U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

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BALCA Case Nos.: **2018-TLN-00164**
2018-TLN-00165
2018-TLN-00166
2018-TLN-00167

ETA Case Nos.: H-400-018163-701143
H-400-018163-756091
H-400-018163-589896
H-400-018159-710537

In the Matter of:

RICHMOND COUNTY CONSTRUCTORS,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Chad C. Blocker, Partner
Fragomen, Del Rey, Bernsen & Loewy, LLP
Los Angeles, CA
For the Employer

Matthew Bernt, Acting Associate Solicitor
Micole Allekotte, Attorney Advisor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of 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 Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)[1]; 20 C.F.R. § 655.6(b)[2]. Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On July 3, 2018, the Department of Labor's Employment and Training Administration ("ETA") received applications for temporary one-time occurrence labor certifications from Richmond County Constructors ("the Employer" or "RCC"). The Employer requested certifications for 150 "Pipefitter-Welder[s,]" AF 1, P146-P218[3]; 150 "Electrician-Welder[s,]" AF 2, P148-P22[4]; 350 "Journey Electrician[s]" AF 3, P160-P233[5]; and 100 "Journeyman Pipefitter[s,]" AF 4, P166-P238[6], on the basis of a one-time occurrence from October 1, 2018 through September 30, 2019.[7] AF 1, P154-165. On July 12, 2018, the CO issued a Notice of Deficiency ("NOD") in Electrician-Welders and reissued the NOD in Pipefitters following an employer inquiry. AF 2, P133-147; AF 4,

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[1] 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).

[2] 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.

[3] OALJ Case No. 2018-TLN-00164, hereinafter Pipefitter-Welders, Administrative File (AF) 1.

[4] OALJ Case No. 2018-TLN-00165, hereinafter Electrician-Welders, AF 2.

[5] OALJ Case No. 2018-TLN-00166, hereinafter Electricians, AF 3.

[6] OALJ Case No. 2018-TLN-00167, hereinafter Pipefitters, AF 4.

[7] Because the listed cases have been consolidated by order issued by the undersigned September 25, 2018 and evidence in each of these cases are essentially identical, this decision refers primarily to AF 1 throughout. Each determination in this consolidated case is intended to apply to all four listed matters.

P141-153. In each case, the employer responded to the NOD on July 17, 2018, correcting most of the deficiencies. AF 1, P 60-133; AF 2, P 60-132; AF 3, P 60-146; AF 4, P 60-P140. On August 23, 2018, the CO denied each case on the basis that RCC had not established temporary need. AF 1-4, P 34-42.

The Applications contained documents explaining that RCC, "a limited liability corporation owned by Bechtel and the Williams Group," is unable to find enough workers to build a power plant. *See, e.g.* AF 1, P200. In support of its one-time occurrence temporary need, the employer submitted with each Application a "Statement of Temporary Need." The letters explained that RCC is applying under the one-time occurrence category for employers that have "an employment situation that is otherwise permanent, but a temporary event of short duration has created a need for temporary workers." *See, e.g.* AF 1, P202. The Employer stated that:

> The instant Application for Temporary Labor Certification qualifies under the one-time occurrence category as we are currently experiencing a severe and unanticipated shortage of skilled Pipefitter-Welders [AF 1] for our discrete, large scale construction project, which will significantly impact the country's power supply. … [T]he Plant Vogtle Units 3 & 4 project … will last one (1) year and is currently entering the critical electrical and mechanical phase of construction. However, due to shortages of skilled U.S. Pipefitter-Welders (Field-Remote) and an unusually high demand for such workers, we are falling behind schedule and are unable to open new work-fronts. We are concerned that the project completion dates will not be met as a result of the aforementioned labor shortage. … We anticipate the temporary need to supplement our existing workforce by recruiting skilled Pipefitter-Welders [AF 1] from the Canadian labor market through the H-2B system during our construction period. … Our H-2B visa application includes an expiration date of September 30, 2019, which will provide sufficient time to cover any unanticipated delays in the project.

AF 1, P202-204.

The CO's July 11 and 12, 2018 NODs presented multiple deficiencies with the applications, two of which are presented on appeal. In total the CO asserted seven deficiencies: Deficiency 1-Failure to establish the job opportunity as temporary in nature in accordance with 20 CFR 655.6(a) and (b); Deficiency 2-Failure to establish a temporary need for the number of workers requested in accordance with 20 CFR 655.11(e)(3) and (4); Deficiency 3-Failure to satisfy the obligations of H-2B employers in accordance with 20 CFR 655.20(e); Deficiency 4-Failure to satisfy the obligations of H-2B employers in accordance with 20 CFR 655.20; Deficiency 5-Failure to satisfy the obligations of H-2B employers in accordance with 20 CFR 655.20 (e); Deficiency 6-Failure to submit an acceptable job order in accordance with 20 CFR 655.16 and 20 CFR 655.18; and Deficiency 7-Failure to submit a complete and accurate ETA form 9142 in accordance with 20 CFR 655.15(a). AF 1 P134-145.

Specifically for Deficiency 1, the CO asserted that RCC did not meet either regulatory test for a one-time occurrence:

> The employer's statement [of temporary need] does not demonstrate that it has not employed workers to perform the services … in the past and will not need workers to perform the services or labor in the future, nor did it adequately demonstrate that it has a temporary event of short duration that has created a need for temporary workers. The employer has provided ample information regarding a large construction project, but has not demonstrated that the employer has a one-time need for workers. It is noted that the employer indicated that there is insufficient labor available locally to complete its projects. However, the employer is reminded that a labor shortage, no matter how severe, does not justify a temporary need.

E.g. AF 1, at P137-138.

On July 17, 2018 the Employer submitted numerous documents in its response to the Notice of Deficiency including: Response Letter; One time occurrence attestation; Demand data for pipefitters; Critical path schedules; Headcount summary; Gross pay summary; Hours summary; U.S. Nuclear Regulatory Commission report; Amendment requests; Business necessity letter; Job advertisements for different job opportunities; and Amended job order. AF 1 P60-133. With regard to Deficiency 1, the Employer stated:

> In order to meet the one time occurrence standard, the employer must demonstrate that it has not employed workers to perform the labor in the past, and will not need workers to perform the labor in the future or that the employer has an employment situation that is otherwise permanent, but a temporary event of short duration has created a need for temporary workers. Please see 8 CFR 214.2(h)(6)(ii)(B)(1). In this situation, RCC is responsible for the construction of Units 3 & 4 of Plant Vogtle. It is a temporary construction project. Once construction is complete, Units 3 & 4 will be fully operational, and construction workers will no longer be needed.

E.g. AF 1, at P62-63.

From July 27 to August 21, 2018, Employer submitted a number of inquiries to the Chicago National Processing Center regarding the delay in issuance of a Final Determination. AF 1 P51-59.

On August 23, 2018, the CO issued its final determination letter including a Denied Application for Temporary Employment Certification for each matter at issue in this case. AF 1, P34-50. The denial letter was based on Deficiencies 1 and 2 listed in the NOD. The CO asserted:

Deficiency 1: Failure to establish the job opportunity as temporary in nature

Applicable Regulatory Citations: 20 CFR 655.6(a) and (b)

In accordance with 20 Code of Federal Regulations (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.

The employer is requesting 150 Pipefitter-Welder (Field/Remote) from October 1, 2018 to September 30, 2019 based on a one-time occurrence need. In order to establish a one-time occurrence, the petitioner must show that it has not employed workers to perform the service or labor in the past and will not need workers to perform the services or labor in the future, or that the employer has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

Section B., Item 9 of the ETA Form 9142 indicates the following:

> The instant Application for Temporary Labor Certification qualifies under the one-time occurrence category as we are currently experiencing a severe and unanticipated shortage of skilled Electrician-Welders (Field/Remote) for our discrete, large scale construction project, which will significantly impact the country's power supply. RCC has been formed as a joint venture between Bechtel and Williams Plant Services to manage daily construction efforts for the Plant Vogtle Units 3 & 4 project. Plant Vogtle Unite 3 & 4 will be the first nuclear reactors built in the U.S. in more than three decades and will be the country's first advanced Gen III+ units.

In support of its application, the employer submitted a statement of temporary need, letter from DOL Secretary Acosta and a letter from the Governor of Georgia. The employer's statement does not demonstrate that it has not employed workers to perform the services of Electrician-Welder in the past and will not need workers to perform the services or labor in the future, nor did it adequately demonstrate that it has a temporary event of short duration that has created a need for a temporary worker. The employer has provided ample information regarding a large construction project, but has not demonstrated that the employer has a one-time need for workers. It is noted that the employer indicated that there is insufficient labor available locally to complete its projects. However, the employer is reminded that a labor shortage, no matter how severe, does not justify a temporary need.

The Department recognizes that Richmond County Constructors is a newly created joint venture, formed to manage daily construction efforts for the Plant Vogtle Units 3 & 4 projects. The Department deems the joint venture as a single employer, with the two entities making up that joint venture. Further explanation and documentation is needed to establish the employer's one-time occurrence standard of need from October 1, 2018 to September 30, 2019. AF 1, P36-37.

Deficiency 2: Failure to satisfy the obligations of H-2B employers

Applicable Regulatory Citations: 20 CFR 655.20(e)

In accordance with 20 Code of Federal Regulations (CFR) 655.20(e), each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H–2B employers in the same occupation and area of intended employment. The employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H–2B employers in the same occupation and area of intended employment.

Specifically, the employer indicated in Section F.b., Items 4. through 4b. that it requires employees to have 60 months of experience in Pipefitter-Welder or related occupation, which exceeds the standardized descriptor for this occupation in O*Net. O*Net indicates that 24 months of experience is normal and accepted for the occupation of Pipefitter-Welders. AF 1, P37.

On September 6, 2018, the Employer requested BALCA review. AF 1, P01-33. Employer argued that the CO's determination was flawed for a number of reasons. Employer stated, "although ETA was construing a DHS- promulgated regulation, it reached a conclusion that flatly contradicted that agency's regulatory statements." AF 1, P09. Employer further argued, "[i]n promulgating the regulatory language in § 214.2(h)(6)(B), DHS specifically identified construction of a power plant among the small handful of activities that qualify as a one-time occurrence." *Id*. Employer avers that despite the hiring of journeyman electricians and pipefitters in the past the particular "services or labor" to be performed in the upcoming phase of the project are different from RCC's normal workforce needs. AF 1, P11.

With regard to Deficiency 2, Employer argues that O*Net qualification descriptors are not an "inflexible mandate" and precedent exists to allow employers to deviate from those default guidelines when there is a valid justification. AF 1, P07. Employer notes given the high inherent potential hazard of nuclear criticality and release of radioactive materials a power plant must be constructed in such a way to minimize the likelihood of accidents. AF 1, P06.

The Board received the appeal file in this matter on September 14, 2018, and counsel for the CO filed a brief on September 26, 2018 after the undersigned granted a one-day extension consented to by Employer's Counsel. Employer filed a response brief

on September 28, 2018. The CO contends that because Employer has hired pipefitter-welders, electrician-welders, electricians, and pipefitters in the past, it fails to meet the one-time occurrence test. CO's Brief at 8. The CO did not present an argument based on Deficiency 2, but rather asserted the Board should rely on the grounds stated by the CO in the denial letters. CO's Brief at 2. Employer filed a response brief on September 28, 2018. Employer affirmed its arguments in its appeal request letter that RCC does qualify as a one-time occurrence need because the CO's determination does not properly consider the DHS regulations that allow for H2-B workers to be considered temporary if it is a one-time occurrence and does not exceed three years. Employer's Brief at 7.

SCOPE OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. §655.33(e). After considering the evidence, BALCA must take one of the following actions in deciding the case:

(1) Affirm the CO's denial of temporary labor certification, or
(2) Direct the CO to grant temporary labor certification, or
(3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

DISCUSSION

1. Did Employer establish that its job opportunity is temporary in nature?

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the DHS. *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). 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." 8 C.F.R. §214.2(h)(6)(ii)(B). 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. *Id*.

The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see also Tampa Ship*, 2009-TLN-44,slip op. at 5 (May 8, 2009). A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. *ABControls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013). In evaluating whether a job opportunity is temporary, "[i]t is not the nature or the duties of the position which must be examined to determine the temporary need," rather, "[i]t is the nature of the need for the duties to be performed which determines the

temporariness of the position." *Matter of Artee Corp.*, 18 I.& N. Dec. 366 (1982), 1982 WL190706 (BIA Nov. 24, 1982).

Here, Employer requests temporary workers for 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.

8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

a. Prong 1: Has the petitioner established that is has not employed workers to perform the services or labor in the past?

The CO argues that Employer fails to meet the first prong of the one-time occurrence test because the evidence RCC submitted shows that it has employed pipefitter-welders, electrician-welders, electricians, and pipefitters in the past. CO's Brief at 8. The Employer argues that CO mistakenly equates "labor or services" with "position." Employer's Brief at 4. Employer states, while RCC has employed pipefitter welders and electricians previously, the requested workers in these applications are for a temporary, one-year critical stage within a multi-year project. Employer's Brief at 4-5. Employer further avers, equating "labor and services" to "position" conflicts with examples that DHS and DOL provided when making relevant regulatory changes. AF 1, P11. Employer notes that the CO's reading of the relevant regulations does not align with the "one-time occurrence" examples that DHS provided in its 2008 alteration to the preamble of § 214(h)(6)(ii)(B)-specifically "construction of a specific building, structure (e.g. bridge, power plant) or other development." *Id*.

Employer, however, fails to overcome demonstrating how its hiring of pipefitter welders and electricians in the past should not disqualify it from meeting the "one-time occurrence" standard required under the H-2B program. Simply because DHS provided power plants as an example of a "one-time occurrence" project, does not exempt power plants from still meeting the requirement to not have employed workers to perform the services or labor in the past. Had RCC never employed pipefitter welders or electricians on the power plant project then they may possibly qualify for a "one-time occurrence" standard.

Conversely, RCC by its own admission has employed workers in these exact positions in the past. AF 1, P72-74 (showing RCC workers, pay, and hours in each of the four categories since November 2017.) Simply designating a particular part of the construction project as a different phase does not overcome the regulatory mandate that RCC has not employed workers to perform the same "services or labor in the past."

Therefore, Employer has failed under the first prong of the "one-time occurrence" requirement.

b. Prong 2: Has the petitioner established 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?

Employer further contends that it should also qualify under the second prong of the one-time occurrence test, as the upcoming phase of the overall construction project is a temporary event of a yearlong duration. Employer's Brief at 5. The CO argues that RCC has failed to demonstrate that it has an employment situation that is otherwise permanent and that a temporary event has created the need for temporary workers. CO's Brief at 9. Specifically, the CO points to Employer's statements that, "[o]nce construction is complete, Units 3 & 4 will be fully operational, and construction workers will no longer be needed." CO's Brief at 9, AF 1, P63.

Employer vies that, "RCC permanently already employs pipefitter-welders and will continue to do so after the upcoming critical part of the construction." AF 1, P13. Further, Employer states the "critical phase is a temporary event of short duration that has created the need for additional pipefitter-welders on top of the existing U.S. workers." *Id*. Employer finally asserts "that this situation-in which a specific, distinct phase of a power plant construction project calls for the performance of a specific distinct phase of labor or services that will not be needed later, and that is a short-duration phase of an otherwise long-term endeavor-is a qualifying one-time occurrence under the language of the regulations." Employer's Brief at 7.

RCC fails under this prong of the regulatory definition of a one-time occurrence because its employment situation in each of the occupations is not "otherwise permanent" with a one-time event causing a temporary need for temporary workers. RCC does not qualify for foreign workers under the one-time occurrence regulation because it is not a business with a permanent employment situation that it needs to supplement. Rather, the entire business is temporary, and a temporary business cannot have an "employment situation which is otherwise permanent" for its non-H-2B workforce.

Finally, Employer cites an example DOL promulgated of a "one-time occurrence" as analogous to RCC's alleged temporary event of the upcoming construction phase. AF 1, P11. In its rulemaking, DOL provided the following example as a "one-time occurrence":

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.

73 Fed. Reg. 78020 (Dec. 19, 2008).

The Employer incorrectly conflates this example as creating an "all or nothing" result barring an employer who has hired American workers in a particular position from qualifying for the H2-B program. AF 1, P12. The Employer overlooks a key aspect of the example, specifically that the additional ship in the scenario is "over and above" the employer's normal workload. The current need for pipefitter welders and electricians is not "over and above" RCC's normal workload. In contrast, this phase of construction was meticulously planned for from RCC's inception and Employer was fully aware of the need when beginning the construction. AF 1, P4, P202-203.

Had the Employer's current need for pipefitter-welders and electricians arose from some unforeseen circumstance surfacing during the overall construction project the scenario would be in line with the provided shipbuilding example.

Accordingly, the Employer has failed to demonstrate it qualifies under either prong of the test provided for in the DHS regulations and the CO properly denied the applications on this basis.

2. <u>Did Employer satisfy the obligations of H-2B employers with regard to the experience and qualifications requirements?</u>

Twenty C.F.R. § 655.22(h) requires the job opportunity that is the subject of the H-2B labor certification application to be "a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations."

In its denial the CO simply stated, "[t]he employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment." AF 1, P25. The CO's brief choose not to address this issue. CO's Brief at 2.

However, the Employer provided sufficient justification as to why it requires qualifications including 60 months experience versus O*Net's "normal and accepted" qualifications of 24 months. First, the nature of the project at issue, a nuclear power plant, gives rise to a heightened level of safety and compliance with federal safety regulations. The site is subject to inspection by the U.S. Nuclear Regulatory Commission and requires the strictest compliance with the Commission's safety rules and regulations. AF 1, P75-91. This heightened level of safety and need for strict compliance necessitates laborers to possess skills and experience above that in O*Net's listed typical qualifications, which does not consider these factors. Further, the Employer included eleven recent job listings from various employers for pipefitter-welders and electricians that required at least five years of experience. AF 1, P102-123.

While of course it is appropriate to take official notice of O*Net descriptions of what experience is typical for a given occupation, *Strathmeyer Forests, Inc.*, 1999-TLC-6, slip op. at 4 (Aug. 30, 1999); *Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter at 6 (May 8, 1998), the Employer provided ample evidence, as discussed above, that the job

opportunity at issue is one where the "same or comparable occupations in the area of intended employment" would require more than the 24 months experience typical for the occupation of pipefitter-welder and electrician reported in O*Net. Accordingly, while I have considered the O*Net information, I find the information provided by the Employer more probative concerning the job opportunity at issue.

Employer submitted sufficient information, including supporting reasoning and substantiating evidence, to meet its burden regarding the qualifications requirements under Deficiency 2. However, Employer failed to establish that it has a need for 150 Pipefitter-welders, 150 Electrician-welders, 350 Journeyman Electricians, and 100 Journeyman Pipefitters under a temporary one-time occurrence basis from October 1, 2018 to September 30, 2019. Thus, the CO properly denied the applications.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC/dce