



Issue Date: 16 May 2016

BALCA Case Nos.: 2016-TLN-00038; 2016-TLN-00042
ETA Case Nos.: H-400-16005-732611; H-400-16004-467531

In the Matters of:

KBR, INC.,
Employer.

Certifying Officers: Charlene G. Giles, Leslie Abella Dahan
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For the Employer

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For the Certifying Officers

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

These cases¹ are before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to KBR, Inc.’s (“Employer”) request for review of the Certifying Officer’s Final Determinations in the above-captioned H-2B temporary labor certification matters.² The H-2B

¹ These cases were consolidated by my order issued May 3, 2016 on motion of the Certifying Officer and without objection of the Employer.

² On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655 and 29 C.F.R. Part 503). Pursuant to this rule, the Department will process an *Application for Temporary Employment Certification* filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR. *Id.* at 24,110. The Employer filed two *Applications for Temporary Employment Certification* on January 8, 2016, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis, as defined by Department of Homeland Security regulations.³ Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).⁴ A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁵

STATEMENT OF THE CASE

Employer’s H-2B Applications

On January 8, 2016, the ETA received H-2B Applications for Temporary Employment Certification (ETA Form 9142B) from the Employer for 72 “pipefitters” and 38 “combination pipe welders” as one-time occurrence workers for an engineering, procurement, and construction contract, to be employed in La Porte, Texas, from April 1, 2016 to January 31, 2017. (AF-1 169; AF-1 189).⁶ The pipefitter positions were classified at O*Net Code 47-2125, Plumbers, Pipefitters, and Steamfitters. (AF-1 169-172). The welder positions were classified at O*Net Code 51-4121, Welders, Cutters, Solderers, and Brazers. (AF-2 189-192). The Employer specified that the positions required a High School Diploma/GED and 24 months of experience. (AF-1 172; AF-1 192).

CO’s First Notices of Deficiency & Employer’s Responses

On February 18, 2016, the CO issued a Notice of Deficiency (“NOD”) in 2016-TLN-00042, identifying two deficiencies: (1) that the Employer failed to submit an acceptable job offer; and (2) that the Employer failed to disclose foreign worker recruitment. (AF-2 182-188).

On February 29, 2016, the CO issued a NOD in 2016-TLN-00038, identifying three deficiencies: (1) that the Employer failed to establish the job opportunity as temporary in nature; (2) that the Employer failed to submit an acceptable job offer; and (3) that the Employer failed to disclose foreign worker recruitment. (AF-1 157-165). In relevant part, the CO found Deficiency 1 because the Employer had not demonstrated the project represented a unique event in its business operations and that as an engineering and construction service company its business practices appeared to be contingent on securing and fulfilling contracts. The CO noted that the Employer had submitted five previous applications for temporary workers including H-400-15308-859028 for 56 Plumbers, Pipefitters, and Steamfitters from March 1, 2016 through September 1, 2016; and H-400-16007-144802 for 80 Plumbers, Pipefitters, and Steamfitters from April 1, 2016 through October 1, 2016. (AF-1 161-162).

³ 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).

⁴ 8 C.F.R. §214.2(h)(6)(iii).

⁵ 20 C.F.R. §655.61(a).

⁶ Citations to the Appeal File in the case will be abbreviated (“AF”) followed by the page number(s). As there are two Appeal Files in the case, the abbreviation “AF-1” refers to the Appeal File for 2016-TLN-00038, and “AF-2” refers to the Appeal File for 2016-TLN-00042.

On February 24, 2016, and March 11, 2016, the Employer filed responses to the NODs. (AF-1 26-156; AF-2 168-178). In both cases, the Employer addressed the deficiency that it failed to submit an acceptable job offer by providing additional information about the rate of pay and by submitting the SWA job order. (AF-1 26; AF-2 175-178). The Employer also addressed the deficiency that it failed to disclose foreign worker recruitment through a declaration that it would not utilize an agent or recruiter for the recruitment of H-2B workers under the application. (AF-1 26; AF-2 182). With regard to the first deficiency in 2016-TLN-00038, the Employer noted that it was an engineering and construction service company that secured and fulfilled contracts on a regular basis. (AF-1 26). The Employer stated that its contracts, including the current project for which it was seeking temporary workers, were large “multi-phase” projects and that each phase was “different,” “separate,” and “not reoccurring” and that the activities performed by workers during each phase were “unique and independent”. *Id.*

