



**Issue Date: 12 February 2014**

**BALCA Case No.: 2014-TLN-00010**  
**ETA Case Nos.: H-13225-090372**

*In the Matter of:*

**HERDER PLUMPING INC.**

*Employer.*

Appearances: Jesus R. Leon  
Foremen, Inc.  
Laveen, AZ  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Steven R. Jones, Senior Trial Attorney  
Office of the Solicitor of Labor  
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**

This case arises from the Employer's request for review of the Certifying Officer ("CO")'s denial of an application for temporary alien labor certification under the H-2B 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).

**STATEMENT OF THE CASE**

On December 6, 2013, the Employment and Training Administration ("ETA") received an application for H-2B temporary labor certification from Herder Plumbing, Inc. ("Employer") for fifteen "General laborers" to be employed as "Helpers-Pipelayers, Plumbers, Pipefitters, and

Steamfitters,” from January 20, 2014 through January 20, 2016, due to a one-time occurrence. AF 33.<sup>1</sup> In an addendum to the application, the Employer explained its temporary need for these workers as follows:

Herder Plumbing, Inc. has been operating since 1996. Our business is to provide pool plumbing services to the biggest Phoenix Metropolitan area pool builders. We have recently been awarded a big job by Presidential Pools (the biggest pool plumbing company in Arizona) which begins in January 20, 2014 until January 20, 2016. This one time need event has led us to procure a willing and able general laborer U.S. workforce, but we have had no success. Even when we ran our recruiting by posting the job with our State Workforce Agency and run ads, we have had no applicants. After our current recruiting effort, we now understand that the AZ construction workforce landscape has changed considerably, given Arizona's past construction debacle and the fact that many workers left the industry. Now it is obvious that we are facing an entry level general laborer shortage in the construction industry in Arizona. Therefore, given our coming workload and the need for workers, we have no option but to supplement our permanent workforce with guest workers. According to DHS regulations at 8 CFR 214.2(h)(6)(ii)(B) and the DOL regulations at 20 Code of (CFR) 655.6(b) [sic], we qualify for a labor certification since our workforce is temporary in nature as a one time need.

Please receive and process this application for alien employee certification in which we will appreciate and thank your certification, as soon as possible, so we can timely finish the process to hire fifteen (15) foreign temporary general laborers to supplement our current workforce for this one time need. Our company's success depends on it.

AF 39.

On December 12, 2013, the CO issued a *Request for Further Information* (“RFI”) notifying the Employer that its application did not comply with the requirements of the H-2B program. AF 28-32. The RFI identified one deficiency: “failure to establish that the nature of the employer’s need is temporary,” as required by 20 C.F.R. §§ 655.21(a), 655.22(n). In particular, the CO observed:

The requested dates of need in the current application are only 35 days apart with the employer's previously certified application for the designated occupation. Last year, the employer applied for and received certification (H-400-12333-423221) for 15 Helpers-Pipe layers, Plumbers, Pipe fitters, and Steamfitters in the same area of intended employment from February 15, 2013 through December 11, 2013 (which are historically consistent with the employer's other peakload requests). The employer's current application, when taken together with the employer's previous certification, demonstrates a need covering approximately 34 months with only a 35 day break between the end date of need and the beginning date of

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<sup>1</sup> Citations to the 48 page Administrative File will be abbreviated “AF” followed by the page number.

need. The employer's past and present filing activity, therefore, demonstrates that the nature of the employer's need for the services or labor may be permanent. The employer also has not indicated how this 2 year contract is different from their normal business operations.

A detailed chart of the employer's filing activity for the past couple of years is listed below:

Case #	Workers Requested	Occupation Title	Start Date of Need	End Date of Need	Standard	Status
H-400-13225-090372	15	Helpers– Pipelayers, Plumbers, Pipefitters, and Steamfitters	1/20/14	1/20/16	One-time Occurrence	Pending
H-400-12333-423221	15	Helpers– Pipelayers, Plumbers, Pipefitters, and Steamfitters	2/15/13	12/15/13	Peakload	Certified
C-12026-57691	15	Helpers– Pipelayers, Plumbers, Pipefitters, and Steamfitters	2/15/12	12/15/12	Peakload	13 Partial Certification

It is unclear how it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers and how they will no longer be required after January 20, 2016, given the employer's consistent history of filing with the Department for its peakload need.

AF 31-32. To remedy this deficiency, the CO directed the Employer to submit supporting information and documentation in support of its chosen standard of temporary need, including an explanation of how its application for a two-year one-time occurrence differed from the peakload applications that it previously submitted. AF 32.

The Employer responded to the RFI on December 17, 2013. AF 8-27. In its response, the Employer explained its one-time need for 15 Helpers–Pipelayers, Plumbers, Pipefitters, and Steamfitters as follows:

I appreciate your concern to our one time need. Hence, and to dissipate your concerns, I want to let you know that as of now we are also going through our recruiting process for our normal H-2B peak load season petition which is, clearly, the recurrent need we have every year and we have had in the past as appropriately mentioned in this document [the RFI] by you. Basically, what I need to state here is that we have both a peak load and a onetime need occurrence. I might seem odd that we have both needs, concurrently, but when I further

explain the job necessities and send to you additional requested documents, you will definitely understand.

Please note that the onetime need being requested for this time is for General Laborers whom will be in charge, mostly, as trench digging and clean-up crews and their prevalent wage was set at \$10.18 per hour. The initial prevalent wage petition was under soc-code 51-9198 as Helpers-production workers (I must also state that this soc-code was deliberately changed by your PW Department). This soc-code describes the one time job need more accurately than the one we usually have as our peak load need. According to the O\*Net Online job description for the above mentioned soc-code “help production workers performing duties requiring less skill. Duties include supplying or holding materials or tools, and cleaning work area and equipment.” This job description clearly differentiates from our normal peak load petition for pool laborer helpers which is under soc-code 57-3015 with a job description as Helpers-Pipelayers, Plumbers, Pipefitters and Steamfitters with an obvious difference in wage rate of \$14.44 (determined as of July 2013). Please acknowledge the job difference and skill level difference.

Finally, please review our awarded letter of intent as a clear proof of our one time need occurrence; and please notice that I have not committed to the engagement yet because I need to know if I will have the sufficient workforce to perform the job well and on time. Furthermore, even though the work is for a total of 27 months, I know giving the timing I can finish the job with the help of some of my peak load guest workers. Hence, I am only asking for a 24 month commitment from my one time need crew.

I am quite frustrated because of the recent Government shut down because it has delay my petition and our getting the help we need to commit to this work opportunity depends on your approval to obtain this supplemental workforce for this one time need. By providing us your approval to supplement our current permanent workforce, you will also help our permanent, more skilled pipelayers, keep busy at their job for the next couple of years.

AF 17. The Employer also provided a letter of intent between itself and Shasta Industries stating that Shasta Industries intends to award a 27 month contract to the Employer to plumb a total of 1524 pools in Maricopa County between December 10, 2013 and March 31, 2016. AF 25-27.

After reviewing the documentation that the Employer submitted in response to the RFI, the CO concluded that the Employer failed to establish a one-time need for the positions in its application. Consequently, on January 3, 2014, the CO issued a Final Determination denying certification. AF 2-7. In an attachment to the denial, the CO explained:

The employer has not demonstrated through its statements or documentation that the one-time occurrence need requested in this application represents a unique need that differs from the job applications requested in previous H-2B applications. The Employer has requested the same type of workers, performing

the same duties, in the same worksite locations as in it [sic] previously certified peakload need requests. The Department acknowledges that the employer received a different SOC code this year; however, the job duties and experience requirements are identical to its duties and experience required in its previously certified peakload requests. This point is further supported by the employer's statement that it will use it [sic] "peakload guest workers" to complete this contracted work. Therefore, the employer has employed workers in the past and may employ workers in the future to perform the duties described in this application.

Finally, the employer states it has a 27 month contract that creates its one-time occurrence need and has requested dates of need lasting 24 months. However, this need of 24 months is not of short duration. Additionally, the employer has failed to show that similar contracts will not be accepted.

The employer failed to adequately respond to the RFI and failed to provide sufficient documentation to establish it has a one-time occurrence need that differs from its normal peakload need. Therefore, the application is denied.

AF 6-7. The Employer requested administrative review of the denial on January 23, 2014. AF 1.

## **DISCUSSION**

An employer who seeks to hire foreign workers under the H-2B program must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.21(a) (citing 8 C.F.R. 214.2(h)(6)(ii)); *see also* 8 U.S.C. §1101(a)(15)(H)(ii)(b). For purposes of the H-2B program, temporary services or labor "refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." Pursuant to DHS 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 peakload need, or an intermittent need.

8 C.F.R. 214.2(h)(6)(ii)(B). To establish a one-time occurrence, the employer must demonstrate "that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker." 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

As the CO found, the Employer has employed Helpers–Pipelayers, Plumbers, Pipefitters, and Steamfitters in the past and has not established that it will not employ such workers in the future. The Employer argues that its need for the positions at issue in the instant application is different than its need for the positions requested in its previous applications because “the onetime need being requested for this time is for General Laborers whom will be in charge, mostly, as trench digging and clean-up crews . . . .” AF 17. This argument is unavailing, as the Employer never fully explained how its need for these materially differ from the duties performed by the workers in its previous “peakload” applications. In fact, in its response to the RFI, the Employer indicated that it intended to use “peak load guest workers” to do the same work as the workers for which it seeks certification in the instant application. AF 17 (“[E]ven though the work is for a total of 27 months, I know giving the timing I can finish the job with the help of some of my peak load guest workers.”).

The Employer similarly failed to establish that it has an employment situation that is otherwise permanent, but that a temporary event of short duration has created the need for a temporary worker. The Employer is a pool plumbing services company. It is in the nature of its business to contract to provide pool plumbing services on a project and then move on to another project. A contract between Shasta Industries and the Employer is not a “temporary event” when viewed in the context of the Employer’s business, but rather, an indication that the Employer continues to grow its business.

In the Final Rule promulgating the current H-2B regulations, ETA gave the example of a shipbuilder that might be eligible for temporary labor certification for a contract to build a ship that created a burden outside its normal workload, but that would not be eligible if it continually requests H-2B workers for each shipbuilding project:

Neither the Department nor DHS is changing the long-established definition of onetime occurrence which encompasses both unique non-recurring situations but also any “temporary event of a short duration [that] has created the need for a temporary worker.” For example, an employer could utilize the H-2B program to secure a worker to replace a permanent employee who was injured. Further, if that permanent employee, upon returning to work, subsequently suffered another injury, the same employer could utilize the H-2B program again to replace the injured employee on the basis of a one-time occurrence. A one-time occurrence might also arise when a specific project creates a need for additional workers over and above an employer's normal workforce. For example, if a shipbuilder got a contract to build a ship that was over and above its normal workload, that might be a one-time occurrence. However, the Department would not consider it a one-time occurrence if the same employer filed serial requests for H-2B workers for each ship it built.

ETA, Final Rule, Labor Certification Process and Enforcement (H-2B Workers), 73 Fed. Reg. 78020, 78027 (Dec. 19, 2008). Here, the Employer has filed serial requests for H-2B workers in the same position. Thus, even though the Shasta Industries contract may be a discrete contract, it is only one of many contracts that the Employer has entered into over the years as a pool plumbing services company.

In its statement of temporary need, the Employer explains that it cannot procure a willing and able workforce because the “construction workforce landscape” in Arizona has changed “considerably.” AF 39. The Employer goes on to state: “Therefore, given our coming workload and the need for workers, we have no option but to supplement or permanent workforce with guest workers.” *Id.* To employ guest workers under the H-2B program, however, the Employer must establish that its need for these workers “will end in the near, definable future.” 8 C.F.R. 214.2(h)(6)(ii)(B). The Employer has provided no indication that the circumstances which led to the shortage of construction workers will change in the near future.

The CO may not grant certification under the H-2B program unless the petitioning employer has established that its need for the nonagricultural services or labor to be performed is temporary in nature. 20 C.F.R. § 655.23(b). Based on the information in the record, the CO could not determine that the Employer had a one-time temporary need, as defined by the pertinent regulations. Accordingly, I find that the CO properly denied certification.

### **ORDER**

In light of the foregoing discussion, the CO’s denial of certification is hereby **AFFIRMED**.

For the Board:

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