



**Issue Date: 14 December 2017**

**BALCA Case No.:** 2018-TLN-00023  
**ETA Case No.:** H-400-16005-319467

*In the Matter of:*

**NATRON WOOD PRODUCTS, LLC,**  
*Employer.*

Appearance: Gretel M. Ness, Esquire  
Parker, Butte & Lane  
Portland, Oregon  
*For the Employer*

Louisa Reynolds, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Daniel Solomon  
Administrative Law Judge

**DECISION AND ORDER**  
***AFFIRMING DENIAL OF CERTIFICATION***

This case arises from Natron Wood Products LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, Division D, § 101(a)(8) (2017).

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

## BACKGROUND

On September 7, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from the Employer. AF 99-109.<sup>3</sup> The Employer requested eight millwrights, Standard Occupational Code (“SOC”) 49-9044, for the period of December 1, 2017 until August 31, 2019 under a one-time occurrence. AF 99. It explained that it needs the temporary employees for a “one-time, capital improvement” project which consists of installing a plywood press. AF 99. The job is located in Jasper, Oregon. AF 102. On the application the Employer explained that it had not employed workers to do this expansion service in the past, and that it would not need more in the future as “there is not additional space in the site plywood building to install any additional presses.” AF 105. The job duties included the following: “dig press pit; concrete pour; reconstruct and upgrade used press; lower press into pit; adjust motor controls and hydraulics; ensure functionality of assembled press.” AF 101. Under their statement of temporary need the Employer explained that they had a “one time occurrence need for supplemental millwrights due to the growth of our company related to the increase [sic] needs of our expanding customer base.” AF 99.

The Employer had previously received two H-2B certifications. One was for eight millwrights (SOC 49-9044) from February 6, 2017 until December 31, 2017 (H-400-16270-764511). AF 155. On that application the Employer was extending a previously granted H-2B application also for eight millwrights (SOC 47-2152) which had been certified for February 4, 2016 to February 3, 2017 (H-400-15293-528219). AF 165. These two prior H-2B applications had both been for a one-time occurrence “due to the growth of our company related to the increase [sic] needs of our expanding customer base.” AF 165. The employees were to install a veneer drier. The duties included: “site prep, assemble/weld drier pieces, install internal parts for drier. [sic] replace/re-weld drier doors, install air system, plumbing and piping, ensure functionality of assembled drier.” AF 167.

The CO issued a Notice of Deficiency for the case before me on September 18, 2017 citing three deficiencies with the application. AF 91-98. The Employer submitted a response to the Notice of Deficiency on September 27, 2017 attempting to remedy those deficiencies. AF 30. The only deficiency remaining before me regards the nature of the temporary need. In an

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<sup>2</sup> On April 29, 2015, the Department of Labor (“DOL”) 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. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

<sup>3</sup> References to the appeal file will be abbreviated with an “AF” followed by the page number.

attempt to remedy this deficiency the Employer submitted a revised detailed statement of temporary need. AF 40. It explains:

This one-time need is different from Natron's prior H-2B application for capital improvement to its veneer drying sector in that the prior application was for the installation of a dryer that was replacing Natron's other dryer, which was located at another location, and which was at the end of its life span. Additionally, the prior application was for a dryer that only dries veneer for Natron's expanded needs as a plywood manufacturer. This current application is necessary for primarily two reasons: 1) to provide a dryer that can dry veneer that will be available for sale to outside veneer purchasers; and, 2) to provide a dryer that is available for drying specialty veneer for out of the ordinary specialty panels that our customers desire Natron to produce for specific projects.

AF 40. The Employer explained in the same statement that they needed the supplemental millwrights to install a plywood press. It reiterated the fact that because the worksite will have no more room, they will not be requesting more workers to install additional equipment in the future. AF 43.

On November 3, 2017 the CO finally issued a Non-Acceptance Denial. AF 14. The CO, citing 20 C.F.R. § 655.6(a)-(b), stated that the Employer failed to establish that the job opportunity was temporary in nature. AF 16. The CO pointed out that the Employer had received certification for eight millwrights on two prior occasions in the same area of intended employment. AF 17. The CO noted: "The employer's business expansion through capital improvements appears to be open-ended and does not demonstrate a one-time occurrence." AF 19.<sup>4</sup>

The Employer submitted a brief with its request for appeal. AF 8-12. The Employer's main argument is that this particular business expansion qualifies under the one-time occurrence provision because it is 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). It explains that there is no limit on the number of times an Employer may ask for workers based on a one-time occurrence, but that the only limitation is that it must be a temporary event of short duration. In response to the CO's conclusion that the need is not a one-time occurrence and is instead, open-ended, it argues that it is possible for an Employer's need to be open-ended as "[w]hat employer would not want its business to continue to grow and expand endlessly?" AF 10. It believes that the installation of this plywood press is a finite temporary event and that "no prohibition exists for recurring applications based on different events of temporary duration." AF 11. The Employer goes on to argue that the previous two H-2B

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<sup>4</sup> The CO also pointed to the two prior applications which were questioned by another certifying officer and then included excerpts from the Employer's responses to those prior applications. AF 18-19. However, because the CO did not include the actual letters from Employer which were in the previous H-2B application, those letters are not part of this appeal file, and I will not consider the excerpts as they are not presented with their full context.

applications, which were also based on capital improvement projects, should not be used to penalize the Employer. AF 11.

