In the Matter of:

ATASCA ENERGY MANAGEMENT SERVICES, LLC,
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Rhonda Butler Harkey, Esq.
Orgain Bell & Tucker, LLP
Beaumont, Texas
For the Employer

Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the H-2B temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A. 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

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This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Atasca Energy Management Services, LLC’s (“the Employer” or “AEMS”) request for administrative review of the Certifying Officer’s (“CO”) denial of the temporary labor certification under the H–2B non-immigrant program. For the following reasons, the Board affirms the CO’s denial of the Employer’s applications for certification for the 100 “Specialized Combination Welders” and 100 “Industrial Pipefitters.”

**STATEMENT OF THE CASE**

On July 31, 2019, the Employer applied for temporary labor certification through the H-2B program to fill 100 positions for “Specialized Combination Welders” (H-400-19212-031514) and 100 positions for “Industrial Pipefitters” (H-400-19212-031512) for a “major capital construction project,” to be employed in Port Arthur, Texas, from October 14, 2019 through October 31, 2021. The Employer stated the nature of the temporary need for workers was a one-time occurrence need. The welding positions were classified at O*Net Code 51-4121, Welders, Cutters, and Welder Fitters. The pipefitter positions were classified at O*Net Code 47-2152, Plumbers, Pipefitters, and Steamfitters.

On August 7, 2019, the CO issued Notices of Deficiency identifying two deficiencies pursuant to 20 C.F.R. § 655.6(a)-(b) and § 655.11(e)(3) and (4), concerning both of the Employer’s applications for welders and pipefitters. First, the CO notified the Employer that it failed to show the job opportunity was temporary in nature. The CO stated that in order to establish a one-time occurrence, the employer must establish either 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 it has an employment situation that is otherwise permanent, but a temporary event of short duration has

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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 have[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 In this decision, AF1 is an abbreviation for “Appeal File” for the Employer’s Case Number H-400-19212-031514 (2019-TLN-00154), for 100 “Specialized Combination Welders,” and AF2 is an abbreviation for the Appeal File for Employer’s Case Number H-400-19212-031512 (2019-TLN-00155), for 100 “Industrial Pipefitters.” As will be discussed below, on October 7, 2019, the undersigned issued an Order Consolidating Cases and Correcting Assigned BALCA Case Numbers, consolidating the Employer’s aforementioned cases for administrative review. Of note, although the Employer filed two separate applications for each type of temporary worker (i.e., welders and pipefitters), the Employer’s applications appear to be identical concerning the information the Employer supplied to the CO in support of each application (i.e., the exhibits), the location of the Employer’s proposed project (i.e., the Ethane Cracker Project (ECP) in Port Arthur, Texas), the CO’s Notices of Deficiency and Final Determinations, as well as the Employer’s Motions for Administrative Review. Indeed, the only difference between the two files is that each application references either 100 “Specialized Combination Welders” or 100 “Industrial Pipefitters.” See (AF1 1-760; AF2 1-745).
created the need for a temporary worker. (AF1 598; AF2 583). The CO acknowledged that in support of its application the Employer submitted a statement of temporary need, its letter of intent and contract with McDermott International Incorporated (“McDermott”), its 2018-2019 Monthly Payroll Summary Report, and articles containing company information. Id. Further, the CO considered the Employer’s Section B, Item 9, of the ETA Form 9142 and an attachment that stated the following:

Atasca Energy Management Services, LLC’s Application for Temporary Employment Certification. Company Description and [Specialized Combination Welders and] Industrial Pipefitters One-Time Need Atasca Energy Management Services, LLC (AEMS) is a specialty services company established in 2001 which provides a wide range of services for oil and gas facilities: project construction, management, operations and maintenance through our services of fabrication, construction and maintenance workforce, planning and scheduling, reliability engineering, commissioning, and materials management.

AEMS offices are in Richmond, Houston, and LaPorte, [sic] Texas. AEMS has been awarded an opportunity to perform a large-scale fabrication project for its client, McDermott (McDermott purchased CB&I, LLC), for its current Total Ethane Cracker Project at 7600 32nd Street, Port Arthur, Texas 77642. This specialized project is a major capital construction project estimated at approximately $2 billion in value.

Usually, for typical, non-specialized project work, AEMS meets its client needs through domestic employment via word of mouth, newspaper ads, or online job listings or the use of local agencies. However, the McDermott contract has created an unexpected demand for [Specialized Combination Welders and] Industrial Pipefitters. As a result, AEMS is required to look to the H-2B program to hire temporary [welders and] pipefitters to meet the ECP project demands for the October 2019 through October 2021 period.

AEMS has not previously employed [Specialized Combination Welders and] Industrial Pipefitters. Please see attached payroll report to confirm. AEMS and McDermott (CB&I) have contracted to provide a total of [100 Specialized Combination Welders and] 100 Industrial Pipefitters to service the one-time Ethane Cracker Project need. Due to McDermotts [sic] need for [100 Specialized Combination Welders and] 100 Industrial Pipefitters for this large specialized project and based on the letter of intent and contract from McDermott, it is necessary for AEMS to hire this temporary [Specialized Combination Welder and] Industrial Pipefitter workforce during this one-time temporary need period.

This recent contract with McDermott for the well-publicized Ethane Cracker Project for the Total [Ethane Cracker Project] to provide [welder and] pipefitter services is a unique non-recurring situation for AEMS. Per the contract and submitted letter of intent, AEMS will not provide supplemental [Specialized Combination Welder and] Industrial Pipefitter services after October 31, 2021. The temporary staff additions

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H-2B [Specialized Combination Welders and] Industrial Pipefitters will not be subject to rehire and do not receive compensation upon leaving AEMS’ employment. The employer states that its one-time occurrence need is based on a large-scale project for its client, McDermott, and has provided information regarding the magnitude of the construction project.

(AF1 598-99; AF2 583-84).

Notwithstanding the foregoing, the CO concluded that further documentation was needed to support the Employer’s one-time occurrence need from October 14, 2019 through October 31, 2021. (AF1 599; AF2 584). In order to resolve the first deficiency the CO requested the following information and/or documentation:

1. A statement describing the employer's business history and activities (i.e. primary products or services);
2. Schedule of operations throughout the year and how its one-time need is an exception to those operations;
3. A summary listing of all projects in the area of intended employment for its previous calendar year. The list must include start and end dates of each project and worksite addresses;
4. Explanation as to how a single contract (or contracts) represents a one-time need when the employer is in the business of securing contracts for services on an ongoing basis; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF1 599; AF2 584).

The CO also identified a second deficiency, noting that in accordance with 20 C.F.R. § 655.11(e)(3) and (4), the Employer failed to establish that the number of workers requested on the application is true and accurate, and represents bona fide job opportunities. (AF1 599-600; AF2 584-85). The CO acknowledged that the Employer submitted a letter of intent from McDermott’s management, along with a fully executed contract in support of its request for [100 Specialized Combination Welders and] 100 Industrial Pipefitter workers from October 14, 2019 through October 31, 2021. (AF1 600; AF2 585). Nonetheless, the CO stated the Employer did not indicate how it determined the need for the specific number of [Specialized Combination Welders and] Industrial Pipefitter workers during the requested period of need. Id. Therefore, in order to resolve the second deficiency the CO requested further explanation and documentation, including the following:
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 [100 Specialized Combination Welders and] 100 Industrial Pipefitter workers for Port Arthur, Texas, during the dates of need requested;
3. Documentation supporting the employer’s need for [100 Specialized Combination Welders and] 100 Industrial Pipefitter workers such as contracts, letters of intent, etc. that specify the number of workers and dates of need; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF$_1$ 600; AF$_2$ 585).

On August 21, 2019, the Employer responded to the CO’s Notices of Deficiency for each application to include supplemental statements of temporary need: Atasca Energy Management Services, LLC schedule of projects (January 2017 – present); January 2018 – July 2019 summarized monthly payroll reports, individually for each and all worksites in which Atasca Energy Management Services, LLC conducted business in 2018 – 2019; Atasca Energy Management Services, LLC corporate information; statements of temporary need dated July 26, 2019 and July 31, 2019; executed subcontract between Chicago Bridge & Iron, LLC and Atasca Energy Management Services, LLC; letters of intent dated July 24, 2019; short-term labor need letters from McDermott International, Inc. dated August 15, 2019; and Ethane Cracker Project internet announcements and news reports. (AF$_1$ 456-593; AF$_2$ 441-578).

After examining the additional information provided by the Employer in response to the Notices of Deficiency, the CO issued Final Determinations on September 3, 2019, finding that the Employer failed to overcome the deficiencies pertaining to its applications for welders and pipefitters. (AF$_1$ 447-455; AF$_2$ 431-440). The CO considered the Employer’s response which in part, stated the following:

As stated in the July 26, 2019 [and July 31, 2019] letter[s] and evidenced by submitted payroll records, AEMS does not employ permanent [Specialized Combination Welders and] Industrial Pipefitters in its fabrication and manufacturing facility in Richmond, Houston, or La Porte, Texas. Recently, it contracted with Chicago Iron & Bridge LLC (purchased by McDermott International, Inc.) ("McDermott") to provide pipe fabrication services for the well-publicized Ethane Cracker Project which is a temporary event of short duration in accordance with H-2B regulations. Due to the size and scale of the project, AEMS ’s [welding and] pipe fabrication services cannot be performed at its Richmond, Houston, or La Porte facilities and must be conducted offsite within the Jefferson County MSA, thus temporary, supplemental [Specialized Combination Welders and] Industrial Pipefitters are needed.

AEMS affirms it will not need workers to perform the services in the future. Additionally, AEMS submitted a contract and letters of intent noting the one-time
need of a short duration -- October 14, 2019 to October 31, 2021, which is less than 3 years. See the dates specifically notated in the executed contract. Per the contract and submitted letters of intent, AEMS will not provide supplemental welding and pipe fabrication services after October 31, 2021.

(AF₁ 452; AF₂ 437).

Upon reviewing the foregoing, the CO noted the Employer provided a schedule of projects that showed construction projects beginning in January 2017, prior to the Employer’s start date of need of October 14, 2019. (AF₁ 452; AF₂ 437). However, the CO stated that in order to show a one-time need, the Employer must demonstrate that it has not employed any workers to perform the services or labor in the past and will not need them 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. Id.

The CO further noted that the Employer provided Articles of Incorporation that demonstrate AEMS was established in October 2001. (AF₁ 452; AF₂ 437). On this basis, the CO concluded that it is not clear how the Articles of Incorporation supports a one-time occurrence need as the employer was awarded the McDermott contract in 2019. (AF₁ 452-53; AF₂ 437-38). In addition, the CO noted the McDermott contract for the Total Ethane Cracker Project (“Ethane Cracker Project”) and previous applications for H-2B certifications “demonstrates that groups of long-time industry specialists have a history of and are still in the business of securing and implementing projects, even if it is only to complete one specific project.” (AF₁ 453; AF₂ 438). The CO found that based on the Employer’s business model, it is unclear how the McDermott contract is unique to the Employer’s operations and how the Employer can attest that it will not require temporary Specialized Combination Welders and Industrial Pipefitters in the future. Id. Consequently, the CO concluded that the Employer did not demonstrate a one-time occurrence need for workers from October 14, 2019 to October 31, 2021, and as such, did not overcome the deficiency in failing to show the job opportunities are temporary in nature. Id.

