

**U.S. Department of Labor**

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**Issue Date: 07 August 2013**

In the Matter of

M&M Industrial Services, Inc.,  
*Employer,*

Certifying Officer:

William L. Carlson  
Chicago National Processing Center

Appearances:

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*For the Employer*

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Washington, D.C. 20210  
*For the Certifying Officer*

Before:

**Linda S. Chapman**  
Administrative Law Judge

Case No.: 2013-TLN-00058

**DECISION AND ORDER REVERSING CERTIFYING OFFICER'S  
DENIAL OF CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009). Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). § 655.33. The administrative review is

limited to the appeal file<sup>1</sup> prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and “such evidence as was actually submitted to the CO in support of the application.” § 655.33(a), (e).

### STATEMENT OF THE CASE

On June 10, 2013, the Employer filed an H-2B application (ETA Form 9142) for 135 workers to be employed as “Layout Workers, Metal and Plastic” from May 15, 2013 to December 28, 2013. The application’s Statement of Temporary Need (Section B, Item 9) noted a “busy season” of “mid-May through December,” and that “an influx of a large amount of new business demand for our services along with a land-based oil boom in South [sic] Texas and various other parts of the country, have created a shortage of workers.” It was for this reason that the Employer “look[ed] to the H-2B program[.]”

In addendum, the Employer elaborated on its need for 135 workers, the same number needed for a prospective client, Kiewit Offshore Services, Ltd:

Kiewit Offshore Services, Ltd. has two offshore construction projects, the Lucius Project and the Delta House Project which will reach a high construction pace through December 2013. Kiewit is requesting 135 M&M shipfitters to assist in the construction of these projects. Please note that if we are able to meet the client’s demand, then M&M Industrial Services, Inc. will obtain additional projects and work from this client . . .

AF 427. The Employer’s application also included a letter from Kiewit detailing the need for “skilled workers” over “the next several years.” The letter specifically “request[s] 135 ship fitters to assist in the construction of these projects,” and provides that the “Lucius Project” has “a scheduled completion timeframe for January 2014.” AF 450. The letter also identified “[t]he Delta House Project” which “will reach a high construction tempo between March and December of” 2013. *Id.* Kiewit makes clear that the requested “supplemental labor” is for “these projects.” *Id.*

The CO requested further information from the Employer on June 17, 2013. The CO requested an updated temporary need stated including: detailed operations descriptions; and a detailed operations description for Kiewit specifically. In its reply on June 24, 2013, the Employer emphasized that its prior references to Kiewit merely “confirm[] this company is engaging us to provide shipfitters” during its seasonal peakload. The Employer’s response also identifies its involvement “in fabrication of several projects,” namely with Transocean, Nabors, ODS International, Oceaneering, and Rowan – all within the purported peakload period. Its request for temporary workers, the Employer reasons, is to meet this increased demand that Kiewit’s interest evinces. AF 267-68.

The CO ultimately concluded<sup>2</sup> that the Employer’s response to the RFI did not satisfy the requirements for a peakload temporary need. The CO reasoned that “[t]he dates of need are not

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<sup>1</sup> The administrative file is cited to herein as “AF” followed by the page number.

based on weather, but [are] contract-dependent.” AF 262. The Employer’s goal, in the CO’s eyes, is to garner H-2B employees so as to secure a contract with Kiewit, guaranteeing it projects over the next several years. *Id.* There was no specific indication that this need was temporary, or related to a peakload. The CO considered the Employer’s rationale for 135 workers to be deficient because it “did not fulfill the request for annualized and/or multi-year work contracts or work agreements.” AF 264. Further, the CO stated that the Employer’s failure to “specify[] the actual dates when work will” begin and end undermines its claim for a temporal need. *Id.* As the Employer was not yet under contract with Kiewit, the CO argued, it cannot verify a temporary peakload need. *Id.*

The Employer’s Motion to Reconsider or in the alternative Request for BALCA Review was received on July 19, 2013, and the CO’s brief was filed on August 2, 2013. The Employer argued that its “need is specific to its own operational peakload need,” and not contingent upon a prospective contract with Kiewit. *See* Emp. Br. Filed July 19, 2013, 5. The Employer’s need is, instead, based on “work from various oil companies and shipyards specific to construction projects that only occur during a certain time of the year” – referencing the named clients from its June 24, 2013 reply to the CO’s further information request. *Id.* The Employer disputes the CO’s conclusion of an indefinite worker need, noting the time periods cited for Kiewit’s respective projects. *Id.* The Employer argues that it has had oil rig construction and maintenance projects in the May to December time period, as evidenced by its 2011 and 2012 payroll reports and statement of work. *Id.* at 6. The Employer also stated that, as indicated in the previous year’s temporary labor certification:

[O]il rigs are brought in from the Gulf of Mexico in the summer and during hurricane season, and that is the time when the Employer must perform construction and maintenance work for its clients. Workers are requested to perform construction prior to, during, and for approximately one month after hurricane season June 1 to November 30 because of the high volume of construction and maintenance work the Employer must complete for its clients during this peak load time period.

*Id.*

The Employer further argues that the CO’s claim that the increase in work is contingent on the ability of M&M to obtain H-2B workers, and that the payroll is a reflection of prior years’ H-2B worker availability and not the current demand for the Employer’s oil rig maintenance services, is incorrect. Rather, the increase in work is based on a peakload time period, in which oil rig construction and maintenance in the Gulf Coast region occurs. The Employer also argued that it was incorrect to state that the payroll was a reflection of previous years’ H-2B worker availability, when its previous application clearly showed the previous year peakload for 2011 without H-2B workers. The Employer maintained that it had a current peakload demand for oil rig maintenance services from the May to December time period.