## DISCUSSION

The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). “The employer’s need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.” 20 C.F.R. § 655.6(b). According to DHS regulations, a one-time occurrence could last up to 3 years, and “[t]he petitioner must establish that it has not employed workers to perform the services or labor in the past and 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).

The Employer claims that it qualifies for a one-time occurrence based on the second prong: that its is an employment situation that is otherwise permanent but a temporary event of short duration. At the outset it should be noted that the Employer stated contradictory things in their argument to the CO. It stated that the prior H-2B application was for a different location, and that it was for the installation of a dryer. It also stated, however: “This current application is necessary for primarily two reasons: 1) to provide a dryer that can dry veneer that will be available for sale to outside veneer purchasers; and, 2) to provide a dryer that is available for drying specialty veneer for out of the ordinary specialty panels that our customers desire Natron to produce for specific projects.” AF 40. In other areas of the application it appears that the current application is actually for the installation of a plywood press. Furthermore, the three H-2B applications list the job location as Jasper, Oregon, so it appears the job site is the same for all applications despite the assertion to the contrary. AF 102, 158, 168.

Based on the previous H-2B applications and the nature of this application, this is not truly a one-time occurrence need. In another case, *KBR, Inc.*, 2016-TLN-00038 & 2016-TLN-00042 (May 16, 2016), an employer argued that their project for the construction of a facility under a contract was a one-time occurrence because it was a “rare and milestone-type project” and that it was larger than a typical project. *Id.* at 3, 6. It argued that the contracts were different, separate and non-reoccurring and that the completion of the “polyethelene facility” was different than a “urea facility.” *Id.* at 7. The judge explained that the argument was not persuasive as the employer had not established that the work was unique or different enough to establish a one-time need. *Id.* at 7. The Employer also could not establish a temporary need of short duration because “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.” *Id.* at 8. The judge further noted that the employer’s new contract was not a temporary event “but rather an indication that the employer continued to grow its business.” *Id.* at 9.

Admittedly this case does not involve contracts with clients, and so differs from *KBR, Inc.*, in that respect. However, the installation of a plywood press in this case requires eight

millwrights, in the same location as the previous two locations and with similar job duties. Much like the building of a polyethylene facility is not significantly different from the construction of a urea facility it appears that the installation of veneer driers and the installation of a plywood press are similar events. Both involve prepping the location for installation of the equipment and both involve ensuring functionality of assembled pieces. *Compare* AF 167, *with* AF 99. The very fact that eight millwrights were needed for all three applications (two of the three applications had the same SOC code) is also an indication of the similarity of the job types. The Employer is correct that the regulations do not limit the number of times an Employer may ask for a one-time occurrence, but I note that it is called a “**one-time** occurrence.” It strains belief that this is truly an employment situation that is otherwise permanent but only a temporary event of short duration when the Employer has asked for eight millwrights, for similar capital improvement projects, three times in a row. The dates of the prior two applications span from February 4, 2016 until December 31, 2017, while the current spans from December 1, 2017 until August 31, 2019. AF 16. In other words, the need for these eight millwrights for very similar capital improvement projects spans over three years. It rather appears that just as in *KBR, Inc.*, the fact that the Employer continues to routinely need these is an indication that “the combination of these projects [has] create[d] a permanent need.” *KBR, Inc.*, at 8.

I note that it is possible that if a project is over and above the normal workload then even though something is in the regular course of business an employer could qualify for a one-time occurrence, however this Employer has not demonstrated that this is one instance which is over and above the normal workload. *See Herder Plumber, Inc.*, 2014-TLN-00010 at 6 (Feb. 12, 2014) (giving an example of how a shipbuilder may be able to show a one-time occurrence for something over and above its normal workload, but that it is not a one-time occurrence for every ship contract it wins). Rather it appears that that these types of capital improvement projects are now part of the normal workload for the business as part of their continued growth. *See also KBR, Inc.*, at 8 (“The Employer’s new contract is not a temporary event but rather an indication that the Employer continued to grow its business.”). While the Employer has established a timeline for the installation of the plywood press, and claims that it will not need more workers in the future because they simply do not have the space, I am unconvinced that these types of capital improvement projects will simply halt and that the business will not continue to expand.

I note that Respondent alleges in essence that because it relied on prior approval of a similar procedure to its detriment, equitable estoppel attaches. However, to any reasonable degree of probability, the fact that it had two prior “one-time” occurrence cases indicates a permanent need rather than a temporary one.

In conclusion, I find that the Employer has not met its burden to show that the installation of a plywood press is a one-time occurrence, or an employment situation that is otherwise permanent, but a temporary event of short duration that has created the need for a temporary worker. 8 C.F.R. 214.2(h)(6)(ii)(B). The Employer has not adequately shown that this one

capital improvement project is actually a temporary event of short duration. Accordingly I affirm the denial of the CO.

For the Board:

**DANIEL F. SOLOMON**  
**ADMINISTRATIVE LAW JUDGE**