



**Issue Date: 06 April 2016**

**BALCA Case Nos.: 2016-TLN-00026, 2016-TLN-00027**  
ETA Case Nos.: H-400-15307-457694, H-400-15308-859028

*In the Matter of:*

**KBR, INC.,**

*Employer.*

Appearances: Kevin Lashus, Esq.  
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For the Employer

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For the Certifying Officer

Before: MONICA MARKLEY  
Administrative Law Judge

**DECISION AND ORDER - AFFIRMING**  
**DENIAL OF TEMPORARY LABOR CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matters.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the

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<sup>1</sup> On April 29, 2015, the Department of Labor (the “Department”) and the Department of Homeland Security jointly published an Interim Final Rule amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). Pursuant to this rule, the Department will “continue to process an *Application for Temporary Employment Certification* submitted prior to April 29, 2015 in accordance with 20 C.F.R. Part 655, Subpart A, revised as of April 1, 2009.” *See id.* at 24109 (to be codified at 20 C.F.R. § 655.4). Employer filed an *Application for Temporary Employment Certification* on December 15, 2015, with a start date of need after October 1, 2015. Accordingly, the Interim Final Rule, 80 Fed. Reg. 24042 (Apr. 29, 2015), applies to this case. Employer also filed a request for emergency handling, which was approved by the CO, and the emergency processing provisions at 20 C.F.R. § 655.17 apply to this case.

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). Employers who seek to hire foreign workers under this program must apply for and receive a labor certification from the Department of Labor. *See* 8 C.F.R. § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). *See* 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

## STATEMENT OF THE CASE

### Employer’s H-2B Application

On December 15, 2015, the ETA received two *H-2B Applications for Temporary Employment Certification* (ETA Form 9142B) from KBR, Inc., (“Employer”) for 6 “Instrument Fitters” and 56 “Pipefitters” as one-time occurrence workers for an engineering, procurement, and construction contract, to be employed from March 1, 2016 through September 1, 2016. (AF-1 73; AF-2 69).<sup>2</sup> Both positions are classified as O\*Net Code 47-2152, Plumbers, Pipefitters, and Steamfitters, and are to be performed in Borger, Texas. (AF-1 73–76; AF-2 69–72). Employer specified that both positions require a High School Diploma/GED, and indicated that 24 months of experience as an instrument fitter or pipefitter is required in Section F.b of the application. (AF-1 76; AF-2 72).

### CO’s First Notice of Deficiency & Employer’s Response

On January 5, 2016, and January 8, 2016, the CO issued a Notice of Deficiency (“NOD”) in each case and indicated there were four deficiencies. (AF-1 61–68; AF-2 56–64). In 2016-TLN-00026, the CO found Employer was deficient in: (1) failure to establish the job opportunity as temporary in nature; (2) failure to submit an acceptable job order; (3) disclosure of foreign worker recruitment; and (4) failure to submit a complete and accurate ETA Form 9142. (AF-1 61–68). In relevant part, the CO found Deficiency 1 because Employer previously received certification, H-400-15078-572665, for 12 Plumbers, Pipefitters, and Steamfitters from April 3, 2015 through September 30, 2015 with a one-time occurrence need. (AF-1 64). In 2016-TLN-00027, the CO found Employer was deficient in: (1) failure to justify the dates of need requested; (2) failure to submit an acceptable job order; (3) disclosure of foreign worker recruitment; and (4) failure to submit a complete and accurate ETA Form 9142. (AF-2 56–64).

On January 20, 2016, and January 22, 2016, Employer filed responses to the NODs. (AF-1 50–55; AF-2 46–55). In both cases, Employer addressed Deficiency 2 by submitting the SWA job order, addressed Deficiency 3 through a declaration that it would not utilize an agent

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<sup>2</sup> Citations to the Appeal File in this case will be abbreviated “AF” followed by the page number(s). As there are two Appeal Files in this case, the abbreviation “AF-1” refers to the Appeal File for 2016-TLN-00026, and “AF-2” refers to the Appeal File for 2016-TLN-00027.

or recruiter for the recruitment of H-2B workers under the application, and addressed Deficiency 4 through the submission of the ETA Form 9142, Appendix B. *Id.*

