

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

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



**Issue Date: 08 November 2018**

BALCA Case No.: 2019-TLN-00005  
ETA Case No.: H-400-18213-038334

*In the Matter of:*

BH CONTRACTORS, LLC,  
*Employer*

Certifying Officer: Chicago National Processing Center

Appearances: Tina Mouton  
HR/Account Manager, BH Contractors, LLC  
Ingleside, Texas  
*For the Employer*

Micole Allekotte, Esquire  
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.<sup>1</sup> 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

---

<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).<sup>2</sup>

This proceeding is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to BH Contractors, LLC's ("the Employer") 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 certification.

### **BACKGROUND**

On August 1, 2018, the Employer applied for temporary labor certification through the H-2B program to fill 184 positions for "Combination Welder/Industrial Pipefitter" for the period of October 1, 2018 through September 9, 2019.<sup>3</sup> (AF 154, 164). The Employer stated the nature of the temporary need for workers would be a one-time occurrence. (AF 154). The Employer explained it historically provided services to "upstream" clients in the oil and gas industry in subsea construction, in both domestic and international regions. (AF 160). However, the Employer has expanded into the "downstream" market by supporting clients in the refinery industry and those companies who manage onshore pipeline projects. *Id.* Consequently, the Employer has a one-time occurrence need to provide combination welders and industrial pipefitters to McDermott International, Inc. (herein "McDermott") for three years or less in Hackberry, Louisiana, and Westlake, Louisiana. *Id.* The Employer averred it has not employed workers to perform the services or labor of Combination Welders and Industrial Pipefitters in the past and will not need workers to perform the services in the future. *Id.* Even though the Employer has a one-time occurrence need for a 184 workers for a total of three years or less, the Employer is seeking certification for one year at a time. *Id.*

On August 9, 2018, the CO issued a Notice of Deficiency citing four deficiencies regarding 20 C.F.R. §§ 655.15(b) and

---

<sup>2</sup> 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.

<sup>3</sup> In this decision, AF is an abbreviation for "Appeal File."

655.17, as well as Sections 655.6(a)-(b), 655.11(e)(3)-(4), and 655.16 and 655.18. (AF 147-153). Specifically, the CO notified the Employer that its H-2B application was deficient because the Employer filed its ETA form 9142 on August 1, 2018, only **61 days** before the Employer's start date of need, October 1, 2018. However, the Employer's filing date does not comport with the requirement set forth in 20 C.F.R. § 655.15(b), stating the Employer must file its ETA form 9142 **no less than 75 days** before the Employer's date of need. (AF 147). Further, pursuant to Section 655.17, the Employer could have submitted an emergency request with its application, but the Employer failed to do so. *Id.* Second, the CO indicated the Employer did not sufficiently demonstrate how its need meets the regulatory standard of a "one-time occurrence" need as set forth in Sections 655.6(a)-(b) because the Employer's single project with McDermott is not adequate to establish a one-time occurrence need. (AF 148). The CO noted the Employer's website stated its clients include major oil and gas industry leaders and the Employer is in the business of identifying qualified personnel for a variety of technical and non-technical disciplines, which led the CO to further question how the Employer's need is considered a one-time occurrence when the Employer is engaged in the ongoing recruitment of workers in the oil and gas industry, just as with the Employer's current application. (AF 148-149). The CO noted the third deficiency was due to the Employer's failure to establish a temporary need for the 184 Combination Welder/Industrial Pipefitters in accordance with Sections 655.11(e)(3) and (4), which requires the Employer to establish that the number of worker positions and period of need are justified, and the request represents a bona fide job opportunity. (AF 149). The CO found the Employer failed to explain how it determined that it needs 184 Combination Welder/Industrial Pipefitters during the requested period of need. *Id.* Likewise, the CO noted the Employer listed in Section B, Item 9 of its ETA form 9142 that it required 92 Combination Welders and 92 Industrial Pipefitters, but the job order lists the same job duties as the ETA form 9142. *Id.* Thus, the CO stated it is unclear whether the Employer is in need of 184 Combination Welder/Industrial Pipefitters, or if the Employer has separate needs for Combination Welders and Industrial Pipefitters. *Id.* Finally, the CO found the Employer properly submitted a job order with its application pursuant to Section 655.16, but the job order did not comply with the required transportation and subsistence rates by providing a daily subsistence rate at a cost of \$12.26 per day during travel, to a maximum of \$51.00 per day with receipts. (AF 151).

Consequently, in the Notice of Deficiency the CO requested Employer provide the following documentation:

In order to resolve the **first deficiency** the CO requested the Employer submit the following:

1. An emergency request that meets the requirements outlined in 20 C.F.R. § 655.17; or
2. An amended ETA form 9142, Section B, Item 5, to reflect a start date of need that is in compliance with the above regulation.

To resolve the **second deficiency**, the CO requested the Employer submit the following:

1. A statement describing the Employer's business history and activities, and schedule of operations through the year;
2. Documentation that demonstrates the details of the one-time event, its scope, and expected duration. An explanation from the Employer why this event is a one-time occurrence, not occurring in the past and not to occur again;
3. A summary of all projects in the area of intended employment that have contributed to the Employer's need for temporary workers at the worksite location(s) during its requested dates of need. The summary should include the anticipated start and end dates of each project and worksite addresses; and
4. Other evidence or documentation that similarly serves to justify the dates of need being requested for certification.

To resolve the **third deficiency**, the CO requested the Employer submit the following:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. Clarification of whether the two occupations of Combination Welder and Industrial Pipefitters are the same or different with supporting documentation;
3. An explanation with supporting documentation of why the Employer is requesting 184 Combination Welder/Industrial Pipefitters for Westlake, Louisiana, during the dates of need requested;
4. If applicable, documentation supporting the Employer's need for 184 Combination Welder/Industrial Pipefitters

- such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
5. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. 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
  6. Other evidence or documentation that similarly serves to justify the number of workers requested, if any.

To resolve the **fourth deficiency**, the CO requested the Employer submit the following:

1. Submission of an amended job order language to indicate the amount for daily subsistence will be at least \$12.26 per day during travel to a maximum of \$51.00 per day with receipts. The Employer's NOD response must include the corrected language as well; or
2. Submission of an already-amended job order that contains all of the required language indicated above.

(AF 147-153).

On August 15, 2018, the Employer responded to the CO's Notice of Deficiency ("NOD") to include an amended ETA form 9142, Section B, Item 5, to reflect a start date of need; an amended Statement of Temporary Need; a summary listing all projects in the area of intended employment for the current and previous year; summarized monthly payroll reports (combination welder/industrial pipefitters and reports for helper projects); a schedule of operations to show the need of 184 total workers, 92 on each jobsite and timeline; a letter of intent from Client; contract with Client; master service agreement with Client. The Employer provided the aforementioned documents in response to all four of the deficiencies identified by the CO in the August 9, 2018 NOD. (AF 98-143).

After examining the additional information provided by the Employer in response to the NOD, the CO determined on October 10, 2018, that the Employer failed to comply with 20 C.F.R. § 655.6(a)-(b) by establishing the job opportunity was temporary in nature, and as a result, found the Employer was unable to cure the deficiency. (AF 84-89). The CO noted the Employer's

NOD response reiterated that its basis for a one-time temporary need is based on contracted work with McDermott and that this job was a "special case." (AF 88). Nevertheless, the Employer did not explain why this job with McDermott is a "special case" or why such a situation would not emerge again in the future. *Id.* The CO further noted the Employer stated it is strategically expanding into a different market than it had previously conducted business, stating the following:

We take pride in keeping abreast of market trends, technology, and events in order to effectively serve our client's needs. Historically, our upstream clients include major oil and gas industry leaders in subsea construction in both domestic and international regions, employing various helpers to support each job. We have since expanded strategically into the downstream market by supporting clients in the refinery industry and those who manage onshore pipeline projects.

*Id.*

Given the foregoing, the CO found the very nature of the Employer's business model would indicate that in order for the Employer to keep abreast of the market trends, technology, and events, other contracts would necessarily follow the current contract with McDermott. *Id.* The CO also considered the Employer's summarization of all its projects from 2014 to present, as well as monthly payroll reports, and the Employer's attestation that it has not utilized Combination Welder/Industrial Pipefitters in the past. *Id.* However, the CO found it is reasonable to expect that the Employer will be in the business of continually securing contracts with clients and performing similar services in support of its clients given the Employer's current contract with McDermott to provide services in furtherance of a very large construction project. *Id.* Thus, the CO concluded that although the workers are being sought for a specific contract, there is no reason to expect that when the project is complete, especially if the Employer is highly successful, other similar projects will not present themselves. *Id.*

The CO also considered the Employer's contract agreements and McDermott's Letter of Support, which the CO found supports the number of workers requested and the dates of need for the project. (AF 88). Nonetheless, the CO stated one specific contract is not enough to substantiate the Employer's one-time need when the nature of the Employer's business is to secure

contracts and provide services. *Id.* The CO further noted the Employer is seeking certification for one year at a time, for a three year project with McDermott. *Id.* However, the CO noted the Employer has contracted to complete **two** projects with McDermott, that being, the projects in Hackberry, Louisiana, and Westlake, Louisiana. *Id.* Therefore, the CO concluded the Employer's need is not a one-time occurrence because it has a need for **two** individual projects.<sup>4</sup> *Id.* As such, the CO found the Employer failed to submit supporting documentation that justifies its one-time occurrence standard of need, and thus did not overcome the deficiency. (AF 89).

