



**Issue Date: 18 December 2017**

BALCA CASE NO.: 2018-TLN-00026

ETA CASE NO.: H-400-17265-113771

*In the Matter of:*

**PREEMP, INC.,**  
*Employer.*

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

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) on the Employer’s request for review of the Certifying Officer’s denial in this H-2B temporary labor certification matter.

**Procedure for Temporary Labor Certification**

Under the H-2B program, employers may hire foreign workers to perform temporary nonagricultural work within the United States, under certain circumstances, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 C.F.R. §214.2, subsection (h)(1)(ii)(D). Employers wishing to hire foreign workers under this program must apply for a “labor certification” from the U.S. Department of Labor (“DOL”). 8 C.F.R. §214.2, subsection (h)(6)(iii). A Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) reviews the employer’s application under 20 C.F.R. §655.50.

The CO (acting for the Secretary of Labor, 20 C.F.R. §655.2, subsection (a)) can issue the labor certification only after determining (1) that there are not sufficient U.S. workers who are qualified and available to perform the work in question and (2) that employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. §655.1, subsection (a). The burden of proof is on the employer to show it is entitled to the labor certification. 8 U.S.C. §1361.

If the CO denies certification, the employer may seek administrative review before BALCA under 20 C.F.R. §655.61 (*see* 20 C.F.R. §655.53). When the employer requests administrative review, the CO, within seven business days, submits the Appeal File to BALCA, to the employer, and to the Associate Solicitor for Employment and Training Legal Services. 20 C.F.R. §655.61, subsection (b). Counsel for the CO may submit a brief in support of the CO's decision within seven business days of receipt of the Appeal File. 20 C.F.R. §655.61, subsection (c). BALCA then considers only the Appeal File, the request for review, and any legal briefs submitted, and must either affirm the CO's determination; reverse or modify the CO's determination, or remand to the CO for further action. 20 C.F.R. §655.51, subsection (e).

By another curious quirk of this procedure, by designation of the Chief ALJ, I am BALCA for purposes of this appeal. 20 C.F.R. §655.61, subsection (d).

### **Standard of Review**

BALCA reviews H-2B decisions under an “arbitrary and capricious” standard, *Brook Ledge, Inc.*, 2016-TLN-00033, at \*5 (May 10, 2016), meaning that I must uphold the CO's decision so long as its construction of the regulations is permissible and its “path may be reasonably discerned.” *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). I may reverse the CO's determination for a clear error of judgment, but I may not substitute my own judgment for the CO's. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Neither the CO nor the Employer filed a brief in this matter.

### **Statement of the Case**

#### **The Application**

On September 13, 2017, Employer Preemp, Inc. (dba Prometheus Industrial Services), applied for a Temporary Labor Certification (AF pp. 173-188). The application included this Statement of Temporary Need (AF p. 173):

#### **SEE ADDENDUM**

As an employer of local talent for more than 20 years, we have the unique opportunity to provide specialized construction services to a large-scale liquefied natural gas project. PreEmp regularly hires technical specialists for the oil and gas industry, and while PreEmp 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 PreEmp 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.

The “Addendum,” although not specifically marked as such, is apparently a one-page letter dated September 8, 2017, from Joe Elkin, Senior Director, Subcontracts, of CB&I addressed “To Whom It May Concern” (AF p. 188). According to Mr. Elkin:

CB&I LLC is a contractor providing a complete spectrum of engineering, procurement, fabrication and construction services. We are currently involved in the construction of the Lotte-Axiall Ethylene Plant project whose address is 2200 Bayou D’Inde Pass, Westlake, LA 70669, Calcasieu parish. This project is a major capital construction project exceeding \$3.2 Billion value in Lake Charles, Louisiana.

For the support of this project, we have selected Preemp, Inc.; dba Prometheus Industrial Services to provide contractor services. The Nature of Preemp, Inc.; dba Prometheus Industrial services *[sic]* will primarily be related to installation of piping and components, which will require specialized Combination Welders and Pipefitters. 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.

Combination Welders for this contract must be dual process, SMAW and GTAW, as well as able to perform both processes on a range of metallurgy, including carbon steels, stainless steels, and other alloys. Industrial Pipefitters for this contract must be experienced with the installation, assembly, layout, and maintenance of piping systems for gas, steam and process applications. Pursuant to this contract, these workers will be needed from October 1, 2017 through September 30, 2018. Given that these workers will be used only to satisfy this part of the contract, our need for these workers is of a temporary nature and of a short duration with a definable end point.

## The Notice of Deficiency

On September 25, 2017, the CO issued a Notice of Deficiency (AF pp. 163-172). As relevant here, the CO stated

In accordance with Departmental regulations at 20 CFR 655.6(a) and (b), an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

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.

The employer did not sufficiently demonstrate the requested standard of temporary need.

Preemp Inc. is requesting 50 Combination Welders from October 1 2017 to September 30, 2018 based on a one-time occurrence. In order to establish a one-time occurrence, the petitioner 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.

...

Although the employer states that this one-time occurrence need is tied to a specific contract for a liquefied natural gas project with set completion dates, which the employer characterizes as unique in scope, *it is not clear that this project represents a unique event in its business operations.*

Based on the documentation submitted, the employer has not demonstrated a one-time occurrence temporary need. *The employer's business is to secure contracts in the oil and gas industry on an ongoing basis. This is contrary to the definition of a one-time occurrence in that the constant bidding and winning of contracts is not a one-time occurrence; rather, it is a recurring event that is the basis for the existence of the employer's business and therefore represents a year-round permanent need for workers* (emphasis added).

(AF pp. 167-168). The CO asked the Employer to submit additional information:

1. A description of the employer's business history and activities (i.e. primary products or services) and schedule of operations throughout the year;
2. An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

...

#### **AND**

1. The employer must submit the services Agreement *[sic]* and Work Order mentioned in the Statement of Temporary Need attachment;<sup>1</sup> and
2. The employer must submit any additional supporting evidence and documentation that justifies the chosen standard of temporary need. The employer's response must include, but is not limited to, a summarized report that outlines the employer's recent and ongoing contracts in the petrochemical and natural gas pipeline industries.

Note: If the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

(AF, p. 168).

#### Response to Notice of Deficiency

On October 13, 2017, Employer filed a response to the Notice of Deficiency (AF pp. 69-162), requesting emergency treatment of its H-2B application under 20 C.F.R. § 655.17(a) (AF, p. 69). Employer identified the project in question as "the largest liquefied natural gas project in the history of the United States" and argued Tropical Storm Harvey had caused widespread flooding, resulting in "unforeseeable change in conditions that require temporary workers on a one-time basis" (AF, p.

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<sup>1</sup> I see no reference to a Services Agreement or a Work Order in Mr. Elkin's letter, or in any other document attached to the application in the Appeal File.

70). Employer attached several news reports and other information about the disruptions caused by Tropical Storm Harvey (AF pp. 97-117).

Additionally, Employer submitted a new Statement of Temporary Need (AF pp. 118-120), in which it reported

Preemp's activities are project-based, so it does not keep a regular work schedule throughout the year. During the periods that Preemp is hired by another company to provide its services, Preemp works for a set term as defined by the project contract.

In this case, Preemp has been hired by CB&I, LLC to provide combination welding services pursuant to a term contract for the period between October 1, 2017 and September 30, 2018. Preemp will not serve as a job contractor for the employees hired, but will directly employ them. The employees will work at the job site controlled by CB&I, LLC, but subject to exclusive Preemp control.

...

Preemp's need for temporary Pipefitters meets the one-time need standard, as the need has been created by a temporary event of short duration, its agreement with CB&I to provide services under contract for a term of set duration. The Master Services Agreement states that the term of the project is set by the Work Order. Pursuant to the Work Order, CB&I, LLC set the time period for the project as October 1, 2017 to September 30, 2018. This is confirmed by a memorandum signed by Joe Elkin, Senior Director of Subcontracts at CB&I, LLC. Together, these documents demonstrate that the period of need will extend from October 1, 2017 to September 30, 2018, a temporary event of short duration.

...

The number of combination welders needed was determined by considering the total number of hours needed to complete the project and total available work hours that a single full-time worker could offer. The total number of hours needed to complete the project was then divided by the total number of hours that a worker could offer. That value was then multiplied by the expected turnover value to arrive at the total number of workers needed.

Here, we anticipate that 104,000 hours will be needed to complete the project by September 30, 2018. A single full-time worker could work up to 2,280 hours during this one year time period. When we divide 104,000 by 2,280 we get 45.61. Then, we account for at least 10% turnover using the following values:  $45.61 \times (1 + 0.10) = 50$ . As such, 50 combination welders will be needed for this temporary position.

As such, this project has an anticipated end and represents a temporary one-time need that will not be needed in the future.

(AF, pp. 118-120).

### The Non-Acceptance Denial

On November 14, 2017, the CO denied the application (AF pp. 47-48). In support of the denial, it attached a statement again faulting Employer for failing to “establish the job opportunity as temporary in nature” (AF, p. 49). After citing language identical to the CO’s original Notice of Deficiency, as quoted above (AF, p. 50), the CO added:

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 Preemp’s activities are project-based, so that it does not keep a regular project schedule throughout the year.

The employer went on to explain that, “[d]uring the periods that Preemp is hired by another company to provide its services, Preemp works for a set term as 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 that its work is “project-based” and they provide a wide range of services including industrial construction focusing on specialized welding and pipe-fitting services through its own employees. These services are based on contracts. However, the employer did not sufficiently justify with the supporting documentation provided how its project with CB&I, LLC 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 (emphasis added).

(AF, pp. 51-52).

This appeal followed.

### Discussion

I cite at length the documents the CO and the employer exchanged because I think they show, unfortunately, that the two parties were essentially talking past one another. In this case, the result is particularly disappointing, because the CO did not determine the Employer's application on the merits. The CO merely concluded that Employer, after two chances, had failed to meet its burden of proof.

Here, the issue separating the parties is whether the Employer has made a sufficient showing of temporary need. The applicable regulation is 8 C.F.R. § 214.2, subsection (h)(6)(ii)(B):

(B) Nature of petitioner's need. 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. . . . The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(1) One-time occurrence. The petitioner 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.

...

(4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

On appeal, Employer contends the CO misunderstood its business model (AF, pp. 1-2). Employer admits it “has a history of providing labor in the oil and gas industry,” but contends that history was essentially limited to operating “small specialty teams on only a small number of long-term service projects at a time so as to provide a stable and reliable project services solution to our clients.” The Lotte-Axiall Ethylene Plant project, by contrast, “calls for general provision of welding and pipefitting services . . . . 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.<sup>2</sup> 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” (AF, p. 2). Employer faults the CO for “interpret[ing] the project underlying this petition to be typical of Employer’s ongoing business” (AF, p. 3). Employer argues the CO should have approved the application either as a one-time need, or as an intermittent need (AF, p. 3).

I can understand why these arguments would not carry the day with the CO. Even if the Lotte-Axiall Ethylene Plant project represented a departure from the historical scope of Employer’s business, Employer does not deny it intends to pursue such business in the future. In fact, the Business Plan says it does.

Of course, in the ordinary sense of the words, the Lotte-Axiall Ethylene Plant project was a “one-time” need, in that it was only going to be built once. But in that sense of the words, *every* Preemp job is a one-time need, because *every* Preemp job is a project that ends when it is finished, whether it involves a “small specialty team” or “dozens if not hundreds” of Preemp employees. The appropriate question here is whether the Lotte-Axiall Ethylene Plant project comprises a “one-time need” (or an “intermittent need”) as defined at 8 C.F.R. § 214.2, subsection (h)(6)(ii)(B). Employer has not shown it is. I can easily imagine the CO reading Preemp’s application and thinking, okay, here’s a business that provides labor for oil and gas projects, and it has a chance to provide workers for the Lotte-Axiall Ethylene Plant project. Does Preemp have any welders or pipefitters on its payroll now, and if so, how many? Is Preemp going to go after big jobs like the Lotte-Axiall Ethylene Plant project from now on, and, if it is, doesn’t that really mean that it needs to expand

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<sup>2</sup> An Executive Summary of Employer’s Business Plan was attached as Exhibit “B” to its Appeal and Request for Director Review (AF, pp. 12-16), but does not appear elsewhere in the Appeal File.

and hire more workers *permanently*, rather than temporarily? The fact that Employer distinguishes between operating “special service teams” and acting as a “general services provider” does not answer those questions, and Employer nowhere provides any other answers. Because it does not, I must conclude that the CO’s decision was not a clear error of judgment, and I must affirm the denial.

It may be that Employer never answered those questions because the CO did not state them as clearly, or as conversationally, as I just did. Or it may have overlooked those questions because the CO’s request for more details on those points was buried in an avalanche of other demands for information. I confess to some sympathy for the Employer here. Running a business is not easy, and frequently demands fast action. And people who enjoy writing detailed presentations conforming to exacting legal standards are much more likely to seek employment in government than in the oil and gas industry, for example. In fairness to the CO, of course, Employer can hire all the domestic workers it likes, regardless of what the CO may think about it. When an employer seeks to hire foreign workers, the CO has a job to do.

But those are observations for another time and place. Here, my duty is to determine whether the CO made a clear error of judgment. The CO did not.

### **ORDER**

The Certifying Officer’s denial of the Temporary Labor Certification in this case is affirmed.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge