

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 January 2013

BALCA Case No.: 2013-TLN-00021
ETA Case No.: C-12285-59930

In the Matter of:

KIEWIT OFFSHORE SERVICES, LTD.,

Employer

Certifying Officer: Chicago National Processing Center

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

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Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) pursuant to Employer Kiewit Offshore Services Limited’s request for review of the Certifying Officer’s *Final Determination* denying temporary labor certification under the H-2B non-immigrant program. For the reasons discussed below, the Certifying Officer’s *Final Determination* in this matter is **AFFIRMED**.

BACKGROUND

The H-2B Program

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for such certification, a petitioning employer must file an *Application for Temporary Employment Certification* (ETA Form 9142) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008).¹ After the employer’s application has been accepted for processing, it is reviewed by a Certifying Officer, who will either request additional information, or issue a decision granting or denying the requested labor certification. 20 C.F.R. § 655.23. If the Certifying Officer denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

The Employer’s Application for H-2B Labor Certification

Employer Kiewit Offshore Services Limited (“Employer”) operates an offshore oil rig fabrication facility in Ingleside, Texas. AF 239.² On October 10, 2012, the Employer filed an application with the CNPC seeking H-2B temporary labor certification for 200 Pipe Fitters, based on a “peakload” standard of temporary need. AF 186-366. The application lists a period of intended employment beginning on October 1, 2012 and ending on May 30, 2013. AF 188.

In an attached statement of temporary need, the Employer’s Assistant Manager for HR Operations, Mr. John Hardin, related that the Employer specializes in the custom fabrication of large steel structures and components for deep water offshore oil and gas projects. AF 239. According to Mr. Hardin, the unique features of the Employer’s facility have given the company a reputation for successfully delivering large offshore projects on time and within budget. AF 240. He stated that, at the time of the filing, the Employer employed 1,800 full-time permanent workers; however, due to the company’s scheduled workload, the Employer temporarily requires the services of an additional 200 Pipe Fitters for a peakload period beginning on October 1, 2012 and ending on May 30, 2013. *Id.*

Mr. Hardin explained that the Employer’s contracts to fabricate custom large steel structures and components involve multiple phases, with each phase dependent upon the

¹ All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance*, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

² Citations to the Appeal File will be abbreviated “AF” followed by the page number.

completion of the previous phase. AF 240. He cited the Employer's contract with Shell Offshore, Inc. on the "Olympus" project as an example. This contract lists a series of mechanical completion phases, the first of which is scheduled for November 10, 2012 and the last of which is scheduled for March 29, 2013; the overall completion date for this project is scheduled for June 1, 2013. AF 264. According to Mr. Hardin, each phase in this contract "represents independent short term demand needs . . . [and] requires a different demand in Pipe Fitters." AF 241.

In support of the Employer's temporary peakload need for 200 Pipe Fitters, Mr. Hardin referred to the Employer's "Pipe Fitter Needs Histogram." AF 244. According to Mr. Hardin, the Employer's anticipated a spike in need for Pipe Fitters during the identified "peak months" due to four main projects: the Olympus project described above; the Delta House project; Lucius Topsides; and Jack St. Malo Modules. AF 242. Specifically, he stated:

In October of 2012 several projects including the Lucius Topsides and the Olympus modules begin phases wherein extra manpower is required. The 200 extra Pipe fitters are required to complete those particular phases of the project.

In January 2013, a scheduled phase for the Delta Topsides commences and the increased manpower is needed through May 2013. The need for the various phases increases in the last quarter of the year and remains elevated through the first two quarters of the following year. Thereafter, the need returns to our normal levels in June of 2013. Thus, the demand is not year round, but is short term commencing in October and tapering off in mid-year 2013. Having the extra 200 temporary Pipe Fitters on staff will give Kiewit Offshore Services, Ltd the requisite labor force needed in order to complete the projects in a timely manner. The projects cannot be completed by the existing workforce and Kiewit will not be able to fulfill its contracts.

AF 242. Mr. Hardin asserted that the Employer would not need the requested temporary workers after the peakload period ended on May 30, 2013. *Id.*

On October 18, 2012, the Certifying Officer ("CO") issued a *Request for Further Information* ("RFI") informing the Employer that its application failed to meet the requirements of the H-2B program. AF 177-185. Although the RFI identified four deficiencies in the Employer's application, only one is relevant to this appeal: the Employer's failure to demonstrate a temporary need for the requested H-2B workers, as required by 20 C.F.R. §§ 655.6 and 655.21(a). AF 180-182. In particular, the CO found that the Employer failed to include adequate attestations to establish that it had a peakload temporary need for 200 Pipe Fitters. AF 180. In arriving at this conclusion, the CO identified the following issues:

1. In the letter of intent for the Delta House contract dated May 1, 2012 it is stated that the letter of intent expires if no contract is signed by October 1, 2012. However, the employer did not provide a contract with Delta House that included any delivery dates or dates of performance specified;

2. Lucius Topsides contract date was December 15, 2011 with a delivery date of January, 2014;
3. The Jack St. Malo contract is incomplete with delivery dates of February 2011 through October, 2011 as results are inconsistent with the requested dates of need for this application. These three contracts do not support the peakload need for temporary workers; and
4. The Olympus Contract is a long term, ongoing project that spans 2010 through 2013. The contract information does not contain sufficient detail to determine a peakload standard based on the dates of need and does not support the request for 200 Plumbers, Pipefitters, and Steamfitters. Specifically, in the Olympus Contract does not provide the occupation or number of workers required in reference to the "scheduled key dates" of the contract and it does not indicate a period when the workers are not need.

AF 181. The CO additionally noted that the Employer had not provided payroll records to help the Department “discern between” the Employer’s need for a permanent Pipe Fitter staff and its purported temporary peakload need for additional Pipe Fitters. *Id.* According to the CO, such payroll records “may further substantiate the peakload need period when workers are utilized and the period when the workers are not being utilized.” *Id.*

To remedy the above deficiency, the CO instructed the Employer to submit supporting evidence and documentation that justified its chosen standard of temporary need, including, but not limited to, “summarized monthly payroll reports for a minimum of three previous calendar years 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.” AF 182.

The Employer timely responded to the RFI by cover letter dated October 24, 2012. AF 111-176. In response to the CO’s request for evidence and documentation, the Employer submitted the following: a supplemental statement of need signed by its HR Operations/Assistant Manager, Mr. John Hardin; summarized monthly payroll reports for three previous calendar years; supplemental documents to the work contracts that were provided with the initial application, which specify the actual dates when work will commence and end; and a histogram illustrating the workers needed to fulfill each of the contracts.

The summarized payroll reports provide the following data on the number of Pipe Fitters that the Employer has employed since January 2009:

		2012							
	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.
Pipe Fitters	146	143	140	132	145	144	137	146	149
H-2B Pipe Fitters	139	139	137	135	145	144	139	—	—

2011

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.
Pipe Fitters	160	168	167	156	151	153	156	150	143	147	152	153
H-2B Pipe Fitters				1	1					43	45	45

2010

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.
Pipe Fitters	132	122	117	114	93	88	85	84	92	97	127	140

2009

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.
Pipe Fitters	107	105	120	123	131	140	144	148	165	151	142	137

AF 143-146. The Employer's histogram provides the following month-by-month projections for the number of Pipe Fitters it will need per project to meet its upcoming contractual obligations:

	Olympus Modules	Jack & St. Malo Topsides and Integration	Lucius Topsides	Combined Need
August 2012	214	134	0	348
September 2012	219	136	0	355
October 2012	259	173	0	432
November 2012	275	175	13	163
December 2012	265	220	16	501
January 2013	238	230	39	507
February 2013	216	235	79	530
March 2013	208	230	86	524
April 2013	197	207	99	503
May 2013	154	221	103	478
June 2013	97	229	121	447
July 2013	0	226	123	349
August 2013	0	203	114	317
September 2013	0	203	113	316
October 2013	0	189	104	293
November 2013	0	0	28	28
December 2013	0	0	4	4
January 2014	0	0	0	0
February 2014	0	0	0	0
March 2014	0	0	0	0

AF 164. According to Mr. Hardin, this histogram indicates a spike in the Employer’s need for Pipe Fitters during the identified peakload months (October 2012 through May 2013). AF 133.

In the supplemental statement of need, Mr. Hardin reiterated that the Employer’s contractual obligations on the Jack & St. Malo project, the Lucius project, and the Olympus project have created a peakload need for 200 additional Pipe Fitters. AF 111-114. For instance, on the Olympus project, the Employer contracted to provide fabrication and integration of Topside Modules on a floating production system. AF 137. The Employer is scheduled to work on the topside modules in November 2012 and December 2012; the load out of these modules is scheduled for January 2013; system testing is scheduled in February and March 2013; the mechanical completion is due in March 2013; and the delivery of the unit is due by the end of May 2013. AF 137-138. According to Mr. Hardin, the employer requires the following number of Pipe Fitters to complete this work in a timely fashion:

Date	Workers Needed ²	Process Completion
Oct. 2012	259	Wellbay module
Nov. & Dec 2012	275-265	Wellbay module, Power module, Drilling module, Process Module, Quarters Module
Jan. 2013	238	Delivery of the TLP Hull & Loadout of Wellbay, Power Module, Drilling Module, Process Module, Quarters Module
Feb. 2013	216	System Testing
Mar. 2013	208	Scheduled Mechanical Completion
Apr. 2013	197	System Testing
May. 2013	154	System Testing for delivery scheduled in June 2013

AF 138.³ With regard to the Jack & St. Malo project, the Employer contracted to complete the Topside between October 2012 and January 2013, and integrate the Topside onto the offshore structure between February 2013 and March 2013. AF 136-137. According to Mr. Hardin, the Employer requires the following number of Pipe Fitters to complete this work in a timely fashion:

³The footnote in this chart indicates that the “workers needed” is per project, and includes the Employer’s permanent workers as well as requested H-2B workers. To determine the Employer’s need, Mr. Hardin stated that the numbers of workers needed per month for each project should be added.

Date	Workers needed ¹	Process Activity
Oct. 2012	173	Topside Drilling Rig
Nov. 2012	175	Topside Drilling Rig
Dec. 2012	220	Topside Drilling Rig
Jan. 2013	230	Topside Drilling Rig
Feb. 2013	235	Completion of Topside Drilling Rig and Commence Integration of Topside onto Platform
Mar. 2013	230	Integration of Topside onto Platform
Apr. 2013	207	Integration of Topside onto Platform
May 2013	221	Finish for Mechanical Acceptance

AF 137. And on the Lucius Topsides project, the Employer must fabricate the deck and topsides of the floating production system. AF 138. This work is scheduled to begin in November 2012 and expected to last until May 2013.⁴ According to Mr. Hardin, the employer requires the following number of Pipe Fitters to complete this work in a timely fashion:

Date	Workers needed ¹	Process Activity
Oct. 2012	0	
Nov. 2012	13	Cellar Deck-Finalize fabrication of cellar deck Production Deck- Install rack piping and support Sub-Cellar Deck -Install Center and row sections
Dec. 2012	16	Production Deck- Fabricate Spools and Supports Sub-Cellar Deck -Install Center and row sections
Jan. 2013	39	Cellar Deck-Install Piping and Support Production Deck-Fabricate Spools and Supports/Install rack piping and support Main Deck - Install Rack Piping and Supports
Feb. 2013	79	Cellar Deck-Install Piping and Support Production Deck-Fabricate Spools and Supports/Install rack piping and support Main Deck - Install Rack Piping and Supports/Fabricate Spools and Support
Mar. 2013	86	Cellar Deck-Install Piping and Support Production Deck-Fabricate Spools and Supports Main Deck - Install Rack Piping and Supports/Fabricate Spools and Support
Apr. 2013	99	Cellar Deck-Install Piping and Support Production Deck-Fabricate Spools and Supports Main Deck - Install Rack Piping and Supports/Fabricate Spools and Support
May. 2013	103	Cellar Deck-Install Piping and Support Production Deck-Fabricate Spools and Supports Main Deck - Fabricate Spools and Support

⁴ As Mr. Hardin explained:

While the overall Lucius project began in December of 2011, the position for which we need the additional workers begins in November of 2012 and continues throughout the date of need contributing to the overall temporary need for 200 Pipe Fitters. In November and December of 2012, fabrication of various phases of the Cellar Deck, Production Deck, and Sub-Cellar Decks begin. From January through May, important phases of the Main Deck, Cellar Deck and Production Deck are begun and completed in order to ensure the completion date in June of 2013. These steps need to be completed in order to ensure the completion date in June of 2013.

AF 139.

AF 139. Mr. Hardin urged the CO to consider the staffing needs arising from these projects, and asserted that when all three projects are viewed together, “a tremendous strain is placed on the company’s welding resources which cannot be completed by the existing permanent workforce.” AF 149.

The CO issued a *Final Determination* denying certification on December 5, 2012, citing the Employer’s failure to establish a temporary need. AF 103-110. The CO confirmed his receipt of the RFI response materials, but found that the Employer’s evidence failed to establish that the Employer’s need for H-2B workers is temporary, as required by 20 C.F.R. §§ 655.6 and 655.21(a). AF 109. In particular, the CO cited a chart listing the Employer’s filing history,⁵ and noted that the dates of need requested in the current application “create overlapping dates of need,” thus demonstrating that the Employer’s need for the services or labor to be performed is permanent, not temporary, in nature. AF 107. The CO additionally stated:

Based on the documentation provided in this and previous applications, it seems that Kiewit is experiencing a growth of business. For example the contract with Delta House dated May, 2012 via a letter of intent, was not mentioned in the RFI response however it was included in this application as a future contract. The Department believes that the execution of Kiewit's long term contracts may indicate expansion of the business, demonstrated with the contracts mentioned above, Delta House future contract, and Kiewit's history with the Department through previous applications. However, the expansion of a business does not demonstrate a temporary need.

AF 110. In conclusion, the CO noted that the Employer was experiencing a “growth in business, which is not considered a reason to bring in temporary workers.”

The Employer filed a request for administrative review by letter dated December 15, 2013, and received by BALCA on December 17, 2013. AF 1-102. Shortly thereafter, the Board issued a Notice of Docketing setting forth an expedited briefing schedule. The CO filed a brief on January 4, 2013; the Employer did not file an additional brief or statement of position.

⁵ In this chart, the CO provides the following data:

Case #	Workers Requested	Occupation Title	Start Date of Need	End Date of need	Status
C-12285-59930	200	Plumbers, Pipefitters, and Steamfitters	October 1, 2012	May 30, 2013	In Process
C-12062-58548	100	Plumbers, Pipefitters, and Steamfitters	April 1, 2012	January 31, 2013	Denied
C-11045-54011	150	Plumbers, Pipefitters, and Steamfitters	October 01, 2011	July 31, 2012.	Certified

AF 107.

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 temporary labor certification under the H-2B program must establish that their need for labor or services is temporary in nature. 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The regulations implementing this provision provide:

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 peakload need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B). Absent unusual circumstances, the Department will deny an *Application for Temporary Employment Certification* where the employer has a recurring, seasonal or peakload need lasting more than 10 months (except where an employer’s need is based on a one-time occurrence). 20 C.F.R. § 656.6(c).

In the instant case, the Employer maintains that it has a peakload need for 200 Pipe Fitters from October 1, 2012 through May 30, 2013. To qualify under a “peakload” standard of 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 asserts that it has met this burden because it regularly employs Pipe Fitters, and needs to supplement its permanent staff with an additional 200 Pipe Fitters for an eight-month period (from October 1, 2012 and ending on May 30, 2013), due to a short-term demand caused by overlapping contractual obligations. The Employer maintains that these additional Pipe Fitters will not become part of its regular operation, since it will no longer require the services of these additional Pipe Fitters at the end of the eight-month period. The Employer’s documentation, however, fails to support this peakload temporary need.

Even though the Employer provided detailed estimates regarding the number of Pipe Fitters needed to fulfill its upcoming contractual obligations, it neglected to state the number of Pipe Fitters employed on its “permanent” staff. A review of the Employer’s payroll records reveals that the number of Pipe Fitters the Employer employs is largely volatile and tends to vary each month. It is thus difficult to assess the veracity of the Employer’s claim that it needs to temporarily supplement its permanent staff of Pipe Fitters with exactly 200 extra workers. But even setting aside the fluctuating number of workers on the Employer’s “permanent” staff of Pipe Fitters, the Employer’s payroll records indicate that the Employer used the H-2B program to fill between 43 and 145 Pipe Fitter positions from October 2011 through July 2012. AF 143-146. Viewing the Employer’s documentation as a whole, it appears that the Employer’s “peakload” need for additional Pipe Fitters spans at least a 19-month period (from November

2011 until May 2013)—a period that far exceeds the ten month limit provided for in the regulations.⁶ The Employer did not base this need on a one-time occurrence, nor did it present any unusual circumstances to overcome the 10 month limit. Consequently, the CO was authorized to deny the Employer’s application pursuant to section 655.6(c).⁷

ORDER

In light of the foregoing, the Certifying Officer’s *Final Determination* denying certification is hereby AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

⁶ Although the Employer did not use the H-2B program to employ Pipe Fitters in August or September 2012, the Employer’s histogram projected a much greater need for Pipe Fitter positions during both of these months than the number of Pipe Fitters it actually employed. *Compare* AF 143 (payroll records indicating that the Employer employed 146 Pipe Fitters in August 2012 and 149 Pipe Fitters in September 2012), *with* AF 164 (histogram indicating that the Employer required the services of 348 Pipe Fitters in August 2012 and 355 Pipe Fitters in September 2012).

⁷ Since the record supports the CO’s denial of certification on this basis, I decline to address the Employer’s remaining arguments in support of certification.