U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case Nos.: 2018-TLN-00156; 2018-TLN-00157; 2018-TLN-00158
ETA Case No.: H-400-18183-036270; H-400-18183-750084; H-400-18180-486684

In the Matter of:

KIEWIT OFFSHORE SERVICES,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Shannon A. Donnelly
Baker & McKenzie LLP
Washington, D.C.
For the Employer

Nora Carroll, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: **CARRIE BLAND**
Administrative Law Judge

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

This case arises from Kiewit Offshore Service's ("Employer" or "KOS") 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 non-agricultural 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)[1]; 20 C.F.R. § 655.6(b).[2] Employers seeking to utilize this program must

[1] The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through

apply for and receive labor certification from the U.S. Department of Labor using Form ETA-9142B, *Application for Temporary Employment Certification* ("Form 9142"). 8 C.F.R. § 214.2(h)(6)(iii). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA"). 20 C.F.R. § 655.61(a).

BACKGROUND

On July 3, 2018, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Employer. AF 1250-1256.[3] Employer requested certification for 80 Structural Welders, 70 Structural Fitters, and 70 Pipe Fitters from October 1, 2018 until June 30, 2019. AF 5235. Employer indicated that the nature of its temporary need was a peakload need, and explained that:

> KOS has a peakload need for structural welders [structural fitters/pipe fitters] to perform temporary services during a specific period of need in order to comply with the terms of three large oil platform fabrication contracts.

AF 1250.

On July 11, 2018, the CO issued a Notice of Deficiency ("NOD") citing two deficiencies in Employer's application. AF 5228 - 5234.

First, the CO idenfied a "failure to estabish the job opportuniry as temporary in nature," and stated that the employer "did not sufficiently demonstrate the requested standard of temporary need." AF 5231. The CO noted that "[t]he employer's peakload need is based on three 'extraordinarily large' projects and the employer's inability to meet the demand with its existing workforce." AF 5232. However, the CO stated that "it is hard to discern what makes them different than the employer's normal operations – especially, when they have sought prior certification due to the size of a previous project. It is unclear what makes the current projects a

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subsequent appropriations legislation, including the current continuing resolution. *See* Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (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] References to the Appeal Files will be abbreviated with an "AF" followed by the page number, i.e. "AF 201." There are three separate case numbers and three separate Appeal Files in this matter. They all contain similar if not identical documentation, with the exception of the category of workers requested. Thus, while they contain similar, if not verbatim documentation and rationales, they are not, unfortunately, paginated similarly. For the sake of brevity and clarity, although each citation will contain only one page number, citing to case number 2018-TLN-00156, the documentation discussed applies to all three appeal files, unless specifically noted otherwise.

deviation in its operations when the employer has established that it has worked under large contracts in the past." Id.

To correct Employer's failure to establish the job opportunity as temporary in nature, the CO requested that the Employer submit supporting evidence and documentation that justifies the chosen standard of temporary need including, but not limited to:

1. An explanation regarding how the employer's request for 80 workers [220 total across the three applications] from October 1, 2018, through June 30, 2018, qualifies for a peakload need in the employer's annual operations of providing workers to clients in the oil, gas, refinery, and pipeline industries;
2. An explanation of why the employer does not have a need for Structural Welders [and Structural Fitters and Pipe Fitters] after June 30, 2019 in and near the Ingleside, Texas metropolitan area;
3. A monthly summary of all Kiewit Offshore Services, LTD. projects for 2016 and 2017. The list should include the start and end dates of each project and worksite addresses;
4. Summarized <u>monthly payroll</u> reports for a minimum of two previous calendar years that identify, for each month and <u>separately for full-time permanent and temporary employment in the requested occupation, *Structural Welders*,</u> [Structural Fitters, and Pipe Fitters,] the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

AF 5233.

Second, the CO identified a "failure to establish temporary need for the number of workers requested" and stated that the employer "has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities." AF 5233. The CO requested futher information and documentation to establish temporary need for the number of workers requested. Specifically, the CO requested that Employer provide:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting 80 Structural Welders[, 70 Structural Fitters, and 70 Pipe Fitters] in Ingleside, Texas during the dates of need requested;
3. If applicable, documentation supporting the employer's need for 80 Structural Welders[, 70 Structural Fitters, and 70 Pipe Fitters] such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
4. Summarized <u>monthly payroll</u> reports for a minimum of two previous calendar years that identify, for each month and <u>separately for full-time permanent and</u>

temporary employment in the requested occupation, *Structural Welders*, [Structural Fitters, and Pipe Fitters,] the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and

5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF 5234.

On July 23, 2018, Employer responded via email to the NOD, including in its response an explanation regarding how the employer's request for 80 workers (220 total across three applications) from October 1, 2018 through June 30, 2019, qualifies for a peakload need and an explanation of why the employer does not have a need for structural welders after June 30, 2019 in and near the Ingleside, Texas metropolitan area. AF 1259 - 1268. The response also contained various charts reflecting "high manpower demand phases" and a histogram reflecting all current and prospective work from employer. Id. In addition, thousands of pages of an employee roster consisting of total wages and hours worked per pay period for the two previous years were attached to the email.

In the explanation regarding how the Employer's request qualifies for a peakload need, Employer explained that it regularly employs permanent workers to perform the services of labor at the place of employment, it needs to supplement its permanent staff at the place of employment on a temporary basis due to a short-term demand, and the temporary additions to staff will not become a part of the Employer's operation. In length, Employer explained the six basic phases of a KOS project lifecycle and stated that beginning in October 2018, high manpower demand phases of each of their three large projects will overlap to create a peakload need in three crafts: Pipe Fitting, Structural Fitting, and Structural Welding. These high manpower demand phases were originally projected to be completed prior to July 2018, but Hurricane Harvey, a category 3 storm, caused substantial project delays. Employer attached multiple histograms reflecting the distribution of required work for each craft/project and the demand for all three craft positions during this peakload time.

In response to Employer's failure to establish temporary need for the number of workers requested, Employer explained:

> The number of workers required for each craft is derived from the schedule for the projects. KOS develops schedules for all of its projects using the Primavera Scheduling Software. Schedules are calculated by entering various project activities along with man hours associated with each of the activities. Once the activity is assigned a timeline and duration, a specific craft discipline is assigned. The schedule software then generates a histogram that defines when and how many of each different craft is required. The schedules for each of the projects are then laid on top of each other to define the total manpower requirements for the yard by craft.

AF 1264.

After reviewing the documentation that Employer submitted in response to the NOD, the CO concluded that Employer did not meet the regulatory requirements and issued a Final Determination denying the Employer's application for temporary labor certification on July 31, 2018. AF 1231 - 1256. The CO denied Employer's application because Employer failed to correct the two stated deficiencies in the NOD. Specifically, the CO noted that the Employer failed to establish the job opportunity as temporary in nature and failed to establish temporary need for the number of workers requested.

The CO determined that Employer did not demonstrate how its need met the regulatory peakload need standard. AF 1243 - 1245. The CO further explained the reasoning for the denial:

> The Employer's current peakload need is based on three "extraordinarily large" projects and the Employer's inability to meet the demand with its existing workforce. However, it's hard to discern what makes them different than the Employer's normal operations, especially when they have sought prior certification due to the size of a pervious project. It is unclear what makes the current projects a deviation in its operations when the Employer has established that it has worked under large contracts in the past.
>
> […]
>
> Furthermore, in the Employer's 2016 application H-400-16074-079640 it also stated the need for Welders was due to a large project, Appomattox. In that application, the Employer explained that the Appomattox project was a deviation from its standard workload "because of the massive size of the projects and peakload timing."
>
> However, as the Employer described above, its business is to secure contracts in the oil, gas, and refinery industries on an ongoing basis throughout the entire calendar year. The Employer has shown a history of acquiring and executing large project contracts. Therefore, it is unclear how certain contracts establish a seasonal or short-term demand in its business operations.

AF 1244 - 1245.

The CO also determined that the Employer did not indicate how it determined that it needs the specified number of additional workers during the requested period of need. AF 1247 - 1249. Further explanation and documentation was required in order to establish the Employer's need for a total of 80 structural welders, 70 structural fitters, and 70 pipe fitters. The CO wrote:

> In response to the NOD, the Employer submitted an attestation of its need, a chart and histogram showing its monthly projects schedule from October 2016 to July 2019, a backlog histogram, and an unsummarized employee roster.

> The Employer did not overcome the deficiency. The Employer's attestation only explains how it intends to allocate its workers to its various projects rather than demonstrating how it quantitatively determined that it has need for [220] additional workers to supplement its current workforce. While Employer provided a histogram showing a headcount illustrating how many workers will be working on which project, it does not show any anticipated work hours needed to complete each project that would support the need for the number of workers provided. The Employer was to submit summarized monthly payroll reports for a minimum of two previous calendar years to show how many hours its permanent and temporary workers had work on its past projects. Instead, the Employer submitted an unsummarized roster of its workers that does not clearly indicate the total number of workers or staff employed, total hours worked, and total earnings received. It therefore remains unclear how the employer has a need for 80 structural welders[, 70 structural fitters, and 70 pipe fitters] in Ingleside, Texas.

AF 1249.

On August 13, 2018, Employer requested administrative review of the CO's Final Determination/Denial. AF 1 - 7.

In its request, Employer argues:

> The CO acted arbitrarily in finding that KOS has not provided evidence that it has a short-term demand for temporary [workers]. KOS submitted two letters and supporting documentation establishing that it has a bona fide need for [the temporary workers] due to overlapping *high manpower demand phases* of three oil rig fabrication projects: Peregrino, Leviathan, and the Husky projects. KOS provided three histograms demonstrating the convergence of structural welding[, structural fitting, and pipe fitting] needs for the projects covering the period from October 1, 2018 to June 20, 2019. *See Exhibits 2, 5, and 7.* KOS also provided an explanation in its Statement of Temporary Need and Response to the NOD that the peakload was not anticipated and was a result of substantial delays caused by damage created by Hurricane Harvey. *See Exhibits 1 and 5.* KOS respectfully requests a review of the following:
>
> 1. The Final Determination improperly relies upon KOS's past H-2B requests to determine that KOS does not currently have a short-term demand for Structural Welders[, Structural Fitters, and Pipe Fitters]. Nothing in the H-2B regulations suggests that a peakload is limited to a single occurrence. Similarly, there is nothing to suggest that peakload need cannot recur. Had Congress intended to limit the definition of a peakload to a single occurrence, there would not be a separate definition for peakload need.
>
> Accordingly, the CO erred in considering KOS's past peakload approvals and incorrectly determined that the past requests precluded temporary employment

> certification for the current short-term demand. The Final Determination failed to find that KOS was not experiencing a bona fide short-term demand beginning in October 2018. Rather, the CO relied only upon past peakload requests to deny the current request without considering the evidence presented regarding the current demand. The fact that KOS has experienced prior peakload needs does not dilute the peakload need beginning in October 2018. KOS's history of securing large contracts in prior years is also irrelevant to the current peakload request. The Final Determination also included references to KOS's 2016 H-2B requests. However, KOS did not apply for temporary employment certification for Structural Welders [or Structural Fitters] in 2016.
>
> KOS provided substantial evidence concerning its bona fide short-term demand that was not considered by the CO. Specifically, KOS provided two explanatory letters, contract excerpts, three histograms, and a phase-by-phase breakdown verifying its need for [additional workers] from October 2018 through June 2019. KOS provided detailed statements showing that it would experience a surge in demand for Structural Welders[, Structural Fitters, and Pipe Fitters] during that time, verified that it did not have the workforce to meet that demand, and explained its ongoing, if unsuccessful, efforts to recruit local workers for permanent and peakload employment. KOS also presented a written explanation detailing why the peakload would end in July 2019 and provided a histogram of expected need visually confirming the end of the peakload period. None of this evidence was considered by the CO, who focused only on past needs. The CO acted arbitrarily and capriciously in failing to consider this evidence.

AF 5.

The Employer went on to argue that the CO did not consider evidence concerning the impact of Hurricane Harvey, and it also failed to consider evidence presented to establish the peakload need. Specifically regarding the evidence to establish peakload need, Employer argued:

> The CO failed to consider the payroll records presented by KOS. *Please see Exhibit 6.* In its initial filing, KOS presented a current roster of Structural Welders[, Structural Fitters, and Pipe Fitters]. In the NOD, the CO requested a summarized payroll record for two years. KOS reasonably complied with this request and presented a record for each worker, temporary and permanent, for the past two fiscal years summarizing their hours worked and total earnings per pay period.

AF 6.

APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, 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. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc*., 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July28, 2009). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

Employer is required to establish that its need for the workers requested is "temporary." Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

> (A) Definition. Temporary services or labor under the H-2B classifications 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.
>
> (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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. 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.

8 C.F.R. § 214.2(h)(6)(ii)(A)-(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. § 1361; *Alter &Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need. An employer establishes a "peakload need" if it shows it "regularly employs permanent workers to perform the services at the place of employment and

that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

If I affirm the CO's denial on any singular basis, I need not look further to other denial reasons to decide whether those would also be affirmed.

DISCUSSION

The CO denied certification because the Employer failed to correct the two deficiencies noted in the NOD. Specifically, the CO determined that the Employer failed to justify the temporary need for the number of workers requested and failed to establish that the job opportunity is temporary in nature.

The CO's argument that Employer is in the business of securing large project contracts and they have sought prior certification due to the size of a previous project before is not compelling. A previous demand for short-term supplemental workers does not preclude an employer from applying for temporary employment certification again in the future. The CO stated that "it is unclear what makes the current projects a deviation in its operations when the employer has established that it has worked under large contracts in the past." AF 1244. However, Employer stated that the overlap in project phases is not typical, and would be avoided if possible under KOS normal operational protocols. "However, in this line of business, we must accommodate the overlap on occasion to meet and complete our contractual obligations." AF 1264. Employer further stated:

> Hurricane Harvey, a historic Category 3 storm, devastated the coastline between Corpus Christi and Houston causing substantial project delays on the KOS yard. The hurricane caused significant damage and impacted construction activities. In addition, there were design delays due to impacts from the storm in Houston where the design work was done. The hurricane also impacted several sub-vendors in the Houston area that were contracted to fabricate smaller equipment skids for these projects. This delay in fabrication delayed the receipt of the materials, which in turn delayed the work flow for skilled craft workers.

AF 1263 - 1264.

In response to the NOD, Employer submitted an attestation of need, charts showing "high manpower demand phases" of the three large projects for each requested craft profession, histograms demonstrating its monthly projects schedule from October 2016 to July 2019,

summarized payroll records, and employee rosters for Structural Welders, Structural Fitters, and Pipe Fitters over the last two years.

I find that Employer demonstrated that it regularly employs permanent workers to perform the services of labor in Ingleside, Texas, through the employee rosters for each position. AF 45 – 1239; AF 1259 - 1261. The Employer has also demonstrated that it needs to supplement its permanent staff on a temporary basis due to a short-term demand caused by Hurricane Harvey. AF 1261 – 1267. Lastly, Employer has shown that the temporary additions to staff will not become a part of Employer's regular operations by attaching summarized payroll records verifying that all past H-2B employees were terminated at the end of the previously certified peakload periods. AF 1267.

Second, the CO claims that Employer did not overcome their failure to establish temporary need for the number of workers requested. The CO stated that "[E]mployer's attestation only explains how it intends to allocate its workers to its various projects rather than demonstrating how it quantitatively determined that it [has need for 80 additional Structural Welders, 70 additional Structural Fitters, and 70 additional Pipe Fitters] to supplement its current workforce." AF 16. The CO further stated:

> While the Employer provided a histogram showing a headcount illustrating how many workers will be working on which project, it does not show any anticipated work hours need to complete each project that would support the need for the number of workers provided. The Employer was to submit summarized monthly payroll reports for a minimum of two previous calendar years to show how many hours its permanent and temporary workers had work on its past projects. Instead, the Employer submitted an unsummarized roster of its workers that does not clearly indicate the total number of workers or staff employed, total hours worked, and total earnings received. It therefore remains unclear how the Employer has a need for 80 Structural Welders[, 70 Structural Fitters, and 70 Pipe Fitters] in Ingleside, Texas.

Id.

I disagree with the CO. In their response to the NOD, Employer submitted a roster listing each temporary and permanent employee in the three requested craft categories, for the past two fiscal years, including hours worked and total earnings per pay period. Employer also explained that KOS uses Primavera Scheduling Software to calculate total manpower requirements by craft. "This allows KOS to identify its requirements within an acceptable margin of error." AF 1264. I find that Employer submitted all of the necessary additional information requested by CO in the NOD and has demonstrated a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4).

I find that the record demonstrates that the CO's denial of certification based on the Employer's failure to demonstrate a temporary need and establish its need for the number of workers requested was arbitrary and capricious. For the reasons discussed above, Employer has sufficiently established the requested peakload period of October 2018 through June 2019. Also,

based on my review of evidence in the Appeal Files, I find that the Employer justified its need for 80 Structural Welders, 70 Structural Fitters, and 70 Pipe Fitters. Based on Employer's statement explaining its staffing software supporting the requested number of workers, the prior two years of payroll and hours documentation, and histograms demonstrating the high manpower demand phases, I find that Employer has established its need for 80 Structural Welders, 70 Structural Fitters, and 70 Pipe Fitters. For these reasons, I reverse the CO's denial of certification.

CONCLUSION

Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of Employer's *Application for Temporary Employment Certification* is **REVERSED** and that the matter is **REMANDED** for certification.

SO ORDERED.

For the Board:

C**ARRIE BLAND**
Administrative Law Judge

Washington, D.C.