The Employer also submitted a statement to support a temporary need for workers that stated that on August 21, 2014, it was awarded a contract from Gemini HDPE, LLC to provide engineering, procurement, and construction services for a new high-density polyethylene facility to be located in La Porte, Texas. (AF-1 152-156). The statement indicated that although the Employer was in the business of providing engineering, procurement, and construction services to its clients, each project it supported was unique in nature and had “varying degrees of commitment and staffing needs.”⁷ *Id.* The statement averred that it was “widely acknowledged” in the agricultural and petrochemical industries that craft workers were scarcely available to complete the existing work because these industries require much stricter standards than other commercial or residential industries. *Id.* The Employer also indicated that the Gemini HDPE project was “considerably larger than a typical project” and that the company had been unable to locate a sufficient number of skilled workers. *Id.* The Employer stated that:

The workers requested at each stage of the project are unique and the work they will engage in in the requested time is specialized and temporary in nature. KBR establishes that we have a one-time need for the services of the Pipefitters. Although we have employed Pipefitters in the past, they have not been engaged in the work now being sought and we will not need them to perform the services in the future. As such, KRB seeks certification for its own temporary need, which in the case of the La Porte project will cease on January 31, 2017.

Accordingly, KBR is an ideal candidate for H-2B temporary workers because we have an employment situation that is not permanent, but a temporary event of short duration that has created a need for skilled pipefitters for a well-defined and unique project in the U.S. Upon successful completion of their work on the La Porte facility, the workers will depart the United States and return to their employment abroad.

(AF-1 155-156).

⁷ The statement notes that KBR is currently engaged in three large projects: construction of urea processing facilities in Borger, Texas and Enid, Oklahoma and the HDPE facility La Porte, Texas. (AF-1 154-155).

CO's Second Notice of Deficiency & Employer's Response

On March 10, 2016, the CO issued a Second NOD in 2016-TLN-00042, identifying two deficiencies: (1) that the Employer failed to establish the job opportunity as temporary in nature; and (2) that the Employer failed to supply confirmation of job contractor status. (AF-2 160-167). In relevant part, the CO found Deficiency 1 because the Employer had not demonstrated the project represented a unique event in its business operations and that its business practices appeared to be contingent on securing and fulfilling contracts. The CO noted that the Employer had submitted five previous applications for temporary workers including H-400-16008-078777 for 30 Welders, Cutters, Solderers, and Brazers from April 1, 2016 through October 1, 2016; and H-400-16006-600596 for 29 Combination Pipe Welders from April 1, 2016 through October 1, 2016. (AF-2 164-165).

On March 22, 2016, the Employer filed a response to the Second NOD. (AF-2 27-159). The Employer addressed the deficiency that it failed to confirm job contractor status through a declaration that it was not a job contractor seeking to contract workers on behalf of another employer. (AF-2 29). With regard to the first deficiency the Employer noted that it regularly secured and fulfilled contracts for large "multi-phase" projects and that each phase was "different," "separate," and "not reoccurring" and the activities performed by workers during each phase was "unique and independent". (AF-2 27). The Employer also noted that the construction of the HDPE facility was unique from its previous and future contracts and that the work performed by the welders was "unlike the other work the KBR's pipe welders have been required to perform." *Id.* The Employer concluded that the current project was a "rare and milestone-type project" and that it was "highly unlikely" that KBR would require pipefitters once the project was complete. (AF-2 28). The Employer also submitted a statement to support a temporary need for workers, which provided that:

The workers requested at each stage of the [HDPE] project are unique and the work they will engage in in the requested time is specialized and temporary in nature. KBR establishes that we have a one-time need for the services of the Combination Pipe Welders. Although we have employed Combination Pipe Welders in the past, they have not been engaged in the work now being sought and we will not need them to perform the services in the future. As such, KRB seeks certification for its own temporary need, which in the case of the La Porte project will cease on January 31, 2017.

Accordingly, KBR is an ideal candidate for H-2B temporary workers because we have an employment situation that is not permanent, but a temporary event of short duration that has created a need for skilled Combination Pipe Welders for a well-defined and unique project in the U.S. Upon successful completion of their work on the La Porte facility, the workers will depart the United States and return to their employment abroad.

(AF-2 158-159).

Emergency Filing Approval

On February 22, 2016, the Employer requested emergency treatment pursuant to 20 C.F.R. § 665.17. (AF-1 167; AF-2 180). The request was approved in both cases by the CO on February 25, 2016. (AF-1 166; AF-2 179).

