needed 736 structural fitters in February 2012 and 627 structural fitters in March 2012, its purported "off-peak" months, and beginning in September 2012, a purported "peakload" month, the Employer will need fewer than 180 structural fitters. AF 1191. If this documentation is accurate, it would appear that the Employer's need for structural fitters is greatest during its two off-peak months, and that the Employer has enough permanent structural fitters on staff to fulfill its needs for five of the months that it requests H-2B workers. The Employer submitted another backlog histogram with its RFI response materials that also undermines the Employer's contention that it needs 100 structural fitters from April 2012 through January 2013. The backlog histogram submitted with the Employer's RFI response shows that during its purported peakload period of need from April 2012 and January 2013, the Employer will need a maximum of 78 structural fitters in April 2012 and as few as eight structural fitters in November 2012. AF 144.

Based on the foregoing, I find that the CO properly denied certification because the Employer failed to establish that it has a temporary peakload need for 100 structural fitters from April 1, 2012 through January 31, 2013.²

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

² Because I find that the Employer has not established that it has a temporary peakload need for 100 structural fitters, I need not reach the other grounds for denial.