With respect to the second deficiency, the CO also determined that the Employer did not overcome the deficiency by establishing a temporary need for 100 Specialized Combination Welders and 100 Industrial Pipefitter workers. (AF₁ 454-55; AF₂ 439-40). In particular, the CO noted the Employer averred it had demonstrated that its permanent workers are fully committed and employed on “typical work and projects” at its facilities and that based on the incoming large scale McDermott project it has the need for 100 welders and 100 pipefitters. (AF₁ 455; AF₂ 440). The CO considered the Employer’s contract with Chicago Bridge & Iron, LLC, as well as the Letter of Intent from McDermott, which indicate the total number of workers required for the project. Id. Nevertheless, the CO found that it was still unclear how the Employer determined that it specifically needs 100 welders and 100 pipefitter workers during the requested period of need. Id. As a result, the CO concluded that the Employer did not cure the second deficiency by

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4 In her discussion, the CO mentioned “previous applications for H-2B certifications,” but it appears as though the CO was referring in general to petitioning employers of long-time industry specialists rather than the Employer in the present matter because the record is devoid of any evidence that the Employer has previously applied for temporary labor certification. See (AF₁; AF₂).
showing a temporary need for 100 Specialized Combination Welders and 100 Industrial Pipefitters from October 14, 2019 to October 31, 2021. *Id.*

On September 17, 2019, the Employer submitted requests for administrative review to BALCA appealing the CO’s Final Determinations in the above-captioned H-2B matters regarding its applications for welders and pipefitters. (AF 1; AF 2). In doing so, the Employer requests that BALCA remand each case back to the CO for acceptance of its Temporary Labor Certification for 100 Specialized Combination Welders and 100 Industrial Pipefitter workers. (AF 1-7; AF 2-7). In addressing the first deficiency, namely, the CO’s finding that the Employer failed to establish the job opportunity as temporary in nature, the Employer avers that it does have projects starting in 2017, and will continue to have projects, the scope of which they previously provided (Exhibit E). (AF 4; AF 2 4). In addition, the Employer avers it provided Payroll Report summaries (Exhibit F) to reiterate that it never employed “Specialized Combination Welders” or “Industrial Pipefitters” to perform work as these type of workers have not been previously required to fulfill its scope of work to date. *Id.* In contrast, the Employer states it regularly employs engineers, quality assurance/quality control support, and supervision to oversee engineering and quality tasks. *Id.* The Employer avers that to date it has never been hired by any company to provide this type of specialized welding or industrial pipefitting work, that is, until it was hired for the construction of the Ethane Cracker Project. *Id.* On this basis, the Employer asserts that it has clearly stated it will not require Specialized Combination Welders or Industrial Pipefitters in the future pursuant to its Statements of Temporary Need (Exhibit G) and its Supplemental Statements of Temporary Need (Exhibit H). *Id.* Further, the Employer contends it provided an executed contract that specifically identifies dates of need from October 14, 2019 through October 31, 2021, which also identifies the number of temporary workers requested, and two letters of need that identify a one-time occurrence need (Exhibit I). *Id.*

The Employer further addressed the CO’s conclusion that based upon the Employer’s business model it is unclear how the contract with McDermott is “unique” or how the Employer can attest it will not require Specialized Combination Welders or Industrial Pipefitters in the future. (AF 1-4; AF 2 4-5). The Employer averred it is not required to prove the Ethane Cracker Project is a “unique,” non-recurring situation. (AF 1; AF 2 5). Rather, the Employer contends that it may also show that the proposed project is any “temporary event of a short duration [that] has created the need for the temporary worker,” which the Employer argues it has done by submitting an executed and temporary contract (Exhibit I) showing a defined need and the associated temporary duration project schedule from October 14, 2019 through October 31, 2021, as well as Letters of Intent from CB & I, LLC (a subsidiary of McDermott), and news reports of the Ethane Cracker Project (Exhibits I and K).* Id.; see Fed. Reg. 78020 (Dec. 19, 2008). The Employer further contends that the temporary Ethane Cracker Project schedule is short-term as defined by the regulations, which allows for a three-year maximum. *Id.; 8 C.F.R. § 214.2(h)(6)(ii)(B). The Employer avers it will not petition for H-2B Specialized Combination

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5 The Employer notes that per the U.S. Department of Labor requirements, it can demonstrate its one-time need in accordance with H-2B regulations by submitting evidence such as "contracts showing the need for the one-time services, letters of intent from clients (which also highlight the need as temporary), news reports, event announcements, and other similar documentation." (AF 5, Exhibit J); see Department of Labor (DOL), "H-2B FAQs-Round 11" (Dec. 16, 2007).
Welders or Industrial Pipefitters in the future. (AF1 5-6; AF2 5-6). Therefore, the Employer argues it has shown it has a one-time occurrence need because its payroll reports confirm AEMS has not employed Specialized Combination Welders or Industrial Pipefitters for past projects, and AEMS has provided statements averring it will not employ specialized welders or pipefitters through the H-2B program in the future. (AF1 6; AF2 6).

Likewise, in response to the second deficiency noted by the CO, Employer argues that it has provided adequate evidence demonstrating a temporary need for 100 Specialized Combination Welders and 100 Industrial Pipefitters as shown by its executed contract and Letters of Intent from CB & I, LLC, both of which specifically state and affirm the need for 100 welders and 100 pipefitters for the Ethane Cracker Project. (AF1 6; AF2 6). Further, the Employer asserts that it determined the need for 100 welders and 100 pipefitters on the basis of the client’s managers who determine timeline, scope, and worker needs (Exhibit I). Id.; see Industrial Equipment Solutions, Inc., 2018-TLN-00147, 00148 (July 13, 2018) (BALCA found that the employer demonstrated its need for the number of temporary workers by providing a pending contract with its client, as well as letters of intent attesting to the need for 80 pipefitters and 90 welders at the contracted worksites). Id.

On September 17, 2019, BALCA docketed the appeal concerning the Employer’s denied application for 100 Specialized Combination Welders (ETA Case No. H-400-19212-031514), and on September 20, 2019, a Notice of Assignment and Expedited Briefing Schedule was issued for the Employer’s application. On October 3, 2019, the CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) in accordance with 20 C.F.R. § 655.33(b). Likewise, on September 17, 2019, BALCA docketed the appeal concerning the Employer’s denied application for 100 Industrial Pipefitters (ETA Case No. Case No. H-400-19212-031512), and on September 19, 2019, the case was assigned to Administrative Law Judge Monica Markley. On September 23, 2019, Judge Markley issued a Notice of Assignment and Expedited Briefing Schedule. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) in accordance with 20 C.F.R. § 655.33(b) also on October 3, 2019. Nevertheless, on October 3, 2019, Judge Markley reassigned the case to the undersigned.

In light of the foregoing, on October 7, 2019, an Order Consolidating Cases and Correcting Assigned BALCA Case Numbers was issued, informing the Employer that ETA Case No. H-400-19212-031512 that was initially assigned to Judge Markley had been reassigned to the undersigned on October 3, 2019, and was consolidated with ETA Case No. H-400-19212-031514 for judicial efficiency and economy. Counsel for the CO and the Employer were provided an opportunity to file a brief within seven business days of receipt of the Appeal File. However, neither party filed a brief.

**SCOPE & STANDARD OF REVIEW**

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). The burden of
proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an Application for Temporary Employment Certification (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. See Clay Lowry Forestry, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); Hampton Inn, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); Earthworks, Inc., 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), “[t]he 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).”

After considering evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; or (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e). BALCA may overturn a CO’s decision if it finds the decision is arbitrary or capricious. See Judulang v. Holder, 565 U.S. 42, 53 (2011); see also Brook Ledge, Inc., 2016-TLN-00033, slip op. at 5 (May 10, 2016); J and V Farms, LLC, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016). Therefore, the Board must be satisfied that the CO has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Id. A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” Id.

DISCUSSION

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B). 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. 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. Therefore, the petitioning 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). Furthermore, “the
determination of temporary need rests on the nature of the underlying need for the duties of the position” and not “the nature of the job duties.” 80 Fed. Reg. 24042, 24005. 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 Tampa Ship, 2009-TLN-00044, slip op. at 5 (May 8, 2009).

In the present case, the Employer has attempted to establish a “one-time occurrence” need for the period of October 14, 2019 through October 31, 2021, for 100 Specialized Combination Welders and 100 Industrial Pipefitters. To establish a one-time occurrence need, the petitioning employer must show that “it has not employed workers to perform the services of labor in the past and that it will not need workers to perform the services of 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. Past and Future Employment

The Employer contends it has established a one-time occurrence need because it has never employed Specialized Combination Welders or Industrial Pipefitters in the past and it will not employ them in the future. The Employer avers that its payroll records and project-specific documents demonstrate its one-time occurrence need in order to assist in completing the Ethane Cracker Project only for the period of October 14, 2019 through October 31, 2021. The Employer acknowledged that it provided a list of projects that began in 2017, and stated it will continue to have projects. The Employer averred that it operates and provides “a wide range of services for oil and gas facilities,” that include fabrication and construction services from its facilities in Richmond, Houston and La Porte, Texas, but given the “magnitude and scale” of the Ethane Cracker Project it is required to perform its services at the project location on a one-time need basis.

On the other hand, the CO determined that the Employer failed to establish a one-time occurrence need because it failed to show how, based on its business model, the contract to provide specialty welders and pipefitters for the Ethane Cracker Project is unique to its operations and how the Employer can attest that it will not require temporary welders and/or pipefitters in the future. More specifically, the CO noted that the Employer stated its one-time occurrence need is based on the large-scale Ethane Cracker Project for its client McDermott, and in doing so, the Employer provided information about the magnitude of the construction project. The CO found that it appears the Employer is in the business of soliciting and securing contracts, and while the specialized welders and pipefitters are sought for a specific contract, there is reason to anticipate that when the project is completed, other similar projects may present themselves.

In KBR, Inc., 2016-TLN-00038 (May 16, 2016), the CO considered whether the Employer’s request for 72 Pipefitters and 38 Combination Pipe Welders was a one-time occurrence need for an engineering, procurement, and construction contract from April 1, 2016 to January 31, 2017. Id. Ultimately, the CO denied the employer’s application because the employer failed to demonstrate its HDPE project was a unique event in its business operations. Id. The CO noted that although the HDPE project would increase the employer’s business and would be unique insofar as it involved construction of a new facility, the project did not
“significantly differ” from the Employer’s other projects or contracts, thus not showing a temporary one-time need. Id. On appeal, BALCA upheld the CO’s denial because the employer failed to establish it would not need workers to provide these services in the future, noting the Board has held that when an employer’s business model is based on obtaining multiple successive projects, an employer cannot establish a one-time need by focusing on a specific contract. Id. BALCA noted that the employer was an engineering and construction service company that contracts to build production facilities in the agricultural and petrochemical industry on a regular basis. Therefore, BALCA found where the employer entered into unique, but distinct contracts, the combination of these contracts created a permanent need. Id. In addition, BALCA found that the Employer’s emphasis on the specific job location of the HDPE project was insufficient to establish a one-time need for workers. Id.

Similarly, in Herder Plumbing Inc., 2014-TLN-00010 (Feb. 12, 2014), on appeal BALCA rejected the employers’ request for nonagricultural workers where the one-time occurrence need was based on a contract, but the employer’s business was based on continuous contract procurement. Id.; see Apollon Contracting, LLC, 2018-TLN-00005 (Nov. 16, 2017) (affirming the CO’s denial for a one-time need because the employer’s argument did not establish why the temporary need would end in the near, definable future; as the employer’s business model was based on fulfilling successive contracts and there was no evidence that showed the Employer would not need this type of worker in the future); see also Turnkey Cleaning Services, GOM, LLC., 2014-TLN-00042, slip op. at 5 (Oct. 1, 2014); Cajun Constructors, Inc., 2009-TLN-00096 (Oct. 9, 2009) (BALCA held the employer failed to show a temporary event when it admitted its business model was to work on a project to completion and then take another project. BALCA found the employer’s need for temporary workers on a single contract was not a temporary event when viewed in the “context of the employer’s business,” but rather “just one of a series of projects.”). Further, BALCA found the employer’s new contract was not a temporary event, but instead was evidence that the employer continued to grow its business. Herder Plumbing, supra, slip op. at 6.

Just as in KBR and Herder Plumbing, I find the Employer has failed to show how the project with McDermott would not significantly differ from the Employer’s other projects or contracts in the future given that the Employer provides a “wide range of services for oil and gas facilities,” which also includes construction and fabrication. Although the Employer has been engaged to provide services in furtherance of a very large construction project, it is reasonable to expect that the company will continue to be in the business of continually seeking out and performing similar services in support of the fabrication and/or construction in the oil and gas industries, alone or, as in this case, in concert with companies like McDermott. While the temporary welders and pipefitter 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.6 Accordingly, pursuant to KBR

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6 I also note for the record that the Employer argues that its payroll records dating from January 2018 through July 2019, demonstrate it has not employed Specialized Combination Welders or Industrial Pipefitters in the past. (AF 44; AF 617). However, the Employer did not supply affirmative evidence of its payroll records, in that, it did not show who or what type of workers it actually employs on a permanent or temporary basis. Moreover, the Employer did not provide payroll evidence for any project before 2018, or what type workers were employed on its past
and Herder Plumbing, I find the CO properly denied the Employer’s application for temporary labor certification for failing to demonstrate it will not need workers to perform the services of labor in the future. See 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

B. Temporary Event of Short Duration

I also find for similar reasons, the Employer has failed to adequately demonstrate how the Ethane Cracker Project is a temporary event of short duration that has created the need for temporary workers. See 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The Employer argues that its temporary labor certification is not based solely on a unique non-recurring situation, but is also a temporary event of short duration. The Employer avers that it has an employment situation that is otherwise permanent because it “employs permanent workers for its typical project work at its locations in Richmond, Houston, and La Porte, but the temporary Ethane Cracker off-site fabrication project requiring temporary supplemental welding [and pipefitting] labor has created the need for temporary workers.” The Employer stated that it has never contracted to provide a “large-scale complex capex project off-site,” and instead normally completes smaller projects doing “in-shop” design. While the Ethan Cracker Project is of size and scope, as well as an off-site location never before offered or completed by the Employer, it does not create a temporary need for workers. Indeed, BALCA in Turnkey Cleaning Services clearly stated that the size or scale of a contract, or coverage of more detailed services set forth in an agreement do not by itself indicate the need for temporary labor when an employer’s business model is to contract for services on one project after another. Turnkey Cleaning Services, supra, slip op at 5. Here, the Employer conceded that it provided a list of projects dating from 2017, and that it would continue to contract for various projects. Further, the Employer clearly stated that it is in the business of fabricating and constructing oil and gas facilities. Where the Employer, such as is the case here, is in the business of contracting to provide services on one project, and thereafter, moving to another project, such business model indicates the Ethane Cracker Project is not a one-time occurrence.

Moreover, the Employer emphasizes that the off-site location in Port Arthur, Texas, has also made the need for welders and pipefitters temporary in nature. However, BALCA has previously held “[t]he regulations do not specify that a need is a one-time occurrence based on the geographical area of the employer’s work sites but rather [is] based on the employer’s need.” Cajun Constructors, Inc., supra, slip op at 4. Thus, the off-site location of the Ethan Cracker Project also does not support the Employer’s argument that it has a one-time occurrence need.

Based on the foregoing discussion, I find and conclude the CO properly denied the Employer’s H-2B application. It is the Employer’s burden to demonstrate eligibility for the H-2B program, but the Employer failed to demonstrate its temporary one-time need for 100 “Specialized Combination Welders” and for 100 “Industrial Pipefitters” for the period of October fabrication/construction projects. Instead, the Employer simply provided a single document designated “welders” and/or “pipefitter,” with no payroll history. The undersigned finds this evidence is unpersuasive because arguably a petitioning employer can simply create a document showing a certain type of worker was not paid during a specified period of time rather than the presentation of affirmative evidence of the classification of workers who were actively employed on its payroll.
14, 2019 through October 31, 2021. Thus, the denial of the Employer’s H-2B certification must be **AFFIRMED**.

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

**ORDERED** this 17th day of October, 2019, at Covington, Louisiana.

For the Board:

LEE J. ROMERO, JR.
Administrative Law Judge