On October 17, 2018, the Employer submitted a request for administrative review to BALCA appealing the CO's Final Determination in the above-captioned H-2B matter. (AF 2). The Employer explained that its contract with McDermott is a "special case" because it is not a job/project the Employer has ever undertaken, nor one that it would perform again in the future. (AF 3). According to the Employer, the McDermott project is something the Employer "does not prefer to complete on a normal basis and is only completing it as a 'favor/benevolence' to our client. They came to us asking for dire assistance and we worked out an agreement with them." *Id.* Furthermore, the Employer avers that its contract with McDermott states the Employer is not responsible, nor will it be requested to provide this type of workers again in the future. *Id.* The Employer stated it does not usually meet the need of its clients for Combination Welders/Industrial Pipefitters because it is too difficult to find and supply such workers. *Id.* The Employer stated this is the first time it has contracted to perform work for McDermott, and it has no further commitments with McDermott. (AF 4). Moreover, the Employer has other clients that it services, and trying to find qualified workers for McDermott has taken too much time and resources to make it an ideal business relationship in the future because it detracts from its other clients. *Id.*

Additionally, in response to the CO's conclusion that the Employer does not have a one-time need because it is completing two projects at Hackberry, Louisiana, and Westlake, Louisiana,

---

<sup>4</sup> It is noted that the Employer entered into only one contract or agreement with McDermott to provide labor services at two project sites. Contrary to the CO's conclusion, I find the one-time occurrence need in the instant case relates to the Employer's contract or agreement with McDermott, and not two individual projects. Notwithstanding the foregoing, I further find the CO properly concluded the Employer failed to demonstrate eligibility for certification for reasons discussed below.

the Employer stated that even though there are two different locations it is only completing one project for McDermott. (AF 4). On this basis, the Employer avers that the Combination Welders/Industrial Pipefitters will all be completing the same work, with the same job duties, with the same work-hours and wages, and will all be working towards completing "one big project" for its client, McDermott. *Id.* The Employer avers the work for McDermott derives from one work order, and the work will be invoiced and paid as one job/project, with the project only being complete upon all work coming to a conclusion, all of which is supported by the Employer's schedule of operations. *Id.*

On October 22, 2018, BALCA docketed the appeal, and on October 23, 2018, a Notice of Docketing was issued. 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) on October 29, 2018. The parties were given a brief due date of November 7, 2019, in accordance with 20 C.F.R. § 655.33. On November 2, 2018, Employer timely submitted its brief, but the CO did not proffer a brief.

In brief, the Employer states in its Letter of Support dated August 1, 2018, that it has never before needed Combination Welders/Industrial Pipefitters in the past. (AF 165). Additionally, Employer's summarized Monthly Payroll Reports from 2016 up to August 2018 provide evidence it has not filled this type of position in the past. (AF 108-112). On this basis, Employer notes the CO did not find Employer had employed Combination Welder/Industrial Pipefitters in the past, nor did the CO deny Employer's application on such a basis.

On the other hand, the Employer asserts the CO was incorrect in finding Employer failed to show it does not have a future need for the Combination Welders/Industrial Pipefitters because Employer "did not explain why this job is a special case nor why such a special case would not emerge again in the future." The Employer notes it presented three years of historical data evidencing it has never hired these types of workers in the past. In addition, the Employer submitted its projects from 2014 to the present - a period of four years (including projects outside the area of intended employment). (AF 106-07). The Employer avers in the past it only had a temporary need for "Helpers" (SOC Code 47-3015). (AF 166). However, Employer states this present need is "over and above" what it has hired in the past. The Employer contends the CO

denied the Employer's application based upon assumptions on what the Employer's business "could be," which is speculative at best. The Employer notes the CO has no evidence to prove the Employer will or will not enter into a contract in the future that requires Combination Welders/Industrial Pipefitters, and to assume the Employer will require such workers in the future is premature. Further, the Employer avers that should it require this type of worker in the future, it will be subject to the scrutiny under the regulations that would preclude the Employer from using the H2-B program for a one-time occurrence need. Lastly, the Employer notes it provided evidence regarding a date in the near, definable future in which the workers will no longer be needed as demonstrated by its Employer Support Letter (AF 165-69), Statement of Temporary Need (AF 19-23), a Schedule of Operations (AF 47-53), and its Contract Labor Agreement (AF 133-36).

