

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 19 December 2017**

**BALCA Case No.:** 2018-TLN-00024  
2018-TLN-00025  
**ETA Case No.:** H-400-17193-444578  
H-400-17193-282685

*In the Matter of:*

**IRWIN INDUSTRIES,**

*Employer.*

**Appearance:** Sujata Ajmera, Esquire  
Strasburger & Price, LLP  
Austin, Texas  
*For the Employer*

Sarah M. Tunney, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

**Before:** **TRACY A. DALY**  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

**1. Nature of Appeal.** This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h)(6)<sup>1</sup> and 20 C.F.R. Part 655 Subpart A.<sup>2</sup> It involves two of Employer's Employment and Training

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). 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>2</sup> On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A established by the "2008 Rule" found at 73 Fed. Reg. 78020. *See* 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

Administration (ETA) Form 9142B applications for temporary labor certification for a total of 200 temporary nonagricultural workers and an administrative review of the application's denial.

## **2. Procedural History and Findings of Fact.**

a. On September 14, 2017, Irwin Industries (Employer) filed one ETA Form 9142B application for temporary labor certification with the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) for 100 temporary "Specialized Welders" and one application for 100 "Pipefitters/Fabricators," each to perform work from December 4, 2017 through June 8, 2019 based on Employer's claimed one-time need for temporary workers. (AF 24, pp. 3, 119; AF 25, pp. 3, 111)<sup>3</sup> Employer sought these temporary workers to fulfill a contract to provide welders and pipefitters for the construction of an addition to a Liquid Natural Gas (LNG) regasification facility in Hackberry, Cameron Parish, Louisiana. (AF 24, pp. 4, 146; AF 25, pp. 4, 152)

b. Employer is a "construction, maintenance, outage, turnaround and fabrication company serving the energy and industrial infrastructure markets," which is primarily engaged in the "construction of chemical plants and oil gas refineries." (AF 24, pp. 104, 140; AF 25, p. 96)

c. On September 25, 2017, the CNPC issued a Notice of Deficiency (NOD) in response to each application. The Certifying Officer (CO) explained that Employer's applications failed to include sufficient information to establish the job opportunity was temporary in nature pursuant to 20 C.F.R. § 655.6(a)-(b). The CO required Employer to submit additional supporting evidence that justified Employer's chosen standard of temporary need, including a summarized report outlining Employer's recent and ongoing contracts in the petrochemical and natural gas pipeline industries and additional details differentiating the current contract from its previous and ongoing contracts such that it could be defined as a one-time occurrence. The CO permitted Employer to respond to the NOD and remedy the deficiency by October 10, 2017. (AF 24, pp. 69, 112-118; AF 25, pp. 104-110)

d. On October 9, 2017, the CO received Employer's response to the NOD. (AF 24, p. 69; AF 25, p. 64) In pertinent part, Employer explained to the CO:

This is a one-time opportunity for the company to establish itself on a national level. Prior to this opportunity, which as mentioned above is a \$6 billion investment, the largest project that the company has been engaged in was a \$16.5 million endeavor . . . It is crucial that we establish ourselves as a company capable of providing high quality services in even the most challenging projects, regardless of size and scope. This is a notably unique opportunity for Irwin, as the significance of this project is acknowledged throughout the industry and an opportunity to provide services like this is not likely to come around again.

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<sup>3</sup> The two appeals have been consolidated for the purposes of this decision without objection from Employer or the Certifying Officer. References to the Appeal File in 2018-TLN-00024 are referred to as AF-24. References to the Appeal File in 2018-TLN-00025 are referred to as AF-25.

Employer further noted the project presented an “opportunity to expand its national name recognition in the emerging area of the energy industry” and “grow its US business and establish itself firmly as a national service provider of energy industry support services.” (AF 24, pp. 72, 94-95; AF 25, pp. 67, 86-87)

e. On November 13, 2017, the CO denied certification. Specifically, the CO denied certification because Employer’s “business practices appear to be contingent on securing and fulfilling contracts” and because its “business model is based on obtaining multiple successive contracts, the employer cannot establish a one-time need by focusing on a specific contract.” The CNPC further explained it denied certification because, although Employer had been engaged to provide services for a large construction project, it was “reasonable to expect that this company will continue to be in the business of continually seeking out and performing similar services.” The CO further stated there was no reason to expect when the current project concludes that Employer would not pursue additional construction contracts. (AF 24, pp. 67-72; AF 25, pp. 62-67)

f. On November 21, 2017, Employer requested administrative review of the CO’s denial of certification pursuant to 20 C.F.R. § 655.61 and submitted a reply brief in response to the CO’s denial. (AF 24, pp. 1-66; AF 25, pp. 1-61)

g. On November 22, 2017, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. On November 30, 2017, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines. The CO transmitted the Appeal File to BALCA on December 1, 2017.

h. Consistent with 20 C.F.R. § 655.61(c), on December 12, 2017, the CO submitted a brief urging BALCA to affirm the CO’s decision denying Employer’s ETA Form 9142B applications.

