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BALCA Case No.: 2012-TLN-00041

ETA Case No.: C-12108-59022

In the Matter of:

M&M INDUSTRIAL SERVICES,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER VACATING DENIAL OF CERTIFICATION AND REMANDING FOR FURTHER PROCESSING

This matter arises under the H-2B temporary non-agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These provisions allow U.S. employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient workers who are able, willing, qualified, and

available at the place where the alien is to perform such services or labor. 8 C.F.R. § 214(2)(h)(1)(ii)(D). Before filing a petition for H-2B visa classification, an employer must apply for and receive a temporary labor certification from the U.S. Department of Labor ("the Department"), Employment and Training Administration ("ETA"). 20 C.F.R. § 655.20. After ETA accepts an employer's *Application for Temporary Employment Certification* for processing, a Certifying Officer ("CO") reviews the application and makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies labor certification, in whole or in part, then the employer may request review before 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 employer's request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the employer's application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On April 17, 2012, ETA received an application for H-2B temporary labor certification from M & M Industrial Services, Inc. ("the Employer"), an oil field service and fabrication company. AF 881, 1617-1643.[1] In this application, the Employer sought temporary labor certification for 250 "Layout Workers, Metal and Plastic" from May 15, 2012 through December 31, 2012, based on a seasonal standard of temporary need. AF 1619. The Employer stated that its season of need, from mid-May to late December, was "determined by the interaction of hurricane season in the Gulf of Mexico with offshore oil rig operational and safety requirements and with governing federal rig structural safety requirements determined by hurricane season." *Id*. The Employer explained:

> As an example of the types of forces generated by wind-driven waves during hurricane season, for example, note that Federal Regulations at 30 C.F.R. 250.900 et seq. and 250.198 require that, with the exception of rigs with certain types of mooring, an air gap of at least 80 feet between calm water surface and rig platform must be maintained, to take into account the height of hurricane driven swells. Hurricane season in the Gulf of Mexico is from approximately June 1 through November 30. Furthermore, many oil rigs are prohibited by Federal regulation from being on the outer continental shelf during hurricane season, and

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

> rig construction related to that season is required to begin in the month before the start of hurricane season and lasts for up to a month past the end of hurricane season. The interaction of climate (hurricane season) and regulatory factors therefore makes May through December our season of heavy need for shipfitter personnel.
>
> During the hurricane-season-related season of need, the type of construction or maintenance operations our shipfitters are needed for include maintenance of engine room platforms, after conveyer deck platforms, and rig and rig equipment upgrades.
>
> Therefore, in order to meet governing Federal rig structure and safety requirements related to Gulf hurricane season, the heavy season for rig construction and maintenance (that is, the season during which the oil rig operating companies that are our customers engage to provide rig construction and maintenance personnel such as the shipfitters being applied for in this application) runs from mid-May through late December, because rig construction and maintenance related to hurricane season must start at least a few weeks in advance of the normal beginning of hurricane season and runs for about a month after the end of that season.

AF1619, 1627. The employer maintained that it had "virtually no need for shipfitter staff" from early January through mid-May, and accordingly, had a "much smaller" year-round permanent staff. AF 1627. The employer stated that in the past, it was able to fill its temporary positions with U.S. workers, but since the recent "Shell formation" in South Texas and Colorado, which caused a boom in demand for workers in those areas, there has been a decline in the availability of shipfitters. AF 1627.

On April 24, 2012, the CO issued a *Request for Further Information* ("RFI") identifying five deficiencies in the Employer's application. AF 1608-1616. Only one of these deficiencies—the Employer's alleged failure to establish a seasonal temporary need—is relevant to the instant appeal. In an attachment to the RFI, the CO explained that the Employer's application did not "sufficiently explain why a consistent need for 250 Layout Workers, Metal and Plastic continuously exists from May through December." AF 1611. To remedy this deficiency, the CO instructed the Employer to: (1) amend its application to reflect the standard that best matched the Employer's temporary need; and (2) submit an updated temporary need statement. AF 1612. The CO further directed the Employer to submit supporting evidence and documentation that justified its chosen standard of temporary need, including (but not limited to) the following:

> 1. Signed work contracts and/or monthly invoices from previous calendar years clearly showing work will be performed for each month during the

requested period of need on the ETA Form 9142, Section B., Items 5 and 6;

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 services and clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5 and 6;
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, 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. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system;
4. A detailed schedule and/or plan which explains exactly what the Layout Workers, Metal and Plastic position does throughout the year, and that justifies a temporary need for 250 full-time Layout Workers, Metal and Plastic working 40 hours per week from May 15, 2012 to December 31, 2012; and/or
5. Other evidence and documentation that similarly serves to justify the chosen standard of temporary need and number of workers.

AF 1613.

The Employer responded to the RFI on May 1, 2012, submitting an amended application and additional supporting documentation. AF 861-1607. Among other things, the Employer reduced the number of positions it requested to 249, and changed its chosen standard of temporary need from seasonal to peakload. AF 874. The Employer also provided an amended statement of temporary need, in which it continued to maintain that its busy season runs from mid-May to December "due to the hurricane season in the Gulf of Mexico and offshore oil maintenance regulations which cause oil producers to service rigs during that season." AF 881. Hurricane season in the Gulf of Mexico runs from June 1st through November 30th;[2] however, because oil producers are required to conduct rig maintenance in advance of the start of hurricane season, the Employer asserted that mid-May through December is its heavy shipfitters workload season. AF 883. During its busy season, the Employer explained, "our shipfitters work on equipment and system upgrades and hurricane-related damage to rigs, platforms and equipment." AF 881. By contrast, during the non-peak period from January through the middle of May, the Employer's work involved only small pop-up emergency jobs, routine replacement

[2] The Employer provided a print-out from the National Hurricane Center to substantiate this fact. AF 1589.

parts, and the occasional project outside of its region. *Id*. "In other words," the Employer stated, "larger supplementary shipfitter staffing is routinely needed during the mid-May to December period and not during the January through mid-May period." *Id*.

The Employer additionally explained that "[t]he oil industry is required by Federal regulation to maintain off-shore oil rig structures to standards that are directly determined by hurricane storm surges and hurricane season wave heights." AF 882. To support this assertion, the Employer provided copies of applicable Federal regulations and a print out from the National Ocean Industries Association (NOIA). [3] AF 1591-1598. In addition to these documents, the Employer stated:

> [P]lease note with regard to the attached 2011 payroll report summary that even last year (when our workload demand and qualified U.S. worker availability before the South Texas boom enabled us to fill our land-based and fabrication shipfitter positions from the U.S. workforce), our supplementary shipfitter workforce (that is, our heavy staffing period of need) was indeed in the May through December months.

AF 883. The Employer maintained that there was no risk that these temporary shipfitters would become a part of the company's regular operation, since it only had a need for these positions during the seasonal peakload period, and the persons filling these positions were not guaranteed rehire from peakload period to peakload period. *Id*. To support this assertion, the Employer included a payroll report summary with the following data:

Month	**# of Permanent Employees**	**# of Temporary Employees**
January	8	31
February	8	33
March	8	31
April	8	13
May	8	33
June	8	46
July	8	99

[3] In the latter document, the Employer highlighted a bullet point stating: "To address wind threats, offshore facilities work in advance of evacuation to prevent any section or piece of equipment being knocked loose and damaging the rest of the platform."

August	8	101
September	8	81
October	8	76
November	8	52
December	8	50

The Employer asserted that its current work load was large enough to support the requested number of positions, since it had multi-year master service agreements with TransOcean and the Rowan Company, and had been engaged by two additional companies—South Texas Industries (STI) and Fabricating Solutions—to provide an additional 100 shipfitters for the upcoming peakload period. AF 881.

The CO denied the Employer's application on June 6, 2012, after finding that the Employer failed to establish the temporary nature of its need, as required by 20 C.F.R. §§ 655.6 and 655.21(a).[4] AF 830-836. In an attachment accompanying the denial, the CO stated:

> [T]he Employer's statement of temporary need is linking its need to the hurricane season in the Gulf of Mexico. However, it is unclear why the workers requested will be needed to perform construction during this time. The employer repeats that the work must be done prior to and right after hurricane season, which is June 1 through November 30. However, it is requesting dates of need from mid-May to the end of December. The requested period of intended employment is during and overlaps with the hurricane season. The explanation regarding the dates of need for this position remain inconsistent.
>
> The Master Service Agreements submitted by the employer are outdated (2006 and 2008), they do not define the dates of need, the number of workers, and where the work will be performed. These documents do not service as sufficient supplemental documents to prove the employer's temporary need.
>
> Furthermore, the payroll report submitted does not support the 250 workers requested. Although the employer submitted letters of intent, they fail to support the 250 workers requested in the current application and do not reference the number of workers at all.
>
> The payroll demonstrates that the highest number of temporary workers that were employed in 2011 was 101. It is unclear why the employer is requesting a 147%

[4] Although the CO issued a second RFI on May 14, 2012, AF 854-860, to which the Employer timely responded on May 17, 2012, AF 837-853, the CO's Final Determination makes no reference to this second RFI. Accordingly, the contents of these documents are not discussed in detail.

> increase for 2012. Additionally, the letters of intent failed to support the number of workers requested, they only indicate the dates of need.

AF 35. As a result, the CO found that the Employer's response to the RFI failed to establish that the Employer had a peakload need for the number of workers requested and period of need requested.

On June 18, 2012, the Employer filed a request for reconsideration, or in the alternative, BALCA review. AF 1-829. In its request, the Employer reiterated that it had a temporary need for shipfitters to perform construction work prior to, during, and approximately one month after hurricane season, due to the high volume of construction and maintenance work that it was contracted to perform on oil rigs during this period. AF 4. However, the Employer reduced the number of shipfitter positions it requested down to 110, explaining that it had lost a large construction contract to a Singapore company due to the delay in obtaining certification. But the Employer asserted that, contrary to the CO's findings, its MSAs with Transocean and the Rowan Companies were not outdated, and it continued to work under these agreements to the present date. As the Employer explained, these documents "are not structured and are not intended to define specifics such as exact date of service, number of workers required, and exactly where the work will be performed," but rather, "are general agreements for large corporate oil clients with multi-national work." AF 5. For additional details regarding its prior obligations under these MSAs, the Employer pointed to its 2011 invoices, stating that these documents "clearly evidence that the months of May 15 to the end of May, June, July, August, September, October, November, and December are peak load months wherein the Employer has a temporary need for ship fitters to perform the needed work for its clients." *Id*. The Employer asserted that when the MSAs and invoices are read together, they provide a clear picture of temporary need during the requested months. *Id*.

The Board received the Appeal File on June 8, 2012. The CO filed a brief on June 29, 2012, maintaining that the Employer failed to demonstrate temporary need during the requested certification period. In particular, the CO contends:

> M&M submitted only two letters of intent with little information other than the number of workers requested and two Master Service Agreements (MSA) from 2006 and 2008. Neither of the MSAs describes the dates workers are needed or the number of workers needed. Nor do the other two letters of intent contain information other than the number of workers and alleged dates of need.

> Nor Does the payroll chart support dates of need from May through December. M&M itself provided a chart showing its need for Shipfitters during the year period before certification. At best the chart shows an increase in need from July through October. Thus even if the ALJ finds that the agreements above support M&M's modified request for 110 workers, any certification should not extent past October.

(citations to the AF omitted). Counsel for the Employer also filed a brief on June 29, 2012, reiterating the points addressed in its request for reconsideration.

DISCUSSION

An employer seeking temporary labor certification under the H-2B program must establish that its need for the requested positions is temporary. *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). Department of Homeland Security ("DHS") regulations provide, in relevant part:

> 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. . . . The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B). To qualify under a peakload standard of need, an 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).

In this case, the Employer asserts that it maintains a staff of permanent workers year round, but requires temporary staffing during the mid-May through December period due to offshore oil maintenance regulations, which cause its customers to service rigs directly before, during, and after hurricane season in the Gulf of Mexico. AF 881. The Employer provided a detailed explanation of temporary need in both its initial application and response to the RIF.

In the attachment accompanying his denial, the CO asserts that the employer's explanation regarding the dates of need is inconsistent. I disagree, as a review of the administrative file reveals that the Employer's explanation has remained remarkably consistent. The Employer's initial application explained that "rig construction and maintenance related to

hurricane season must start at least a few weeks in advance of the normal beginning of hurricane season and runs for about a month after the end of that season." AF 1627. The Employer again elaborated on this same point in its response to the RFI, and provided copies of applicable Federal regulations and a print out from the National Ocean Industries Association (NOIA). *See* AF 880-883. Aside from the above conclusory statement, the CO has not put forth any basis for rejecting this general premise. Rather, the CO argues that the Employer's evidence does not support a peak load need because: (1) the Employer's letters of intent do not provide any information other than the number or workers or alleged dates of need; and (2) the Employer's MSAs do not describe the dates workers are needed or the number of workers needed. CO Brief at 1. Moreover, according to the CO, the Employer "did not submit any work schedules or more specific documentation showing a seasonal or peak load need." *Id*. But this assertion ignores the 2011 payroll report summary and hundreds of pages of monthly invoices that the Employer submitted in response to the RFI.

The Employer's 2011 payroll report summary indicates that the Employer regularly employed eight permanent workers throughout all twelve months in 2011. AF 923. It also reveals that the Employer employed temporary workers during all twelve months in 2011. However, the number of temporary workers that the Employer employed substantially increased from June through December. *Id*. The CO argues that the Employer's payroll report summary "at best . . . shows an increase in need from July through October."[5] Indeed, the Employer employed fewer temporary workers in June, November, and December than it did during July through October. But the number of temporary workers employed during June, November, and December was still substantially higher than the number of workers employed during January, February, March, April or May. Considering this pattern, in addition to the Employer's detailed statement of temporary need, I find that the Employer maintains a small permanent staff year round, but requires a large increase in temporary staff from June through December (but not

[5] In a footnote following this statement, the CO contests the validity of the Employer's payroll report summary, stating:

> That conclusion is only reached if the chart is taken at face value. A review of the voluminous data [the Employer] submitted to support the chart demonstrates some inconsistencies with the chart, and shows that any potential need would not extent past September.

CO Brief at 1 (citing AF 99-758). However, it is unclear what exactly the CO is referencing within this span of 659 pages as evidence of the alleged inconsistencies. Without a more specific page citation or example of one such inconsistency, I am unable to find the CO's allegation persuasive.

May, as requested by the Employer). I further find that the Employer has established that this increase in temporary staff will not become a part of its regular operations.

The CO argues that "even if the ALJ finds that the agreements above support [the Employer's] modified request for 110 workers, any certification should not extend past October." CO Brief at 1. However, the Employer has explained that its needs this year are greater than last year, since it has been asked to provide clients with an additional 100 shipfitters for the upcoming peakload period. To substantiate its claim, the Employer submitted a letter from STI requesting 60-70 shipfitters from May until at least December, and another letter from Fabricating Solutions expressing a need for 30 to 40 shipfitters until November. Considering these additional needs, as well as the Employer's historical staffing in the 2011 payroll report summary, I find that the Employer demonstrated a temporary peakload need for 110 shipfitters from June through December. Accordingly, based on the foregoing discussion, I find that the Employer demonstrated a temporary peakload need for 110 full-time H-2B workers during the months of June through December.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's determination is **REVERSED** and **REMANDED** for processing consistent with this order.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge