This case arises from the Employer’s 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); 20 C.F.R. § 655.6(b). Employers who seek to hire foreign workers under this 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

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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).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On July 3, 2018, the Employment and Training Administration (“ETA”) received an application for H-2B temporary labor certification from Construction Rent-A-Fence (“the Employer”) for employment of 35 “Fence Erectors,” from October 1, 2018 to July 1, 2019. (AF 47). The Employer indicated the nature of its temporary need was a one-time occurrence, explaining:

Construction Rent-A-Fence has received a number of contracts that are having anticipated start dates at the same time and carrying through next year. Aside from the current contracts, we have previously obligated work that has not been started yet and additional work expected to be awarded in the next month that would double our company workload. I am attaching a spreadsheet of our current workload that shows we have approximately $8.9M in log. In 2017 we had total revenues nearing $9M. Currently awaiting board approval, one job is slated for the upcoming year at over $4M by itself. We currently employ just under 50 full time employees . . . We have attempted to hire full time workers for the upcoming work . . . but to no avail. . . . Additionally, in years past we have had help with temporary workers (previous certification was approved but was limited by the cap) that relieved the pressure of local work and our rental fencing division. The upcoming contracts coupled with the rental fencing operation has our company extended beyond capacity in the near future. The aid of the temporary workers would push us through our current and future workload and allow us additional time to hire qualified individuals to continue our company’s growth. The jump in the number of workers requested is due directly to substantial contracts that would nearly double our yearly revenue requiring a workforce nearly twice our size. The requested duration is in anticipation of fulfilling all of our already contractual obligations in a timely fashion from October until July.

(AF 47, 53). The Employer included various documentation with its application, including a payroll summary for 2018, a statement of assets, liability and equity, a statement of revenues and expenses, a list of jobs, a list of job sites, and several client contracts. (AF 47-183).

*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.

3 The appeal file is referenced herein as “AF” followed by the page number.
On July 12, 2018, the CO issued a Notice of Deficiency (“NOD”), identifying four deficiencies with the Employer’s application. (AF 37). One of the deficiencies cited was that the Employer failed to establish a one-time occurrence need, as required by 20 C.F.R. § 655.6(a), (b).⁴ (AF 40-41). The CO stated:

The employer’s statement does not attest that it will not need workers to perform the services or labor in the future in order to establish a one-time occurrence need. In fact the employer discusses using the H-2B workers in the past and all the supporting documentation points to much growth in the future. This coupled along with the fact that the employer has requested H-2B temporary workers every month of the year when adding in the previous applications, directs the Department to view the request as a permanent need.

In support of its application, the employer submitted a payroll record, contracts, spreadsheet of our current workload, and upcoming jobs. However, the information provided does not support a one-time occurrence temporary need since it indicates that there has been work perform[ed] in the past and will be in the future.

Lastly, the employer indicated that applicants are scarce and hardly qualified. However, the employer is reminded that a labor shortage, no matter how severe, does not justify a temporary need.

(AF 41). The CO requested additional documentation to remedy the deficiency.⁵ (AF 41).

On July 26, 2018, the Employer filed a Response to the NOD, attaching a letter addressing each deficiency cited, along with a payroll summary, revised job order, a statement of business history, and a letter stating all documents provided were true copies and based on company records. (AF 27). As for its need for one-time occurrence, the Employer stated the following:

[T]ypically, [the Employer] gets workers on a peakload basis. Our previous certification although approved was after the visa cap was reached, therefore, no H-2B visa workers were available to be utilized this year. This left us without our planned additional workforce during our peakload, which created a backlog of already contracted work. To compound the situation, [the Employer] was issued a

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⁴ The CO relied solely on this deficiency in his final determination denying certification, and therefore the three other deficiencies identified in the NOD will not be discussed herein.

⁵ Specifically, the CO required a statement that: (1) described the Employer’s business history and activities; (2) provided a schedule of operations through the year; and (3) explained why it will not need workers to perform the services or labor in the future. (AF 41). The CO also required a summary of all projects that have contributed to the Employer’s temporary need and contracts for all the identified projects in the Employer’s summary. (AF 41).
notice of intent on a previously bid project that would take an entire workforce around 9 months to complete. Normally, with the aid of supplemental workers, we would have a workforce to perform our regularly contracted items, but this contract being well above average size coupled with the lack of additional labor force has created a one-time need to complete the project and maintain the already contracted jobs from going into backlog (which will result in liquidated damages for unfinished projects). [The Employer] attests that it will not need workers to perform labor in the future after the extraordinary contract is complete. The fact that workers are scarce and unqualified merely demonstrates there are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, not that this issue is derived from a labor shortage. Again, but for the extraordinary contract to be performed the additional labor force would not be required.

(AF 29).

On August 28, 2018, the CO issued a Final Determination denying certification. (AF 13). First, the CO found the Response to the NOD was not timely, stating the response was due on July 26, 2018, and was received on July 26, 2018. (AF 15). Second, the CO found certification was not warranted on the basis that the Employer did not establish a temporary need based on a one-time occurrence. (AF 13). The CO stated the Employer has a history of certifications for H-2B workers, and therefore, the Employer has employed workers to perform the job duties in the past. (AF 18). The CO stated it is not an employment situation that is otherwise permanent with a temporary event of short duration creating a need for temporary workers, because the contract work is expected to take 9-10 months to complete and the Employer has described its work as temporary in prior applications. (AF 18). The CO also stated it was unclear how one project creates a one-time need in the Employer’s business operations as it is in the business of soliciting, securing, and executing contracts of varying sizes. (AF 18).