In the alternative, the Employer argues it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers. The Employer disagrees with the CO's finding that the Employer's "single project is not adequate to establish a one-time occurrence need." The Employer avers it presented a letter of intent and a contract agreement, both of which demonstrate it has a one-time occurrence need. The Employer argues there is no law that supports the CO's position that a single project is not adequate to establish a one-time need. The Employer also disagrees with the CO's determination that the Employer's need was not a one-time occurrence because it entered into a contract for two projects, at two different locations. The Employer avers there is only one contract, which requires the work to be performed at two different locations, conducting the same work, and the employees have the same job duties. The Employer contends the number of locations does not and never has determined the number of "projects." Thus, whether there is one or two projects, it still suffices to meet the requirements under the regulations.

### **DISCUSSION**

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 *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).

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); 20 C.F.R. § 655.6(b).

In the instant case, the Employer attempted to establish a "one-time occurrence" need for the period of October 1, 2018 through September 1, 2019. To establish a **one-time occurrence**, the 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,"<sup>5</sup> 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). 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)(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.

Here, the CO determined the Employer failed to establish a one-time temporary need for workers because the Employer did not explain how its "special case" would not emerge again in the **future** given the very nature of the Employer's business model indicates that, in order for the Employer to keep abreast of market trends, technology, and events, other contracts must follow the contract with McDermott.<sup>6</sup> The CO further determined based upon the Employer's current engagement to provide services in furtherance of a very large construction project with McDermott, that it is reasonable to expect the Employer will be in the business of continually seeking out and performing similar services in support of the structural and subsea construction industry. Thus, while the Employer seeks workers for a specific contract, the CO noted there is no reason that other similar projects will not present themselves in the future, especially if the Employer is highly successful in its execution of the McDermott project. Lastly, the CO concluded the Employer's need for Combination Welders/Industrial Pipefitters is not a one-time need because there are two separate projects to be completed, one in Hackberry, Louisiana, and the other in Westlake, Louisiana, both of which would be completed over the course of three years or less.

---

<sup>5</sup> The Employer has conceded its need is greater than a one year period, and that it would seek certification for future years.

<sup>6</sup> In the Final Determination letter, the CO did not address whether the Employer had successfully demonstrated it did not have a need for Combination Welders/Industrial Pipefitters in the past. However, the CO did not deny the Employer's application on this basis, nor has the undersigned seen any evidence of the same in the appeal file. Thus, the undersigned presumes the CO determined the Employer demonstrated it did not have a temporary need for Combination Welders/Industrial Pipefitters in the past.

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.* Therefore, BALCA found where the employer entered into unique, but distinct contracts, the combination of these contracts created a permanent need. *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*, slip op. at 6.

Here, the CO found that based on the Employer's business model other contracts will follow, thus necessitating the Employer's need for similar workers in the future. Initially, the Employer averred it has recently expanded into the "downstream" market by supporting clients in the refinery industry and those companies who manage onshore pipeline projects, and not just clients in the oil and gas industry in subsea construction. Conversely, on appeal, the Employer avers the McDermott project is one that it prefers not to undertake on a normal basis and it is only completing the project as a "favor/benevolence" because McDermott was in a dire situation and needed assistance, therefore making it a one-time occurrence need.

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 has expanded into the "downstream" market, one in which it was not historically involved, and now services clients in the refinery industry and onshore pipeline projects. Employer's explanation that it agreed to work with McDermott as a "favor" or out of "benevolence" is unavailing because it still fails to address how a similar need would not emerge again in the future in light of the nature of Employer's business model, indicating it takes pride in keeping abreast of market trends, technology, and events. Thus, it logically follows that the Employer will be in the business of continually securing contracts with clients and performing similar services, and therefore its current application is not a one-time temporary event when viewed in the context of the Employer's business which appears to continue to grow. Accordingly, pursuant to *KBR* 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).

I also find for similar reasons, the Employer has failed to adequately demonstrate how the McDermott 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 stated its project with McDermott is a "special case," and one that it agreed to do as a "favor" or out of "benevolence." However, the Employer has not presented evidence or argument to convince the undersigned that its need for Combination Welders/Industrial Pipefitters will not continue beyond September 9, 2019, based upon its assertion that it has expanded

into the "downstream" market by supporting clients in the refinery industry and those companies who manage onshore pipeline projects. 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, indicates the McDermott project is not a "special case" or one-time occurrence. Accordingly, I find the Employer has failed to provide any evidence showing the McDermott project represents anything other than growth in its newly expanded "downstream" market.

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 184 "Combination Welder/Industrial Pipefitter" for the period of October 1, 2018 through September 9, 2019. 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 8<sup>th</sup> day of November, 2018, at Covington, Louisiana.

For the Board:

LEE J. ROMERO, JR.  
Administrative Law Judge