In response to Deficiency 1 for 2016-TLN-00026, Employer submitted a statement that provided:

KBR, Inc. has been contracted to provide engineering, procurement and construction (EPC) services to Agrium's new urea and ammonia facility in Borger, Texas. As a result of this delay, positions of the work expected to be completed in six months have not occurred. Therefore, as highlighted in the attached, this project, like most construction projects of its size, is conducted in milestones and phases. The project was initially scheduled to be completed in July 2016, but due to unexpected delays it now is scheduled to be completed in February 2017. Unfortunately, KBR has not been able to hire sufficient U.S. workers to meet this temporary, one-time occurrence need for Instrument Fitters for the upcoming phase of the project. For this reason the Company has been unable to meet its temporary demand. Accordingly, at this time, KBR needs to hire temporary workers to fulfill this unique contract. This fact is reflected in the attached letter ("Agrium Project Delays").

KBR does not regularly, permanently employ the type of instrument fitters required for this particular project in the United States, and are otherwise very difficult to find domestically in the quantity currently needed in Borger, Texas.

The labor requirements for these services will end after completion of the upcoming phase of work on Agrium's new urea plant, and as such, the labor need is a one-time occurrence need that will only last approximately six months. The temporary, one-time occurrence of KBR's work on Agrium's facility coincides with the regulatory definition and guidelines set forth in the H-2B program for temporary workers and policy guidance.

Due to the anticipated increase in services needed during the upcoming work schedule for the next project phase, which will take place approximately from March 2016 to September 2016, KBR requires temporary instrument Fitters to meet its business needs. As outlined above, KBR requires temporary instrument Fitters to assist with providing services during the next phase of this significant project that will enable the company to maintain its schedule and focus on the completion of the upcoming phased work.

Accordingly, KBR is an ideal candidate for H-2B temporary workers because it has an employment situation that is not permanent, but a temporary event of short duration that has created a need for skilled instrument fitters for a well-defined and unique project in the U.S. Upon successful completion of the next phase of the Borger facility expansion, the workers will depart the United States and return to their employment abroad.

(AF-1 50).<sup>3</sup>

In both responses, Employer provided a signed letter from the KBR Project Director that indicated the workers were integral to the completion of the project, scheduled for February 2017. (AF-1 52; AF-2 48). The response to Deficiency 1 in 2016-TLN-00027 provides that the activities for which Employer seeks the 56 pipefitters will conclude on September 1, 2016, and those activities are integral to the planned completion of the project. (AF-2 46).

### CO's Second Notice of Deficiency and Employer's Response

By letters dated February 5, 2016, and February 9, 2016, the CO issued a second NOD in each case. (AF-1 41–49; AF-2 36–45). Each NOD indicated three deficiencies: (1) failure to establish the job opportunity as temporary in nature; (2) failure to submit an acceptable job order; and (3) confirmation of job contractor status. *Id.* With regard to the failure to establish the job opportunity as temporary, the CO stated the contract discussed in the Application “seems to be a part of the employer’s normal business operations and not a temporary event as contemplated in the definition.” (AF-1 44; AF-2 39). The CO cited five applications submitted by Employer for additional ammonia production facilities in Texas and Oklahoma, each claiming a one-time occurrence of need:

Case #	Workers Requested	Occupation Title	Start Date of Need	End Date of Need
H-400-16005-732611	72	Plumbers, Pipefitters, and Steamfitters	04/01/2016	01/31/2017
H-400-16004-467531	38	Welders, Cutters, Solderers, and Brazers	04/01/2016	01/31/2017
H-400-16013-078903	40	Electricians	04/01/2016	10/01/2016
H-400-16008-078777	30	Welders, Cutters, Solderers, and Brazers	04/01/2016	10/01/2016
H-400-16007-144812	80	Plumbers, Pipefitters, and Steamfitters	04/01/2016	10/01/2016

(AF-1 45; AF-2 40).

Employer filed responses to the NODs on February 11, 2016. (AF-1 26–39; AF-2 27–35). Both responses provided information about the rate of pay to correct Deficiency 2, and a statement about Employer’s status as a job contractor to remedy Deficiency 3. (AF-1 26–27; AF-2 27–28). With respect to Deficiency 1, Employer provided a statement and two letters to explain the temporary nature of the need. (AF-1 26–33; AF-2 27–35). In pertinent part, the statement provides that Employer is an engineering and construction service company, and it requires temporary workers on a one-time need basis for the completion of specific phases of

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<sup>3</sup> Employer maintained that the two applications are an extension of previously approved applications and were filed as a stop-gap measure due to delays in the project and erroneously issued I-94s. (AF-1 7; AF-2 13). However, when Employer completed the Form 9142 in each case, it checked the box indicating that the application was for new employment rather than the box indicating that it was seeking a continuation of previously approved employment with the same employer. (AF-1 73; AF-2 69). Accordingly, Employer’s applications were treated as new employment for which the one-time occurrence standard must be met.

large, multi-phase projects. (AF-1 26). Employer stated that it submitted several applications for its multi-phase projects, and that it requires temporary workers for the “unique and independent” phases of each projects. (AF-1 26). The first letter submitted explains the nature of the project and Employer’s need for temporary workers, as well as the other projects undertaken by Employer, and is signed by a representative of Employer. (AF-1 28–31; AF-2 32–35). The second letter is signed by the project director of the Agrium project, and discusses the nature of the project and Employer’s need for temporary labor during specific phases. (AF-1 32–33; AF-2 30–31).

#### Emergency Filing Approval

On February 22, 2016, Employer requested emergency treatment pursuant to 20 C.F.R. § 655.17. (AF-1 25; AF-2 26). This request was approved in both cases by the CO on February 26, 2016. (AF-1 24; AF-2 23).

#### Non Acceptance Denial Letter and Request for Administrative Review

By the “Non Acceptance Denial” letter issued on March 3, 2016, the CO denied the application for 6 Instrument Fitters and 56 Pipefitters requested by Employer. (AF-1 18–23; AF-2 17–22). The CO stated: “The CNPC is unable to issue an acceptance in this case because the noted deficiency still remains” related to the “[f]ailure to establish the job opportunity as temporary in nature,” pursuant to 20 C.F.R. § 655.6(a) and (b). (AF-1 21; AF-2 20). The CO found Employer requested Plumbers, Pipefitters, and Steamfitters under a one-time occurrence, but “has not demonstrated this project represents a unique event in its business operations.” (AF-1 22; AF-2 21). The CO stated:

The employer is an engineering and construction service company that specializes in “the energy, hydrocarbon, power, industrial, civil infrastructure, mineral, government services, and commercial sectors.” The employer’s business practices appear to be contingent on securing and fulfilling contracts. The contract discussed in this *Application for Temporary Employment Certification* seems to be part of the employer’s normal business operations and not a temporary event as contemplated in the definition.

Furthermore, the employer’s pending application history suggests procuring contracts for the construction or updating of urea and ammonia production facilities is a normal occurrence in its business operations.

*Id.* The CO cited the five other cases in which Employer submitted an application under individual one-time occurrences for additional ammonia production facilities in Texas and Oklahoma. *Id.* The CO discussed the evidence submitted by Employer, but stated that Employer’s “filing history shows a continued utilization of similar occupations.” (AF-1 23; AF-2 22). The CO concluded that although the particular contract in question here could represent a unique event, it did not differ significantly from Employer’s other projects and Employer did not overcome the deficiency. *Id.* The CO then denied the Employer’s application, and stated Employer “did not 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; thus its job opportunity does not represent a one-time occurrence.” *Id.*

By letter received March 16, 2016, Employer filed a formal request for administrative review of the denial determination in both cases. (AF-1 1–16; AF-2 1–16). The Board issued a Notice of Assignment and Expedited Briefing Schedule on March 22, 2016, and consolidated the cases by Order issued March 29, 2016.

Employer filed a written brief on March 31, 2016, and counsel for the CO filed a written brief on April 1, 2016. The Employer attached nine exhibits to its brief, which include previously submitted evidence, previous applications for instrument fitters and pipefitters, case law, and a copy of the ETA 2008 Final Rule. In a request for administrative review, the Employer may include “only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued.” 20 C.F.R. § 655.61(a)(5). On administrative review, only the material contained within the appeal file upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and the filed briefs may be considered as argument in the case. *See* 20 C.F.R. § 655.61(e). Any submissions made beyond those limitations have not been considered, and all citations are made to the Appeal Files.

## DISCUSSION

An employer seeking certification to employ foreign workers under the H-2B program bears the burden to establish eligibility for issuance of a requested temporary labor certification. *See* 8 U.S.C. § 1361. 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. *See* 20 C.F.R. § 655.6. Employers may hire foreign workers on a one-time occurrence, seasonal, peakload, or intermittent basis, as those terms are 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).

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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). Accordingly, the regulations provide for two prongs under which an employer may establish that its need qualifies as a one-time occurrence. As explained below, Employer has not made the required showing under either prong.

### Prong 1 – No Past or Future Employment

Employer argues that it has satisfied the first prong of the one-time occurrence standard because it will not need to employ “this type of instrument fitters and pipefitters in the future.” (EB at 3).<sup>4</sup> Employer contends the project in question is rare and unique and has a set

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<sup>4</sup> Citations to Employer’s Brief are abbreviated “EB,” and citations to the CO’s brief are abbreviated “CB.”

completion date, after which it will not need the workers in question. The CO asserts that Employer failed to establish that it has not employed workers to perform the services or labor in the past because it previously filed H-2B applications for the same services or labor in 2015 and because of Employer's pending applications. The CO also asserts that Employer cannot establish it will not need workers to perform the services or labor in the future based on Employer's business model and its acknowledgement of likely future need for instrument fitters and pipe fitters.

Employer must be able to show that it will not need workers to perform the services or labor in the future. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). 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 based on the Employer's need." *Cajun Constructors, Inc.*, 2010-TLN-00079, PDF at 4 (BALCA Oct. 5, 2010) [hereinafter *Cajun Constructors II*]. In this instance, the record shows that Employer has two other pending applications for Plumbers, Pipefitters, and Steamfitters for ammonia production facilities in Texas and Oklahoma. (AF-1 7, 14, 45; AF-2 5, 13, 40). Employer's evidence, in the form of signed statements, focuses on the unique nature of the Borger, Texas project, but does not show that the assignments for those workers are distinguishable from the assignments for similar workers in its other pending applications. (AF-1 26-33; AF-2-35).

Employer counters that it is engaged in three separate and unique contracts in the locations in Texas and Oklahoma. (AF-1 30; AF-2 35). That is insufficient to carry Employer's burden, as Employer does not explain how its need for workers in the instant case (in Borger, Texas) materially differs from the need for similar workers in the other pending applications. *See Herder Plumbing, Inc.*, 2014-TLN-00010, PDF at 6 (BALCA Feb. 12, 2014) (finding employer's argument "unavailing" as it failed to explain how its need materially differed from the duties of workers in its previous applications). Employer attempts to distinguish *Herder Plumbing* by arguing that its pending applications are for workers on different projects in different locations, but as stated by the Board in *Cajun Constructors II*, "simply because the Employer thrives on contracts and changes its locations do not alleviate it from meeting its burden." 2010-TLN-00079, PDF at 5. In other words, Employer contends it has met its burden by showing that it will not need pipefitters and instrument fitters for the Borger, Texas project in the future. That is not the controlling inquiry. As stated above, the issue centers not "on the geographical area of the Employer's work sites" but instead focuses upon "the Employer's need." *Cajun Constructors II*, 2010-TLN-00079, PDF at 4. Statements provided by Employer acknowledge that Employer "likely will" employ pipefitters and instrument fitters in the future. (AF-1 84; AF-2 81). Thus, Employer's argument and evidence does not show that it will not utilize workers for similar services or labor in the future.

The record shows Employer has pending applications for other Plumbers, Pipefitters, and Steamfitters for other construction projects in Texas and Oklahoma. Employer failed to provide sufficient evidence or argument to show its need in the current application materially differs from its need in the pending applications. This, combined with Employer's acknowledgement that it will likely employ pipefitters and instrument fitters in the future, demonstrates that Employer failed to show it will not need workers to perform the services or

labor in the future. Therefore, Employer has not established a one-time occurrence through satisfaction of the first prong.

### Prong 2 – Temporary Event of Short Duration

Employer argues that it has satisfied the second prong of the one-time occurrence standard because the contract in question “represents a temporary event of short duration.” (EB at 3). Employer argues the instant case is distinguishable from *Turnkey Cleaning Services GOM, LLC*, 2014-TLN-00042 (BALCA Oct. 1, 2014), because the contract in question is unique from previous and future contracts, and is of a size and scope never before offered to Employer. The CO argues that Employer’s need for services in this case stems “from its nature as a services contract company,” rather than from a temporary event of short duration. (CB at 9). The CO contends the current situation is analogous to *Cajun Constructors*, *Herder Plumbing*, and *Turnkey Cleaning Services*, and argues Employer’s business model suggests the contract in question is not a temporary event.

The Board precedent cited by the CO is applicable to this case. In the first *Cajun Constructors* case, the Board found the employer failed to show a temporary event of short duration when it admitted that its business model required it to take on contracts all over the country, rejecting the employer’s argument that the event was temporary in part because the specific contract arose out of a natural disaster and was therefore unique. *See Cajun Constructors, Inc.*, 2009-TLN-00096, PDF at 11–12 (BALCA Oct. 9, 2009) [hereinafter *Cajun Constructors I*]. As the Board stated in *Cajun Constructors II*: “Every project cannot possibly be a temporary event; at some point, the combinations of ‘temporary’ projects create a permanent need for the Employer.” 2010-TLN-00079, PDF at 5. In this case, Employer argues that the project is unique due to its size and scope, and is considered “distinct, significant, and rare” within the industry. (AF-1 105; AF-2 79). This argument is unavailing in light of the *Cajun Construction* cases. Even if the Borger, Texas project is unique in terms of size and scope, Employer has not shown that its need for pipefitters and instrument fitters results from a temporary event of short duration. Employer is engaged in several other projects and has pending applications for similar workers for these other projects. As recognized in *Cajun Contractors II*, the combination of “temporary” projects can create a permanent need.

Employer argues its situation is distinguishable from *Turnkey Cleaning Services* because the employer in that case failed to show the contract was unique from other contracts. *Turnkey Cleaning Servs. GOM, LLC.*, 2014-TLN-00042, PDF at 5 (BALCA Oct. 1, 2014). 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 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 previous contracts does not by itself indicate that the need for such labor will be limited to a one-time occurrence.

*Id.* Here, although the facts underlying each case may be distinguishable, the Board made clear that a temporary need cannot be established solely by the scale or particular requirements of the contract in question when an employer's business is to contract for services on successive projects. *Id.* Thus, Employer's argument that the unique nature of the Borger, Texas contract creates a temporary event of short duration is without merit, because Employer's business model requires continued engineering, procurement, and construction contracts, and there is no evidence that the need for labor in this instance is limited to a one-time occurrence. In fact, the evidence shows the contrary, as Employer has several other pending applications for similar workers related to its engineering, procurement, and construction contracts at other locations.

Employer also argues that its situation is analogous to that of the shipbuilder discussed in the 2008 H-2B Final Rule, in which the ETA stated a one-time occurrence might occur "if a shipbuilder got a contract to build a ship that was over and above its normal workload." ETA, Final Rule, Labor Certification Process and Enforcement (H-2B Workers), 73 Fed. Reg. 78020, 78027 (Dec. 19, 2008). Employer fails to acknowledge, however, that the ETA continued: "[T]he 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." *Id.* Although the project at issue in this case may be unique in terms of size and scope, Employer has filed requests for similar H-2B workers for other projects. Therefore, pursuant to the Department's guidance, the situation here is not a one-time occurrence. *See Herder Plumbing*, 2014-TLN-00010, PDF at 6-7.

Employer has not shown a temporary event of short duration. Based on the evidence of record, Employer is in a business that requires successive engineering, procurement, and construction contracts. Employer's argument and evidence that this particular contract is unique from its others is insufficient. The evidence shows Employer needs similar workers at other projects in other locations, and thus this is not a one-time occurrence.

## **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial determination is **AFFIRMED**.

**SO ORDERED.**

For the Board:

MONICA MARKLEY  
Administrative Law Judge

MM/mja  
Newport News, VA