On September 13, 2018, the Employer requested administrative review of the denial before BALCA. (AF 1). The Employer asserted that its Response to the NOD was timely, as the CO acknowledged it received the response on the due date. (AF 1). The Employer further stated that it meet the second part of the definition of one time occurrence need because:

[The Employer] has an employment situation that is otherwise permanent (we contract work and employ fence installers permanently) but a temporary event (the extraordinary contract which is more than 10 times the size and scope of the average project) of a short duration (the approximately 9 months to complete the single contract) has created a need for temporary workers (the size and scope of the single contract taking an entire workforce to complete although work is in backlog and otherwise committed stages for currently employed workforce).
The Employer stated once the contract is complete, no additional supplemental workforce will be required. (AF 1). The Employer explained the previously approved H-2B petition, although certified, was never used due to visa cap and is not part of the labor force being requested. (AF 1). The Employer additionally referred to previously submitted documentation, including copies of contracts, stating the particular contract creating a one-time need is for over 4 million dollars, and the Employer’s entire income for 2017 was 9 million dollars. (AF 2). The Employer stated an average contract takes one crew of 6-7 workers for less than a month, whereas the new project will take 35 workers about 9 months to complete. (AF 2).

On September 21, 2018, I issued a Notice of Docketing, allowing the parties to file briefs within seven business days. The Employer filed its appellate brief on October 3, 2018, reasserting that its Response to the NOD was timely and that the single extraordinary contract justifies a one-time occurrence need. The CO did not file an appellate brief.

DISCUSSION

Timeliness

The CO issued his NOD on July 12, 2018, and stated in the NOD that pursuant to 20 C.F.R. § 655.31(b)(2), a response was required within 10 business days from the date the NOD was issued. (AF 37). Ten business days from July 12, 2018 results in a due date of July 26, 2018. (AF 5). As the CO admitted in the final determination, the Employer filed its Response to the NOD on the due date, July 26, 2018. (AF 5). Thus, I find the Response to NOD was timely, and this is not a valid reason for denial of certification in this matter.

One-Time Occurrence Need

An employer seeking temporary labor certification under the H-2B program must establish its need for non-agricultural services is temporary in nature, by establishing 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 peakload need, or an intermittent need, as defined by the Department of Homeland Security (‘‘DHS’’) regulations. 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 need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). Generally, a period of temporary need will be limited to one year or less, but in the case of a “one-time event,” could last up to 3 years. 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. §

6 The Employer’s Response to the NOD is not date-stamped, and I rely on the CO’s representation that the Response was received on July 26, 2018. (AF 5).
The Employer in this case asserts a temporary need based on a one-time occurrence. 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).

The Employer relies on the second method to establish one-time occurrence; namely, that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers. The Employer explained that it contracts work and employs fence installers permanently, but its significant contract with Dallas Love Field represents a temporary event of short duration that has created the need for temporary workers. (AF 1, 29). The Employer argues that the Dallas Love Field contract is an “extraordinary contract,” that is 10 times the size and scope of the average project and requires its entire current workforce to complete. (AF 1, 29-30).

While the Dallas Love Field contract does appear to be larger than previous contracts, the Board has consistently held a one-time occurrence need cannot be established solely by the fact that a particular contract is larger than previous contracts, particularly when an employer’s business is to contract for services on successive projects. See Turnkey Cleaning Services, GOM, LLC, 2014-TLN-00042 (Oct. 1, 2014) (“Where the nature of Employer’s business is to contract to provide services on a 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.”); see also G.A.S. Unlimited, Inc., 2018-TLN-00027 (Dec. 21, 2017); KBR, Inc., 2016-TLN-00026/27 (Apr. 6, 2016); Cajun Constructors, Inc., 2009-TLN-00079 (Oct. 5, 2010); Cajun Constructors, Inc., 2009-TLN-00096 (Oct. 9, 2009); Herder Plumbing, Inc., 2014-TLN-00010 (Feb. 12, 2014).

Here, there is no question that the Employer’s business involves soliciting, securing, and executing contracts of varying sizes. The evidence shows the Employer has several other outstanding and current contracts, and the Employer’s argument that the Dallas Love Field contract is unique in size in scope is insufficient for the Employer to meet its burden of establishing the need for labor is limited to a one-time occurrence. The Employer’s own statements suggest the Employer is seeking to grow its business. Specifically, in its application for certification, the Employer stated: “The upcoming contracts coupled with the rental fencing operation has our company extended beyond capacity in the near future. The aid of the temporary workers would push us through our current and future workload and allow us additional time to hire qualified individuals to continue our company’s growth.” (AF 47). This statement by the Employer strongly suggest that the need for additional labor is in fact permanent, and not a one-time need. See Turnkey, at 5 (Oct. 1, 2014) (“Employer therefore fails to provide . . . any basis to find that the contract represents anything other than a growth in its
business.”); Herder Plumbing, slip op. at 6 (stating one particular contract is not a temporary event in the context of the employer’s business, which regular contracts for services, but is “rather an indication that the Employer continues to grow its business.”).

I find the Employer has not shown a temporary event of short duration. Based on the evidence of record, the Employer is in a business that requires securing contracts of varying sizes. The Employer’s argument and evidence that this particular contract with Dallas Love Field is unique from its others is insufficient. The evidence shows Employer needs similar workers for other contracts and that the company is growing its business. Thus, I find the Employer has not established a one-time occurrence need.

ORDER

It is hereby ORDERED that the Certifying Officer’s denial of the Employer’s Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

For the Board:

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts