



Issue Date: 12 October 2018

BALCA Case Nos.: 2018-TLN-162
2018-TLN-163
ETA Case Nos.: H-400-18183-495513
H-400-18183-072057

In the Matter of:

PLANT PROCESS FABRICATORS, LLC.
Employer

Appearances: Ronda Butler Harkey, Esq.
For Employer

Mikole Allekotte, Esq.
For the Solicitor

Certifying Officer: Leslie Abella
Chicago National Processing Center

**DECISION AND ORDER REVERSING THE
DENIALS OF CERTIFICATION**

This case arises from Plant Process Fabricators, LLC's (Employer) requests for review of the Certifying Officer's (CO) decisions to deny its applications for temporary alien labor certification under the H-2B non-immigrant program.¹ The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (Department).³ A CO in the Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before the Board of Alien Labor Certification (BALCA).⁴

¹ 20 C.F.R. Part 655.

² 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). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

FACTUAL BACKGROUND

Employer is located in Sulphur Springs, Texas, where it regularly employs workers as plumbers, welders, pipefitters, and steamfitters for skid fabrication at an in-house manufacturing facility to fabricate several types of oil field equipment and perform upgrades to that equipment as periodically required.⁵ On 3 Jul 18, Employer applied for H-2B temporary labor certification, seeking approval to hire a total of 210 foreign nationals as (80) welders⁶ and (130) pipefitters⁷ from 1 Oct 18 to 1 May 21, based on a one-time occurrence need,⁸ explaining that its need is due to a single contract for an offsite project at 2440 Kiewit Road, Ingleside, Texas and included a contract with Kiewit Offshore Services to support its need.⁹ The employer also provided a letter of intent and contract from Kiewit, indicating that Plant Process Fabricators, LLC has been selected to provide contractor services on a large-scale offsite fabrication project.

On 12 Jul 18, the CO issued a Notice of Deficiency (NOD), identifying three areas of deficiency.¹⁰ Specifically, the CO determined that employer failed to establish the job opportunity as temporary in nature, establish temporary need for the number of workers requested, and submit a complete and accurate ETA Form 9142.¹¹ The CO requested additional explanation and documentation to support the request for a one-time standard of temporary need. The CO noted that¹²

[t]he employer is using one contract and its inability to recruit an appropriate number of workers to meet its contractual obligations as basis for its one-time need. However, the employer has not demonstrated how this contract/project represents a unique event in its business operations. The employer's business practices appear to be contingent on securing and fulfilling contracts, whether in-house or on-site. Since the employer's business model is based on obtaining multiple successive projects, it is not clear how this one contract represents a one-time need for this employer.

The CO requested the following documents and explanation in addition to any other evidence and documentation that serves to justify the one-time standard of temporary need:¹³

1. A statement describing the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation as to how the employer's need meets the one-time standard of need, as defined above, when the employer is an equipment fabrication company which

⁵ AFA 328-330. AFB 305-307.

⁶ 2018-TLN-162. Administrative File is herein referred to as AFA followed by the page number.

⁷ 2018-TLN-163. Administrative File is herein referred to as AFB followed by the page number.

⁸ AFA 264-334. AFB 294-364.

⁹ I note initially that the two cases have identical fact patterns, deficiencies, reasoning, and supporting documentation, as the same employer is requesting two types of workers (pipefitters and welders) under the H-2B program for the same one-time occurrence special project.

¹⁰ AFA 257-263. AFB 287-293.

¹¹ *Id.*

¹² AFA 261. AFB 291.

¹³ AFA 261. AFB 94.

- fabricates several types of oil field equipment and performs upgrades to same as periodically required;
3. Summarized monthly payroll reports, individually for each and all worksites in which the employer conducts business, for 2016 and 2017 that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received[.]; and
 4. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

The CO requested additional information and modification on the other two identified deficiencies, both of which were subsequently corrected and are not at issue in the instant case.

On 25 Jul 18 Employer responded to the CO's NOD,¹⁴ including additional explanation and documentation. Employer argued that BALCA has already given guidance directly addressing this issue in *In re Industrial Equipment Solutions, Inc*¹⁵ and, as in that case, PPF has permanent workers who are committed to other in-house jobs, and PPF has a contract and letters of intent attached that reflect it needs 130 workers to supplement its pipe fitter workforce and 80 workers to supplement its welder workforce for the short-term Leviathan project off-site. While the facts may be similar, I disagree that this case addresses the same issue: that case was based on a peakload standard of temporary need, not a one-time occurrence standard, as here. The two standards are similar, but not identical.

Payroll records show Employer employed pipefitters and welders from January 2017 until June 2018 and has employed anywhere between 4 and 16 pipefitters and between 4 and 15 welders each month.¹⁶ It argues this temporary event of a short duration will last less than the regulatory maximum of 3 years from 1 Oct 18 until 1 May 21.¹⁷ Employer submitted contract, letters of intent, and internet announcements about the Leviathan Project and news reports noting the fabrication requirement of a 30,000 ton specialized platform. The project reportedly will require the installation and hookup of more than 10,000 valves and 33 miles of deck piping.¹⁸

On 28 Aug 18, the CO issued a Final Determination denying Employer's application, finding that Employer failed to establish the job opportunity as temporary in nature, citing 20 C.F.R. 655.6 (a) and (b).¹⁹ It explained its denial as follows.²⁰

¹⁴ AFA 192-256. AFB 212-286.

¹⁵ AFA 201. 2018-TLN-147 and 2018-TLN-148.

¹⁶ AFA 214. AFB 44.

¹⁷ AFA 210. AFB 117.

¹⁸ AFA 221. AFB 132.

¹⁹ AFA 171-184. AFB 191-204.

²⁰ AFA 176. AFB 178.

The employer explained that its work will be done at the employer's worksite; however, it is not clear if this off-site project is an exception to its business model or one of several types of arrangements it has made in the past. Also, if the employer makes this type of off-site arrangement with one contractor, how can the employer state that such an arrangement would not take place in the future?

Further, it appears that the work duties of the [pipefitters/welders] under the Kiewit Offshore Service, LTD project are the same duties performed by [pipefitters/welders] at its Sulphur Springs, Texas facility. The employer's business model is to solicit, secure, and fulfill contracts on an on-going basis. The employer did not make clear how one contract, regardless of it being onsite or offsite, creates a peakload need in its annual business operations. 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.

As directed, the employer submitted its payroll. The payroll shows that the employer employs [pipefitters/welders] on a permanent basis. Therefore, the employer's one-time need application must be based on an employment situation that is otherwise permanent, but a temporary event of short duration has created a need for temporary workers. However, the employer's specified employment situation does not represent a temporary event of short duration. In fact, as stated previously, while the 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. Therefore, the employer did not overcome the deficiency.

On 5 Sep 18, Employer requested administrative review, arguing that:²¹

PPF's business model is not based on obtaining multiple successive projects. In fact, the Leviathan Project is not a "successive" project but is a defined temporary event of short duration. It is not successive as PPF cannot simply work on its in-house projects to completion then start on the Leviathan project. The Leviathan project is a temporary additional project requiring short-term additional [pipefitters/welders].

...

²¹ AFA 1-2. AFB 4-5.

[T]he standard does not require PPF to prove the present Leviathan project is 'unique' or an 'exception to its business model' in order to be eligible for Temporary Labor Certification under the temporary one-time need standard. As indicated, PPF's current business model requires all projects to be executed at its Sulphur Springs, Texas facilities. The Leviathan project is indeed, however, a unique situation and an exception to PPF's business model in that it obligates PPF to perform the project offsite in the Corpus Christi, Texas Metropolitan Statistical Area. As evidenced by the submitted supporting documents, PPF cannot execute the short-term project at its Sulphur Springs, Texas facilities due to the number of workers required by the client necessary to timely complete the project.

Whether the temporary [pipefitters/welders] will perform the same duties as the [pipefitters/welders] employed at PPF's Sulphur Springs, Texas facilities does not negate its eligibility for H-2B classification under the one-time temporary need standard. Temporary services for labor under H-2B classification refers to positions in which the employer's need for the duties to be performed by the employees are temporary, regardless whether the underlying job can be described as permanent or temporary.²² As noted in *Matter of Arlee Corporation*, "it is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position."²³ Therefore, it is the nature of PPF's need for temporary [pipefitters/welders]"which determines the temporariness of the position" and not the nature or the duties of the [pipefitter/welder] position in and of itself.²⁴ The nature of PPF's need for supplemental [pipefitters/welders] arises out of the fact that its permanent workers already have a full project schedule in Sulphur Springs, Texas and all their workers are committed to these projects as noted in the enclosed Schedule in Sulphur Springs, Texas of Projects at Exhibit C, Item 2. For the Leviathan project, PPF has a temporary event of short duration that has created the need for temporary workers.

PPF is requesting Temporary Labor Certification based on the one-time, and not peakload, standard. As such, the one-time standard requires PPF to prove it has a temporary event of short duration that has created the need for temporary workers. As the enclosed evidence demonstrates, PPF operates solely out of its Sulphur Springs, Texas facility and executes and services projects from said facility. However, due to the short-term Leviathan project, PPF is required to perform the project work offsite in the Corpus Christi, Texas MSA using additional [pipefitters/welders]. The enclosed executed contract and other evidence establishes a one-time need as it demonstrates PPF has a temporary project which requires supplemental [pipefitters/welders] in order to timely execute. Lastly, the DOL's Denial suggests that, because in theory the possibility of future largescale contracts exists, the present need cannot be classified as a one-time temporary need. PPF cannot prove a negative or, in other words, demonstrate the

²² 8 CFR 214.2(h)(6)(ii).

²³ See Training and Employment Guidance Letter (TEGL) NO. 21 06 Change 1 (June 25, 2007) (referencing and readopting the seminal Board of Immigration Appeals (BIA) definition of "temporary" as defined in *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982).

²⁴ *Id.*

non-existence of any future large-scale off-site contracts. However, as noted above, PPF can affirmatively state its use of the H-2B program is limited to the Leviathan project. As the applicable H-2B regulations note, PPF is required to prove (1) it has an employment situation that is otherwise permanent and (2) a temporary event of short duration has created the need for a temporary worker.²⁵ The enclosed Application demonstrates PPF meets both elements and is therefore eligible for H-2B classification under the one-time need standard. Moreover, counter to the DOL's assertion regarding PPF's "survival," PPF does not require any subsequent off-site contracts. The Company's business model has been and remains the on-site work in Sulphur Springs, Texas.

Here, the DOL affirmatively states PPF has shown "the employer employs [pipefitters/welders] on a permanent basis," and therefore meets the first element necessary for H-2B classification under the one-time need standard.²⁶ The temporary event of short duration is demonstrated in the enclosed executed contract and letters of intent which sufficiently evidence PPF is being engaged to provide [pipefitters/welders] on a large-scale project within a defined time period. Any employees hired for the Leviathan project will not be eligible for permanent employment, and their employment will end upon project completion as specified. If other projects present themselves after this one, by regulation, PPF will not and cannot hire these workers on these hypothetical future projects as it has stated in this application that the request is only for the Leviathan project of temporary duration. During the execution and upon completion of this Leviathan project, it is PPF's intent to continue performing projects in their Sulphur Springs, Texas facility using their permanent workforce. As indicated, PPF is not able to perform the Leviathan work using its permanent [pipefitters/welders] at its Sulphur Springs, Texas facilities. Therefore, the Leviathan project is a temporary project of short duration which has created the need for temporary workers.

On 25 Sep 18, I issued a Notice of Docketing and Expedited Briefing Schedule, permitting Employer and counsel for the CO ("Solicitor") to file briefs within seven business days of receiving the appeal file.²⁷ Briefs for both Employer and Solicitor were due by close of business on 5 Oct 18. Neither Employer nor the Solicitor filed briefs.

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and Employer's request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.²⁸ A CO's denial of certification may be reversed when the Employer shows it to be arbitrary or capricious or otherwise not in accordance with law.²⁹ After considering the evidence of record,

²⁵ 8 CFR § 214.2(h)(6)(ii)(B)(1).

²⁶ *Id.*

²⁷ 20 C.F.R. § 655.61(c).

²⁸ 20 C.F.R. § 655.61.

²⁹ *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (10 May 16).

BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action.³⁰

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.³¹ 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."³² 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, definable future."³³ 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.³⁴ The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program.³⁵

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."³⁶

The ETA has clearly envisioned situations very similar to this, which have even been discussed in the Federal Register:³⁷

One-Time Occurrence. The Departments will employ the definition of one-time occurrence established in DHS regulations at 8 CFR 214.2(h)(6)(ii)(B)(1). The Departments do not intend for the 3-year accommodation of special projects to provide a specific exemption for industries like construction in which many of an employer's projects or contracts may prove a permanent rather than a temporary need. Therefore, we will closely review all assertions of temporary need on the basis of a onetime occurrence to ensure that the use of this category is limited to those circumstances where the employer has a non-recurring need which exceeds the 9-month limitation. For example, an employer who has a construction contract that exceeds 9 months may not use the program under a one-time occurrence if it has previously filed an Application for

³⁰ 20 C.F.R. § 655.61(e).

³¹ 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.

³² 8 C.F.R. § 214.2(h)(6)(ii)(A); 20 C.F.R. § 655.6(a).

³³ 8 C.F.R. § 214.2(h)(6)(ii)(B).

³⁴ *Id.*

³⁵ *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 (23 Jan 17).

³⁶ 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

³⁷ ETA, Interim Final Rule, Labor Certification Process and Enforcement (H-2B Workers), 80 Fed. Reg. 24041, 24055-56 (29 Apr 15).

Temporary Employment Certification identifying a one-time occurrence and the prior Application for Temporary Employment Certification requested H-2B workers to perform the same services.

Even prior to this, the ETA clearly envisioned this specific type of situation, where an employment situation that is otherwise permanent, but a temporary event of short durations has created the need for a temporary worker, in prior years of discussing a one-time occurrence.³⁸

A one-time occurrence might also arise when a specific project creates a need for additional workers over and above an employer's normal workforce. For example, if a shipbuilder got a contract to build a ship that was over and above its normal workload, that might be a one-time occurrence, [unless] the same employer filed serial requests for H-2B workers for each ship it built.

Thus, an employer who has a special project contract that exceeds 9 months should be able to use the program under a one-time occurrence if it has NOT previously filed any Application for Temporary Employment Certification identifying a one-time occurrence to perform the same services. Additionally, once an employer has used the program to fulfil a one-time occurrence need for a certain type of position, the likelihood of ever using a one-time occurrence need successfully to fill the same type of position likely drops drastically if it does not disappear altogether. If the need arose again, the intermittent standard may be a path to consider but would then be limited to the typical 9 month duration. "Where a one-time occurrence lasts longer than 1 year, the CO will instruct the employer on any additional recruitment requirements with respect to the continuing validity of the labor market test or offered wage obligation."³⁹

Here, PPF has never requested to or been certified to use the H-2B program before. The one time need is for a special project far over and above its permanent workload. The duration is under the maximum 3 year duration of a one-time occurrence. While the CO may be correct that Employer has not proven it will not enter into any future contract of this magnitude, Employer is also correct in its inability to prove a negative. Should Employer enter into a similar contract in the future, scrutiny under the regulations would likely preclude Employer from using the H-2B program for a one-time occurrence standard of need again.

³⁸ ETA, Final Rule, Labor Certification Process and Enforcement (H-2B Workers), 73 Fed. Reg. 78020, 78027 (19 Dec 08). The 2008 rule, while not currently in effect, is only used here for demonstrative purposes to show examples of the long-standing definition of one-time occurrence.

³⁹ 20 C.F.R. 655.15(g).

Employer has shown the CO's denial is not in accordance with law and that Employer's request for one-time need of 130 pipefitters and 80 welders should be certified by the Certifying Officer.

ORDER AND DECISION

In light of the foregoing, the Certifying Officer's decisions denying certification are **REVERSED**, and these cases are **REMANDED** to the Certifying Officer for further action in accordance with this decision, including instructing Employer on any additional recruitment requirements with respect to the continuing validity of the labor market test or offered wage obligation.

SO ORDERED.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge