



**Issue Date: 21 December 2017**

BALCA CASE NOS.: 2018-TLN-00027  
2018-TLN-00028

ETA CASE NOS.: H-400-17190-617385  
H-400-17190-969800

*In the Matter of:*

G.A.S. UNLIMITED, INC.,  
Employer.

**DECISION AND ORDER AFFIRMING  
DENIAL OF CERTIFICATION**

These consolidated matters arise under the labor certification process for temporary non-agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.<sup>1</sup> 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)(ii)(B).<sup>2</sup>

On November 13, 2017, the Certifying Officer (“CO”) for the Office of Foreign Labor Certification denied two H-2B Applications for Temporary Employment Certification, case numbers H-400-17190-617385 and H-400-17190-969800, of G.A.S. Unlimited, Inc. (“Employer”) because the job requests failed to establish that the job opportunities were temporary in nature. On November 27, 2017, Employer timely filed a request for administrative review of both cases, and the Appeal Files (“AF”)<sup>3</sup> were provided on December 7, 2017. On December 15, 2017, the U.S. Department of Labor, Office of the Solicitor, on behalf of the CO, filed a notice stating that it

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<sup>1</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule amending the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The H-2B program currently operates under the 2015 IFR.

<sup>2</sup> An appropriations rider passed in 2015 overrode the DOL’s definition of temporary need for the H-2B program (20 § C.F.R. 655.6(b)) in favor of DHS’s definition (8 C.F.R. § 214.2(h)(6)(ii)(B)). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, Division A, § 101 (2017).

<sup>3</sup> The Appeal Files for 2018-TLN-00027 and 2018-TLN-00028 are referred to as “AF1” and “AF2,” respectively.

would not file a brief in this matter but requested that the denial be affirmed for the reasons set out in the CO's final determination letter. Employer did not file a brief on appeal.

This proceeding is before the Board of Alien Labor Certification Appeals ("the Board") pursuant to § 655.61(a).<sup>4</sup> As explained below, this Decision and Order affirms the denials of certification and denies Employer's request for relief.

### Background

Employer provides recruitment services to the oil and gas industry and is headquartered in Houston, Texas. AF1 at 285; AF2 at 277. On September 22, 2017, Employer filed an H-2B Application for Temporary Employment Certification ("Application") seeking certification to hire 50 Combination Welders from October 1, 2017, to September 30, 2018, and a separate H-2B Application to hire 50 Pipefitters for the same time period. AF1 at 269; AF2 at 266. On both Applications, Employer listed the nature of its temporary need as a "one-time occurrence." *Id.* In support of this one-time occurrence need, Employer stated in Section B.9 of the Applications:

As an employer of local talent for more than 45 years, we have the unique opportunity to provide specialized construction services to a large-scale liquified [sic] natural gas project. GAS Unlimited regularly hires technical professionals for the oil and gas industry, and while GAS regularly recruits and hires local talent, this project requires high-volume recruiting and hiring with a demanding timeline to meet project milestones.

This unique project opportunity presents GAS Unlimited with a one-time, temporary need for specialized Combination Welders. Each of the workers to be hired will be employed temporarily, only for the job duties described herein, and they will maintain their foreign residences while performing their temporary activities in the US.

Our company is hiring a specialized skill set to meet the requirements of this service contract, a skill set that is in short supply locally. Thus, we cannot obtain sufficient US workers[.]

AF1 at 269; AF2 at 266.<sup>5</sup> In an attached letter, Employer stated that "[g]iven the Company's global reach and established reputation, it has created a 'Specialty Services Group' that will undertake contracts to directly provide combination welding services [and pipefitter services] through G.A.S. Unlimited Employees." AF1 at 285; AF2 at 277. Employer stated that it entered into a contract with Zachry Industrial to provide combination welding services and pipefitter services for the Freeport Liquefaction Project, which is scheduled to be completed by September 30, 2018, pursuant

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<sup>4</sup> The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61(d).

<sup>5</sup> Even though Application H-400-17190-969800 (AF2) is for "Pipefitters," Employer referred to "Combination Welders" in this section of the Form 9142. AF2 at 266.

to a Services Agreement.<sup>6</sup> *Id.* Employer alleged that it will not need these employees beyond the one-time need. AF1 at 286; AF2 at 278.

On October 3, 2017, the CO sent a Notice of Deficiency (“NOD”), notifying Employer that both Applications failed to meet the criteria for acceptance. AF1 at 258-268; AF2 at 255-265. The CO listed six identical deficiencies for both Applications, including the failure to establish that the job opportunity was temporary in nature in violation of 20 C.F.R. §§ 655.6(a) and (b).<sup>7</sup> AF1 at 262-263; AF2 at 259-261. In the later Non-Acceptance Denials, the CO based the denials on the failure to establish that the job opportunity was temporary in nature.<sup>8</sup> AF1 at 100; AF2 at 100. Therefore, only this deficiency is at issue on appeal.

Regarding Employer’s failure to establish that the job opportunity was temporary in nature, the CO stated in the NOD that Employer did not submit sufficient documentation to demonstrate a one-time occurrence because it was not clear that the project represented a unique event in Employer’s business operations. AF1 at 262-263; AF2 at 259-260. The CO reasoned that Employer’s business is to secure contracts in the oil and gas industry on an ongoing basis, which is contrary to the definition of a one-time occurrence since the bidding and winning of contracts is a recurring event and therefore represents a year-round permanent need for workers. AF 1 at 263; AF2 at 260. The CO requested an updated temporary need statement containing a description of Employer’s business history, activities, and schedule of operations throughout the year, as well as further explanation of the temporary need and how the request meets one of the regulatory standards of temporary need. *Id.* The CO also requested that Employer submit the Services Agreement and Work Order mentioned in the statement of temporary need attachment, and any additional supporting evidence justifying the chosen standard of need, including a summarized report outlining Employer’s recent and ongoing contracts in the petrochemical and natural gas pipeline industries. AF1 at 263; AF2 at 260-261.

Employer filed a response to the NOD on October 13, 2017. AF1 at 104-257; AF2 at 104-254. In its revised statement of temporary need, Employer stated that since 1970, it has offered “industrial staff augmentation services to the energy industry,” and that over time, its services “expanded beyond recruitment to human resources, global mobility, and employment payroll and related taxation services.” AF1 at 155; AF2 at 169. Employer stated that it “is now expanding into providing services to businesses through its own employees,” that its activities are “project-based,” and that this is their first project under the new services provided by Employer. *Id.* Therefore, Employer stated that “it does not keep a regular project schedule throughout the year.” *Id.* Employer contended that “[g]iven the size of this project and the natural disaster that hit the worksite [*i.e.*, Hurricane Harvey], G.A.S. anticipates that it has a one-time need and will not have such a need in the future.” *Id.* Employer also contended that the need meets the one-time need

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<sup>6</sup> This letter referred to an “attached Services Agreement,” but no such agreement was attached.

<sup>7</sup> The other deficiencies were: failure to satisfy application filing requirements (20 C.F.R. §§ 655.15(b), 655.17); failure to establish temporary need for the number of workers requested (20 C.F.R. § 655.11(e)(3) and (4)); failure to submit an acceptable job order (20 C.F.R. §§ 655.16, 655.18); failure to include a disclosure of foreign worker recruitment (20 C.F.R. § 655.9(a) and (b)); and failure to submit a complete and accurate ETA Form 9142 (20 C.F.R. § 655.15(a)).

<sup>8</sup> The CO also noted that Employer submitted an emergency request in the NOD response to support the Applications’ late filing, but that the request was not evaluated because Employer did not overcome the temporary need deficiency. AF1 at 102; AF2 at 102.

standard since the need will end in the near, definable future, and it is created by a temporary event of short duration, namely its contract with Zachry Industrial, Inc. AF1 at 156; AF2 at 170.

On November 13, 2018, the CO issued Non-Acceptance Denials (“Denials”) for both Applications, stating that deficiencies still remained. AF1 at 98-103; AF2 at 98-103. Specifically, the CO stated that Employer did not sufficiently explain how its need meets a one-time occurrence temporary need. AF 1 at 103; AF 2 at 100. The CO stated:

The employer was requested to, but did not, submit a summarized report that outlines the employer’s recent and ongoing contracts in the petrochemical and natural gas pipeline industries. Instead, the employer explained that “[b]ecause F.A.S.’s [sic] activities are project-based and that this is their first project under the new services provided by the Company, it does not keep a regular project schedule throughout the year.”

The employer went on to explain that, “[d]uring the periods that G.A.S. is hired by another company to provide its services, G.A.S. works on a definite basis defined by the project contract.” It remains unclear as to why the employer did not provide the requested report outlining the employer’s recent and ongoing projects as the employer explained that it has been hired to provide services in the past.

The employer explained in its NOD response that its work is “project-based” and they provide a wide range of services including industrial construction. These services are based on contracts. However, the employer did not sufficiently justify with the supporting documentation provided how its project with Zachry meets a one-time standard of need. The employer’s business existence consists of constant bidding and winning of contracts which is contrary to the definition of a one-time occurrence. While these workers are being sought for a specific contract, there is no reason to expect that, when the project is complete, other similar projects will not present themselves. The very nature of the employer’s business model would mean that, in order for the company to survive, other contracts must follow this contract.

The employer’s business is to hire specialized workers and dispatch them throughout the liquefaction industry. The employer did not sufficiently explain how its need meets a one-time occurrence temporary need as the employer’s need is to meet its ongoing and continuous need to supply skilled labor on a contract by contract basis. The employer’s need is a recurring event and therefore represents a permanent need. The employer did not demonstrate that it has a one-time occurrence. Therefore, the employer did not overcome the deficiency.

AF1 at 102-103; AF2 at 102-103.

On November 27, 2017, Employer submitted a request for administrative review arguing that the CO misunderstood the nature of Employer’s business practices. AF1 at 1-97; AF2 at 1-97. Employer contended that the project with Zachry Industrial “is in stark contrast to Employer’s normal line of business,” and that the contract “establishes a discrete end-date after which Employer will not continue to employ the individuals certified under this petition.” *Id.*

Employer cited a “Specialty Services Group Business Plan Executive Summary” to support the contention that it “had been attempting to pursue and expand” the portion of its business devoted to providing services to the oil and gas industry “in select circumstances.” AF1 at 2; AF2 at 2 (attached to the request for review as “Contractor Services Business Plan Executive Summary,” AF1 at 12-15; AF2 at 12-15). The purpose of this “discrete operating group” was to “pursue growth in the area of offering services requiring teams of individuals with specialized skills.” *Id.* The business plan was to “operate small specialty teams on only a small number of long-term projects at a time so as to provide a stable and reliable project services solution to our clients.” *Id.* Employer stated that:

By contrast, the Contract between Employer and Zachry Industrial, Inc. calls for general provision of welding and pipefitting services (Exhibit C). The type of services called for in the Contract are much more general and require many times the available labor force than the type of services contemplated in the Business Plan. Whereas specialized services teams can be just a few highly skilled individuals, a general services provider for projects like the one contemplated in the Contract require dozens if not hundreds.

It was in the course of attempting to expand its specialty services group that Employer was awarded the Contract, which asks Employer to act as a general services provider. The award of such a broad-reaching Contract created a sudden and unusual labor demand for Employer. It is in an attempt to meet this sudden and unusual labor demand that Employer filed this labor certification.

*Id.* Employer also stated that it did not submit a report outlining its recent and ongoing contracts as requested by the CO because it “believed that such a report would misrepresent the Contract which prompted Employer’s need for this labor certification as part of Employer’s normal course of business. Because Employer has executed contracts for similar services calling for limited, specialized [sic] Employer feared this misrepresentation because it has performed limited service functions in the past as an added value feature of its staff augmentation agreements with its clients.” *Id.* Employer contended that it has never before entered into a “pure services agreement” and that the project with Zachry is not typical of its ongoing business. AF1 at 3; AF2 at 3.

Employer argued the instant contract is distinguishable from its normal course of business “both in role and scope,” and it therefore meets the regulatory requirement of a one-time need where an employer has not hired workers to perform the services in the past and will not need the workers in the future. AF1 at 3-4; AF2 at 3-4 (citing 8 C.F.R. § 214.2(h)(6)(ii)(B)(1)). Alternatively, Employer argued that “even though [it] has hired workers to perform similar services in the past for other projects,” the contract with Zachry requires Employer to take on a “much larger and more wholistic role” with a definitive end date; therefore, its need is a one-time event because it has an employment situation that is otherwise permanent, but a temporary event has created a temporary need. *Id.* In addition, Employer argued that it could alternatively meet the standards of an intermittent need, as defined in 8 C.F.R. § 214.2(h)(ii)(B)(4).<sup>9</sup> AF1 at 3-4; AF2 at 3-4.

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<sup>9</sup> To establish an “intermittent need,” an employer “must establish that it has not employed permanent or full-time workers to perform the service or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(4);

## Scope and Standard of Review

The scope of the Board's review in the H-2B program is limited. When an employer requests a review by the Board under section 655.61(a), the Board may consider only "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5).

The proper standard of review of the CO's denial of certification is less than clear. Neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, but the Board has fairly consistently applied the arbitrary and capricious standard in reviewing the CO's determinations. *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016)<sup>10</sup>; *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).<sup>11</sup> However, some opinions have not discussed a standard of review,<sup>12</sup> and others issued by the Board have suggested that the CO's determinations should be reviewed, at least at times, *de novo*. See, e.g., *Roadrunner Drywall Corp.*, 2017-TLN-00035, slip op. at 3, n.11 (May 4, 2017) (citing *Albert Einstein Medical Center*, 2009-PER-00379 (Nov. 21, 2011) (*en banc*)<sup>13</sup>); *Sands Drywall, Inc.*, 2018-TLN-00007, slip op. at 3. (Nov. 28, 2017), *Zeta Worldforce, Inc.*, 2018-

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<sup>10</sup> A three-judge panel of the Board adopted the "arbitrary and capricious" standard in *Brook Ledge* after referencing *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015), a case reviewing the denial of labor certification under the H-2A program. *Brook Ledge Inc.*, slip op. at 5-6. After noting that the CO argued that the Board should defer to the OFLC's interpretation of a regulation unless it is arbitrary, capricious, an abuse of discretion or not in accordance with law, the panel stated, "Generally speaking we do not disagree with the CO's characterization of its role vis a vis OFLC. We have previously acknowledged that BALCA reviews decisions under an arbitrary and capricious standard. See *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015). We take no issue with the assertion that BALCA should defer to OFLC's rational and reasonable interpretation of an ambiguous regulatory term." *Id.* at 5.

<sup>11</sup> See also, e.g., *Dallas Stewart Racing Stable, Inc.*, 2018-TLN-00012 (Dec. 1, 2017), *Ron Mexican Produce, LLC*, 2017-TLN-00058 (Sept. 11, 2017), *Fishmaine, Inc.*, 2017-TLN-00056 (June 28, 2017), *Alpha Services, LLC*, 2017-TLN-00051 (June 19, 2017), *Rucoba & Maya Construction, LLC*, 2017-TLN-00048 (June 5, 2017), *Ross Landscape and Paving Services, Inc.*, 2017-TLN-00047 (May 1, 2017), *GM Tile LLC*, 2017-TLN-00032 (Apr. 25, 2017), *Tucker Construction Group, LLC*, 2017-TLN-00028 (Apr. 4, 2017). This list is not exhaustive, but only offered as a sampling of the most recent decisions where the Board clearly stated the standard of review should be "arbitrary and capricious."

<sup>12</sup> E.g., *Natron Wood Products, LLC*, 2018-TLN-00023 (Dec. 14, 2017), *Selmara R. Rydell*, 2018-TLN-00018 (Dec. 13, 2017), *KOE Equine*, 2018-TLN-00011 (Nov. 30, 2017), *Diamond Mountain Retreat Center*, 2018-TLN-00001 (Oct. 26, 2017), *Delta Centrifugal Corp.*, 2017-TLN-00071 (Oct. 19, 2017), *9th Parallel Healthcare, Inc.*, 2017-TLN-00062 (Oct. 4, 2017), *Jetcrafters Aviation, LLC*, 2017-TLN-00059 (Sept. 19, 2017), *Blaze Bar Harbor, LLC*, 2017-TLN-00054 (July 21, 2017), *LL Alvarez, LLC*, 2017-TLN-00052 (June 21, 2017), *New Image Landscape, Inc.*, 2017-TLN-00046 (May 5, 2017), *Three Seasons Landscape Contracting Services, Inc.*, 2017-TLN-00040 (Apr. 28, 2017), *M.A.G. Irrigation, Inc.*, 2017-TLN-00033 (Apr. 25, 2017), *Verdugo and Son Pool Repair, LLC*, 2017-TLN-00030 (Apr. 18, 2017), *Millennium of Gosben, Inc.*, 2017-TLN-00029 (Apr. 10, 2017), *Carolina Contracting & Management, LLC*, 2017-TLN-00026 (Apr. 4, 2017). This list is likewise only a sampling of the most recent decisions where the Board did not explicitly state what standard of review it was applying.

<sup>13</sup> In *Albert Einstein Medical Center*, the Board, sitting *en banc*, adopted a *de novo* standard when reviewing the CO's legal and factual determinations made in denying an application for permanent alien labor certification. *Albert Einstein Medical Center*, slip op. at 25-33. In reaching this conclusion, the Board relied on the relevant regulatory history, the Board's long-standing practice in such cases, and the Administrative Procedure Act's "default reservation of *de novo* review authority for the final agency reviewer of an initial decision rendered in an adjudicatory setting..." *Id.* at 32 (relying on Section 557(b) of the APA). The Board also noted that while 5 U.S.C. § 706 of the APA defines the scope and standard of review of agency decisions by federal courts (an agency's actions, findings and conclusions shall be set aside that are

TLN-00015, slip op. at 4 (Dec. 15, 2017) (suggesting a hybrid approach where a CO's policy-based determinations would not be overturned unless arbitrary, capricious, or inconsistent with the established policy interpretation, but absent such an established policy-based interpretation of the regulations, reviewing the CO's denials *de novo*).

Because in this case I would affirm the CO's decision whether I afforded it deference or not, I need not resolve the issue of what level of deference should be applied in reviewing the CO's determinations.

## Discussion

### *Evidence and Legal Arguments Considered on Appeal*

Although Employer alleged that it submitted the Specialty Services Group Business Plan Executive Summary (or "Contractor Business Plan Executive Summary") to the CO (*see* AF1 at 2; AF2 at 2), there is no indication that this document was submitted to the CO prior to the CO's issuance of the Non-Acceptance Denials. It is not part of the documentation attached in support of Employer's Applications, and it was not submitted in response to the NODs. It is also not addressed by the CO in the Denials. In addition, Employer never argued to the CO that in the alternative to showing a one-time occurrence, it could justify its temporary need based on an intermittent need.

Because the Board may not consider any evidence or legal argument that was not submitted to the CO prior to his final determination, the "Contractor Business Plan Executive Summary" attached to Employer's request for review and any argument related to this document will not be considered on appeal. 20 C.F.R. § 655.61(a)(5); *see also Boot Doctors, Inc.*, 2013-TLN-00057, slip op. at 5, (July 29, 2013) (noting that given that the regulations prohibit the Board from considering new evidence that was not previously submitted to the CO, employers should thoroughly respond to the CO's requests for documentation). I also will not consider Employer's argument that it meets the standard of an intermittent need, as this contention was not made to the CO prior to the issuance of the Non-Acceptance Denials. 20 C.F.R. § 655.61(a)(5).

### *Temporary Need Based on a One-Time Occurrence*

An employer seeking certification must show that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by DHS.<sup>14</sup> 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b). Temporary service 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." 8 C.F.R. § 214.2(h)(6)(ii)(A); 20 C.F.R. § 655.6(a). The DHS regulations provide that 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,

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"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)), this section is not applicable to an agency's internal appellate review process. *Id.* at 30, n.27.

<sup>14</sup> Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant.

definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. *Id.* The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. *Alter and Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017).

There are two methods of establishing a one-time occurrence: 1) the employer may “establish 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 2) the employer may show “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).

After reviewing the record, I find that the CO properly denied the Applications because Employer failed to establish a temporary need based on a one-time occurrence under either method outlined in the regulations.