### **3. Applicable Law and Analysis.**

a. *H-2B Program.* The H-2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 20 C.F.R. § 655.20.

b. *Standard of Review.* BALCA’s standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.61 provides that 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 in support of the employer’s application. After considering the evidence of record, BALCA must: (1) affirm the CO’s decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3). The regulations do not specify a standard of review for BALCA but the

Board has adopted the arbitrary and capricious standard. *Brooke Ledge*, 2016-TLN-00003 (May 10, 2016); *Three Season Landscape Contracting Servs.*, 2016-TLN-00045 (June 15, 2016).

c. *Burden of Proof*. The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof'l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

d. *Nature of Temporary Need*. 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). Employment is of a temporary nature when the employer needs a worker for a limited period of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer must establish that its need for temporary services or labor “will end in the near, definable future.” *Id.* Generally, that period of time will be limited to one year or less, but in the case of a one-time event it could last up to 3 years. *Id.* The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

e. *One-Time Occurrence*. To qualify as a one-time occurrence, the employer “must 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 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.”<sup>4</sup> 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

f. *Analysis*. Employer argues the second prong of a one-time occurrence is applicable to both appeals based on the size, scope, and location of the project for which it has requested approval for temporary workers. Specifically, Employer claims the LNG project is the “largest project for which it has ever been hired” to perform services and it has never provided services in the southern region of the United States. Employer further states that construction of the LNG project is “set to be complete at a definable point in time, after which, the need for workers will no longer exist.” (AF 24, pp. 4-6; AF 25, pp. 4-6) The CO argues the evidence supports a conclusion that Employer’s “business model involves the continual procurement of contracts” and thus Employer has a recurring and permanent need for the labor or services it is seeking under its applications. Therefore, the CO contends Employer has not established a temporary need based on a one-time occurrence.

In *Cajun Contractors*, the Board considered the employer’s argument that its need for 200 laborers was a temporary, one-time occurrence based on the “uniqueness and location” of the construction contract it had procured. *Cajun Contractors, Inc.*, 2010-TLN-00079, at 5 (Oct. 5, 2010). The Board affirmed the CO’s denial of certification and held the employer failed to

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<sup>4</sup> Employer does not argue that the first-prong of the one-time standard is applicable to its two applications for temporary labor certification. However, Employer’s claim would also fail under the first prong because it cannot establish it will not need workers to perform the services or labor in the future.

establish a temporary need because its business model was to perform work on a specific project until completion and then take on other additional projects. *Id.* The Board stated “[e]very project cannot possibly be considered a temporary event; at some point, the combinations of ‘temporary’ projects created a permanent need for the employer.” *Id.* Similarly, in *KBR*, the employer argued it had a temporary need of short duration for pipefitters and pipe welders. *KBR, Inc.*, 2016-TLN-00038, 2016-TLN-00042 (May 16, 2016). The employer procured a contract for a construction project of such a “size and scope” that it had never obtained before and described the contract as “unique” and “rare and milestone-type project.” *Id.* at 8. The Board concluded the employer did not have a temporary need for workers because it routinely entered into contracts for projects and the combination of these projects created a permanent need. *Id.*

In this case, Employer holds itself out as a “construction, maintenance, outage, turnaround and fabrication company serving the energy and industrial infrastructure markets,” which is primarily engaged in the “construction of chemical plants and oil gas refineries.” Thus, its business model requires the continued procurement of varying types of construction contracts. Although Employer has secured a contract to provide construction services on a facility larger than any prior project during its existence, the Board has held the scale or particular requirements of a contract cannot establish a temporary need when it is an employer’s business model to contract for services for successive projects. *Turnkey Cleaning Servs. GOM, LLC*, 2014-TLN-00042, at 5 (Oct. 1, 2014) (“Where the nature of the Employer’s business is to contract to provide services on a project and then move to another project, the fact that this particular contract may be larger . . . than the previous contract does not itself indicate that the need for such labor will be limited to a one-time occurrence.”).

Employer further claims the LNG project is a “significant, unique business opportunity” that “is not likely to come around again” as grounds to establish the requested temporary positions are for a one-time occurrence. However, Employer believes its procurement of this specific contract will assist it with expanding “its national name recognition in this emerging area of the energy industry” and growing “its US business and establish itself as a national service provider of energy industry support services.” Employer also explains the LNG project “will become the basis for further market opportunities for the company.” However, the Board has rejected nearly identical arguments, in particular when an employer communicates intent to use a specific project to grow its business with the hope of securing similar future contracts. *See Herder Plumbing*, 2014-TLN-00010, at 6 (Feb. 12, 2014) (rejecting the employer’s argument that a recent award of a large contract created a need to supplement its workforce and holding the contract was not a temporary event, but rather an indication the employer continued to grow its business).

In conclusion, the size and scope of the LNG project is insufficient to establish it is unique from other contracts or business. As noted, Employer’s business involves securing successive construction contracts. Consequently, Employer did not establish its need for such workers is temporary and will end in the near definable future. Employer did not carry its burden to demonstrate a temporary event of short duration.

4. **Ruling.** Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO's denial of Employer's Application for Temporary Employment Certification is AFFIRMED.

**SO ORDERED.**

For the Board:

**TRACY A. DALY**  
Administrative Law Judge