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<sup>2</sup> Other issues were resolved between the parties, and are not disputed by either side here. The Employer also attempts to supplement the administrative file at this appeal with other information not considered by the CO, *see* AF 12-13. As I am barred to consider such information by 20 C.F.R. § 655.33(a), (e), I decline to review this information here.

The Employer also took issue with the CO's "broad brush" statement that the demand for oil rig services has been demonstrated to be ongoing, as illustrated in previous H-2B filings from Kiewit and other oil rig employers, questioning who these "other employers" were, and pointing out that it is an individual company with a need for temporary workers, and seeks to have its individual case so analyzed and adjudicated.

The CO's brief was filed on Friday, August 2, 2013. In it, counsel for the CO argued that "the employer's ostensible peakload need was, in effect, fabricated to take advantage of the H-2A [sic] program, not to satisfy a bona fide temporary need." *See* CO's Br. Filed Aug. 2, 2013, 5. It notes that Kiewit's Offshore Services letter determined its employee need in years, not a seasonal period. *See* AF 450.

## DISCUSSION

The H-2B program is, by definition, limited to seasonal or temporary work. *See* 8 U.S.C. §1101(a)(15)(H)(ii)(b) (defining the H-2B nonimmigrant category as requiring the performance of nonagricultural "temporary service or labor"). Accordingly, employers who seek H-2B temporary labor certification must establish that their "need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." 20 C.F.R. § 655.6(a). In determining whether a petitioning employer's need is temporary, the Department defers to the implementing regulations promulgated by the Department of Homeland Security ("DHS"). *See* 20 C.F.R. § 655.21(a), *citing* 8 C.F.R. 214.2(h)(6)(ii). Pursuant to these regulations:

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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. 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). The Employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see also Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009).

When determining whether an employer's need for labor or services is temporary, "[i]t 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).

Here, the Employer requests temporary workers for a "peakload" need. A peakload need is a time where the employer "regularly employs permanent workers . . . and that it needs to

supplement its permanent staff . . . 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 relies on Judge Colwell's decision from July 12, 2012 to demonstrate that "it maintains a small permanent staff year round, but requires a large increase in temporary staff from June through December," and that this temporary staff does not become part of the regular staff. *See* Emp. Br. Filed July 19, 2013, 8; *see also M & M Indus. Servs.*, 2012-TLN-41, 9-10 (July 12, 2012). Based on the solicited applications in the Employer's exhibits B-E for varying job shifter projects in 2013, I find that the Employer's claim that it has a small permanent staff supplemented by project-specific workers is credible.

The Employer reasons that it has a "peakload" need from May to December based on its 2011 and 2012 payroll reports, and it "cannot locate any US [sic] workers to do the shipfitting work[.]" *See* Emp. Br. Filed July 19, 2013, 6. The CO responds that a labor shortage cannot provide the basis for a temporary labor need. AF 414. The CO's response begs the question here because it presumes an answer to what is in dispute: whether the Employer has established a peakload need. It is true that a temporary labor shortage cannot establish the basis for a peakload need, but making that point still requires a finding that the Employer's need is not temporary.

In its appeal filing, the Employer refers to the February 22, 2013 Kiewit letter to demonstrate its temporary need. AF 450. One project has a scheduled completion time of January 2014, while another project will "reach a high construction tempo" between March and December 2013. AF 450. The Employer argues that these prospective projects accompany others from other clients. AF 267-68; *see also* Emp. Br. Filed July 19, 2013, 5. This is supported by the various job applications reflected in exhibits B-E.

I do not agree with the CO that the Employer's "peakload need" is fabricated to take advantage of the H-2A program, as opposed to a request to satisfy a bona fide temporary need. Nor does the fact that Kiewit expects to have a lot of work over the next several years, which it hopes that the Employer will be available to help with, negate the fact that at this specific point, the Employer has a peakload need for workers for specific projects. Both the Employer's application and brief cite to the specific projects referenced in the Kiewit letter: the Lucius Project, which is scheduled to conclude in January 2014, and the Delta House Project which "will reach a high construction tempo between March and December of" 2013. AF 450. While it may be that, as the Employer says in its addendum, "if we are able to meet the client's demand, then M&M Industrial Services, Inc. will obtain additional projects and work from this client," AF 427, that is not the basis for the application. The basis for the application pertains to the specific needs of the Lucius and Delta House Projects.

Because the Employer has not provided any documentation of any non-Kiewit project, the CO argues that the Employer thus does not have a peakload need. AF 262. But, as noted *supra*, "[i]t is not the nature . . . of the position which must be examined to determine the temporary need. It is the nature of the need . . . 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). Thus, the fact that the Employer is "not yet under contract with Kiewit" does

not determine the need. AF 264. What determines the need is its nature, and that nature – without access to specific operations schedules from Kiewit, as the Employer explained in its June 24, 2013 response – is determined by the need’s duration.

The CO responds that the temporal descriptions of the specific Kiewit projects do not provide “documentation specifying the actual dates when work will commence and end during each year of service.” AF 264 (emphasis in original). With respect to the Delta House Project, there is no specified termination date, but that is not dispositive. The letter provides the “temporary basis” for work upon “a seasonal or short-term demand,” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3): the “high construction tempo” of March-December 2013, and the completion of the Lucius Project on schedule by January 2014. Both projects are less than one year, and have a “definable future.” *Cf.* 8 C.F.R. 214.2(h)(6)(ii)(B). I thus find that the CO’s demand for specified dates exceeded the requirements for the Employer’s applications.

Accordingly, I find that the CO incorrectly determined that the Employer was unable to establish a “temporary” need for the requested H-2B employees. The CO’s final determination is REVERSED AND REMANDED for certification of the Employer’s application.

**SO ORDERED.**

**LINDA S. CHAPMAN**  
**Administrative Law Judge**