Non-Acceptance Denial Letters and Request for Administrative Review

On April 7, 2016, and April 14, 2016, the CO's issued two "Non Acceptance Denial" letters denying the Employer's applications for 72 pipefitters and 38 welders. (AF-1 11-15; AF-2 12-26). The letters stated that the applications had been denied as the Employer had been unable to show that the job opportunities were temporary in nature. *Id.* The CO's found that the Employer had requested pipefitters and welders under a one-time occurrence, but had not demonstrated that the project represented a unique event in its business operations. (AF 1-16; AF-2 17). The CO's stated that the Employer's business practices appeared to be contingent on securing and fulfilling contracts. *Id.* The CO's cited five other cases in which the Employer had submitted applications for similarly classified workers for individual one-time occurrences to work on projects in Texas and Oklahoma. *Id.* Thus, the CO's noted the Employer's application history suggested that procuring contracts for the construction of facilities was a normal occurrence in its business operations. *Id.* The CO's concluded that, although the current HDPE project would increase the Employer's business and would be unique insofar as it involved the construction of a new facility, ultimately the project did not "significantly differ" from the Employer's other projects or contracts and so the Employer had not shown a temporary need for workers. (AF-1 17; AF-2 18).

By letters dated April 21, 2016, and April 28, 2016, the Employer requested administrative review of the Final Determinations pursuant to 20 C.F.R. § 655.61.⁸ (AF-1 1-10; AF-2 1-11). On behalf of the Board, I issued Notices of Docketing and Orders Setting Briefing Schedules on April 25, 2016, and April 29, 2016, and consolidated the cases by Order issued May 3, 2016.

The Employer filed a written brief on May 11, 2016, in which it argued that KBR, Inc. had shown that its need for workers was for a one-time occurrence as its current project was unique from its previous and future contracts due to its "scope, complexity, and size." (EB at 6).⁹ The Employer further stated that "it has not employed these Laborers in the past at [the La Porte]

⁸ Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

⁹ Citations to the Employer's Brief are abbreviated ("EB"). In addition, the Employer's Brief is not paginated and I have considered the page that begins "Request for BALCA Review" as page 1 and counted subsequent page numbers from there. Citations to the CO's Brief are abbreviated ("CB").

location and it will not need to employ this type of Laborer in the future at this location” and thus the work performed by the workers would be unique to the HDPE project. (EB at 4). The Solicitor filed a written brief on behalf of the CO on May 11, 2016, urging BALCA to affirm the CO’s decisions to deny certification.

DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO before the date the CO issued a Final Determination.¹⁰ After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action.¹¹

An employer seeking certification to employ foreign workers under the H-2B program bears the burden to establish eligibility for issuance of a temporary labor certification.¹² The employer must establish that its need for nonagricultural services or labor is temporary in nature, regardless of whether the underlying job is permanent or temporary.¹³ Employers may hire foreign workers on a one-time occurrence, seasonal, peak load, or intermittent basis, as those terms are defined by the Department of Homeland Security.¹⁴

To establish a one-time occurrence, an employer must show 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.¹⁵” Accordingly, the regulations provide for two prongs under which an employer may establish that its need qualifies as a one-time occurrence. As discussed below, the Employer has not made the requisite showing under either prong.

No Past or Future Employment

The Employer argues that it has satisfied the one-time occurrence standard because “it has not employed these Laborers in the past at [the La Porte] location and it will not need to employ this type of Laborer in the future at this location” and therefore the work performed by the workers would be unique to the HDPE project. (EB at 6). The Employer states that the project it is requesting workers for is a “rare and milestone-type project” with a fixed completion date, after which it will no longer have a need for the temporary workers in question. (EB at 4-5). The CO asserts that the Employer has not proven that it has not employed workers to perform these services in the past because it has previously filed multiple applications for temporary

¹⁰ 20 C.F.R. § 655.61.

¹¹ 20 C.F.R. § 655.61(e).

¹² 8 U.S.C. § 1361.

¹³ 20 C.F.R. § 655.6.

¹⁴ 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).

¹⁵ 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

workers to assist with other large projects it undertakes like the HDPE project it is currently seeking workers for. (CB at 13). The CO also argues that the Employer cannot establish that it will not need workers to perform these services in the future as its business model relies on obtaining engineering and construction service contracts, and it has not established that the HDPE job is different from future jobs in the petrochemical industry in which the Employer operates. (CB at 13-14).

Here, the Employer's focus on the location of the HDPE project is insufficient to establish a one-time need for workers. The Employer argues that the La Porte, Texas project is unique due to its location and because the Employer has never sought workers for a project in La Porte, Texas. (AF-1 26; AF-1 27). As explained by the Board, "[t]he regulations do not specify that a need is a one-time occurrence based on the geographical area of the Employer's work sites but rather [is] based on the Employer's need."¹⁶ In *Cajun Constructors, Inc.* the employer argued that because it did not previously employ temporary workers at a specific job location that the "uniqueness and location of [the] project" qualified it as a one-time occurrence.¹⁷ The Board found that "simply because the Employer thrives on contracts and changes its locations [does] not alleviate it from meeting its burden to show that [it] has not used H-2B workers in the past. The job sites are irrelevant."¹⁸ Thus, in this case, the fact that this is the Employer's only project in La Porte, Texas is not enough to show that it has a one-time need for workers.

The Employer also argues that the pipefitters and welders it has hired in the past "have not engaged in the work now being sought" and that the Employer will not "need them to perform the services in the future." (AF-1 156; AF-2 159). However, the record shows that the Employer has filed two previous applications for Plumbers, Pipefitters, and Steamfitters and two previous applications for Welders, Cutters, Solderers, and Brazers for other large projects in Texas or Oklahoma. (AF-1 161-162; AF-2 164-165). The Employer argues that its current application is different from its prior applications because each of its contracts is "different," "separate," and "non-reoccurring." (AF-1 26; AF-1 27). Here, the Employer seems to rely on the fact that the La Porte, Texas project is for a polyethylene facility as opposed to a urea facility to demonstrate its "uniqueness." This argument is not persuasive as the Employer has failed to show how the work to be completed by the pipefitters and welders it seeks to employ for the La Porte, Texas project materially differs from the work performed by pipefitters and welders on its other contracts. Mere assertions that the work to be performed is unique or different are not enough for the Employer to meet its burden to establish a one-time need.¹⁹

Finally, the Employer had not established that it will have no need for workers to provide these services in the future. The Board has held that when an employer's business model is based on obtaining multiple successive projects that the employer cannot establish a one-time need by focusing on a specific contract.²⁰ Similarly here, the Employer is an engineering and construction service company that contracts to build production facilities in the agricultural and petrochemical

¹⁶ *Cajun Constructors, Inc.* 2010-TLN-00079, PDF at 4 (BALCA Oct. 5, 2010).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 5.

¹⁹ See *Herder Plumbing Inc.*, 2014-TLN-00010, PDF at 6 (BALCA Feb. 12, 2014) (holding that the employer's argument to establish its need for temporary workers was "unavailing" as it failed to fully explain how its need materially differed from the duties of workers in its previous applications).

²⁰ *Cajun Constructors, Inc.*, 2009-TLN-00096 (BALCA Oct. 9, 2009).

industry on a regular basis. (AF-1 26; AF-2 27). As the Employer has stated that it frequently engages in the types of projects similar to the La Porte, Texas project for which it currently seeks workers, it has not established that it has no need to seek workers to provide these services in the future.

The record shows that the Employer has made multiple applications for temporary workers, including pipefitters and welders, for other construction projects in Texas and Oklahoma. The Employer has failed to provide sufficient evidence or argument to show that its current need for these workers materially differs from its need in its prior applications. This, along with the Employer's business model of routinely engaging in multiple successive construction service contracts, fails to demonstrate that the Employer 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. Thus, the Employer has not established a one-time occurrence to satisfy the first prong.

No Temporary Event of Short Duration

The Employer argues that it has a temporary need of short duration because each project is unique and discrete and because a project the "size and scope" of the La Porte, Texas project has never been offered to KBR before, or alternatively, that a boom in construction and a shortage of skilled craft workers in Texas has created a temporary need for pipefitters and welders. (EB at 5; AF-1 152-156; AF-2 155-159). The CO argues that the Employer's need for workers stems from "its nature as a services contract company" rather than any temporary need. (CB at 16). The CO contends that the current situation is analogous to past cases where the Board has held that the employer's business model meant their application was not in response to a temporary event.

The Board precedent cited to by the CO is applicable to the current case. In the first *Cajun Constructors* case, the Board held that the employer failed to show a temporary event when it admitted its business model was to work on a project to completion and then take another one.²¹ The Board held that the Employer's need for temporary workers on a single contract was not a temporary event when viewed in the "context of the Employer's business" but rather "just one of a series of projects."²² In the second *Cajun Constructors* case, the Board rejected the employer's argument that every contract was a temporary event of short duration which created a discrete temporary need, instead holding that "[e]very project cannot possibly be a temporary event; at some point, the combination of 'temporary' projects create[s] a permanent need for the Employer."²³ Thus, the mere fact that the Employer routinely enters into unique and discrete contracts is not sufficient to show that it has a temporary need for workers as the combination of these projects creates a permanent need.