First, Employer did not sufficiently show that it had not employed workers to perform the type of services or labor that was called for in the Zachry contract in the past. In the letter attached to its initial Applications, Employer asserted that it created a “Specialty Services Group” to undertake contracts to provide combination welding and pipefitter services. While Employer asserted in its response to the NOD that this was their first project under a new expansion of services provided by Employer to its clients, it submitted no supporting documentation to demonstrate that the services it previously provided were of a different nature than those required by the Zachry contract, despite the CO’s request for a summarized report outlining Employer’s recent and ongoing contracts in the petrochemical and natural gas pipeline industries. Such contracts, or other similar documentation, could have showed that Employer did not provide such services in the past. Without the requested information about Employer’s “recent and ongoing contracts,” or other such evidence, Employer did not provide sufficient information to meet its burden of establishing that it had not employed workers to perform similar services in the past. *See AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient). Further, Employer’s contention in its response to the NOD that it “does not keep a regular project schedule throughout the year” was directly contradicted by Employer’s statement on appeal that it did not submit such reports because it feared they would “misrepresent” the Zachry contract. This argument is, at the least, unconvincing, and supports an inference that Employer engaged in similar services in the past. If Employer truly never engaged in such services prior to the Zachry contract, it could have attached an explanation to prevent any misrepresentations or misunderstanding by the CO. In addition, Employer admitted on appeal that it had hired workers to perform similar services in the past, although on a smaller scale.

Second, Employer did not demonstrate that it will not need workers to perform such services in the future. In its revised statement of need, Employer stated that it was “expanding into providing services to businesses through its own employees.” Employer stated only that it anticipated it had a one-time need and that the contract had a “discrete end-date” after which it would no longer need the requested workers. Once again, these statements are insufficient to demonstrate it would not have a need for the workers in the future. Without any supporting documentation or further evidence that it would not engage in similar contracts in the future, Employer’s statement that it was “expanding” suggests that the need would continue as it would likely engage in similar contracts in the future. *See Cajun Constructors, Inc.*, 2009-TLN-00096 (Oct. 9,

2009), *reconsideration denied* (Dec. 8, 2009) (affirming denial where the employer did not establish that it would not employ construction laborers in the future); *accord*, *KBR*, 2016-TLN-00038, slip op. at 7-8 (May 16, 2016).

Employer also did not submit sufficient information to the CO to establish that it had an employment situation that is otherwise permanent, but a temporary event of short duration created the need for the requested temporary workers. While the Zachry contract appears to be for a large-scale project, Employer submitted no evidence to the CO that such a contract created a need beyond Employer's normal workforce. In addition, the Board has previously held that the fact that a particular project "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." *Turnkey Cleaning Services, GOM, LLC*, 2014-TLN-00042, slip op. at 5 (Oct. 1, 2014). The evidence demonstrated that Employer was seeking to expand and that its business is "project-based." Therefore, the fact that the Zachry contract had discrete dates does not establish that a temporary event of short duration created a temporary need. *See Herder Plumbing Inc.*, 2014-TLN-00010, slip op. at 6 (Feb. 12, 2014) (finding that the employer failed to establish a temporary event of short duration where the nature of its business was to contract to provide services, and the contract in question was an indication that the employer continued to grow its business). While Employer also alluded to the local labor shortages caused by Hurricane Harvey, it did not specifically link this event to its alleged temporary need.<sup>15</sup> *See* AF1 at 116-119; AF2 at 132-135. Furthermore, arguing that it had a permanent employment situation but that the Zachry contract created a temporary need is inconsistent with the argument that it had not provided such services in the past.

Accordingly, I find that Employer has not met its burden of establishing a temporary need. The CO's denial of both Applications is affirmed.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge

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<sup>15</sup> Employer cited the labor situation created by Hurricane Harvey in its request for emergency treatment. *See* AF1 at 117; AF2 at 133. Employer asserted in a letter that the hurricane resulted in an increased pressure to place workers in order to get projects back on schedule, and while it stated at one point that the hurricane resulted in a "change in conditions that require temporary workers on a one-time basis to bring the project back on schedule," it asserted this claim nowhere else in the Appeal Files. Further, this letter was submitted in support of Employer's request that its application be expedited, not in support of its temporary need. Therefore, I do not find that the hurricane was properly asserted as a reason for the alleged temporary need. However, even if it were, I find that this one-sentence argument alone would be insufficient for Employer to meet its burden of establishing a temporary need based on a one-time occurrence. *See Cajun Constructors, Inc.*, slip op. at 11 (finding that the fact that a hurricane created a need for construction work does not change the fact that the employer, as a construction services company, "depends on needs for its services continually arising").