Further, the fact that the La Porte, Texas project is of a size and scope never before offered to the Employer also does not create a temporary need for workers. The Board has made it clear that the scale or particular requirements of a contract cannot establish a temporary need

²¹ *Id.* at 11

²² *Id.*

²³ *Cajun Constructors, Inc.* 2010-TLN-00079, PDF at 5 (BALCA Oct. 5, 2010).

when it is an employer's business model to contract for services on successive projects. In *Turnkey Cleaning Services*, the Board concluded that the employer failed to satisfy the second prong of the one-time occurrence standard:

Where the nature of the Employer's business is to contract to provide services on a project and then move on to another project, the fact that this particular contract may be larger and cover more detailed services than the previous contracts does not by itself indicate that the need for such labor will be limited to a one-time occurrence.²⁴

Similarly, in *Herder Plumbing, Inc.*, the Board rejected the employer's argument that a recent award of a large contract created a need to supplement the workforce, holding that the contract was not a temporary event but rather an indication that the Employer continued to grow its business.²⁵

Like the cases cited above, the Employer's business model is to "contract to provide services on a project and then move on to another project." The Employer's business model requires continued procurement of engineering and construction contracts. Similar to *Herder Plumbing*, the Employer's new contract is not a temporary event but rather an indication that the Employer continued to grow its business. There is no evidence of record to suggest that the need for labor in this instance is limited to a one-time occurrence; in fact, the record shows that the employer is engaged in several other projects that require similar workers. Further, the Employer has provided no indication that its need for pipefitters and welders will not continue past January 31, 2017, as it will continue to procure engineering and construction contracts. Thus, the Employer cannot show that its need for such workers will be of a short duration.

Finally, the Employer argues that a construction boom and shortage of skilled craft labor in Texas has created a temporary need to hire alien workers in order to complete its projects. (AF 1- 286-440; AF-1 306-460). This argument is likewise unpersuasive. In *Cajun Constructors*, the Board rejected the employer's argument that damage from Hurricanes Katrina and Rita had created a temporary need for construction services holding that "the fact that a hurricane created the need for work does not change the fact that [the employer] is a construction services company whose viability depends on needs for its services continually arising" and that a natural disaster had no bearing on the employer's continual need for construction laborers.²⁶ Further, in *Herder Plumbing*, the Board rejected the employer's argument that it was unable to procure a willing and able work force domestically due to the changing construction workforce landscape holding that the employer "provided no indication that the circumstances which led to the shortage of constructions workers [would] change in the near future."²⁷

In this case, the fact that there is a large amount of construction work occurring in Texas does not change the fact that the Employer is a construction services company whose viability depends on needs for its services continually arising. Thus, the current high volume need for

²⁴ *Turnkey Cleaning Services, GOM, LLC.*, 2014-TLN-00042, PDF at 5 (BALCA Oct. 1, 2014).

²⁵ *Herder Plumbing Inc.*, 2014-TLN-00010, PDF at 6 (BALCA Feb. 12, 2014).

²⁶ *Cajun Constructors, Inc.*, 2009-TLN-00096 PDF at 11 (BLACA Oct. 9, 2009).

²⁷ *Herder Plumbing Inc.*, 2014-TLN-00010, PDF at 7 (BALCA Feb. 12, 2014).

construction workers in Texas does not establish a unique event that establishes that the Employer has a temporary need for workers. Further, in order to employ guest workers under the H-2B program, an employer must establish that its need for workers “will end in the near, definable future.”²⁸ Here, the Employer has documented a shortage of construction workers but, as in *Herder Plumbing*, the Employer has provided no indication that the circumstances that led to the shortage of constructions workers will change in the near future.

In sum, the Employer has not demonstrated a temporary event of short duration. The size and scope of this current contract is insufficient to demonstrate that it is unique from other contracts or business that the Employer engages in. The Employer is in the business of fulfilling successive engineering and construction contracts and has not demonstrated that its needs for this project are different from its similar needs on other projects in other locations or that its overall need for such workers is a temporary need that will end in the near, definable future. Thus, the Employer has not established a need of short duration to satisfy the second prong.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision denying certifications be, and hereby is, **AFFIRMED**.

For the Board:

LARRY A. TEMIN
Administrative Law Judge

²⁸ 8 C.F.R. § 214.2(h)(6)(ii)(B).