

**U.S. Department of Labor**

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

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



**Issue Date: 02 December 2019**

**BALCA Case No.:** 2020-TLN-00012

**ETA Case No.:** H-400-19235-045906

*In the Matter of:*

**INDUSTRIAL EQUIPMENT SOLUTIONS,  
INC.,**

*Employer.*

**Appearance:** Ronda Butler Harkey, Esquire  
Orgain Bell & Tucker, LLP  
Beaumont, TX  
*For the Employer*

*No appearance for the Certifying Officer*

**Before:** Christopher Larsen  
Administrative Law Judge

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

This case arises from Industrial Equipment Solutions, Inc.’s (“Employer”), 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 nonagricultural 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this

---

<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

<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*

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. The CO (acting for the Secretary of Labor, 20 C.F.R. §655.2, subsection (a)) can issue the labor certification only after determining (1) that there are not sufficient U.S. workers who are qualified and available to perform the work in question and (2) that employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. §655.1, subsection (a). The burden of proof is on the employer to show it is entitled to the labor certification. 8 U.S.C. §1361.

If the CO denies the application under 20 C.F.R. § 655.53, the employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a). By designation of the Chief ALJ, I am BALCA for purposes of this appeal. 20 C.F.R. §655.61, subsection (d).

### **STANDARD OF REVIEW**

The regulations do not specify the extent to which BALCA should defer to the CO’s determination. When the CO’s determination turns on the Employment and Training Administration’s long-established, policy-based interpretation of a regulation, BALCA likely owes considerable deference to ETA. *Compare* deference courts give administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In such cases, BALCA likely should not overturn a CO’s policy-based determination unless it is arbitrary, capricious, or inconsistent with ETA’s established policy interpretation.

### **BACKGROUND**

On August 23, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. Employer sought certification for eighty-five welders for a “one-time need” from November 14, 2019, to December 31, 2021, for the “West White Rose” project in Ingleside, Texas (AF p. 334).<sup>3</sup> Thereafter, the Certifying Officer (CO) issued a Notice of Deficiency (AF pp. 332-338) and Employer filed a response (AF pp. 248-329). On October 18, 2019, the CO issued a Final Determination denying the application (AF pp. 239-246). The CO concluded Employer had failed to establish its proposed employment of eighty-five welders was “temporary” under the regulatory “one-time need” standard. Employer now seeks administrative review of that decision.

Employer operates an in-house manufacturing facility in Corona, California, where it employs permanent workers (AF pp. 5, 344). By this application, it seeks to hire H-2B welders for the “West White Rose” project, having entered into a contract with Kiewit Offshore Services,

---

*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> References to the appeal file are abbreviated with an “AF” followed by the page number.

Ltd. (“Kiewit”) to do so (AF p. 5). The CO concluded this application “appears to be a continuation of the same job opportunity included in the employer’s partial certification H-400-18088-890329 for 84 welders under a peakload need . . .” (AF p. 246).

## **DISCUSSION**

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

(B) Nature of petitioner’s need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. 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.

(1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

Employer contends its need for eighty-five welders from November 14, 2019, until December 31, 2021, is a temporary need, and specifically a “one-time occurrence,” under the regulatory definition above. In Employer’s view, the Kiewit contract creates an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers (AF pp. 4-5). In fact, Employer argues (AF p. 6):

. . . the Certifying Officer indicates “employer’s business appears to be contingent on securing and fulfilling contracts: and further cites to prior sub-contracts as evidence that IES does not have a “unique non-recurring situation.” Per the Federal Register, the Employer, as petitioner, is not required to prove its project forming the basis of its one-time temporary need is a unique, non-recurring situation. The DOL has recognized a “long-established definition of one-time occurrence which encompasses both unique non-recurring situations but also any “temporary event of a short duration [that] has created the need for the temporary worker.” See Fed.Reg. 78020 (Dec. 19, 2008) (emphasis added) available in relevant parts at Exhibit E.

In its Exhibit E (AF p. 228), Employer cites this sentence:

Neither the Department nor DHS is changing the long-established definition of one-time occurrence which encompasses both unique non-

recurring situations but also any “temporary event of a short duration [that] has created the need for a temporary worker.

But immediately after that cited sentence, the balance of the first full paragraph on AF p. 228 sets forth pertinent examples:

For example, an employer could utilize the H-2B program to secure a worker to replace a permanent employee who was injured. Further, if that permanent employee, upon returning to work, subsequently suffered another injury, the same employer could utilize the H-2B program again to replace the injured employee on the basis of a one-time occurrence. A one-time occurrence might also arise when a specific project creates a need for additional workers over and above an employer’s normal workforce. *For example, if a shipbuilder got a contract to build a ship that was over and above its normal workload, that might be a one-time occurrence. However, the Department would not consider it a one-time occurrence if the same employer filed serial requests for H-2B workers for each ship it built* (emphasis added). (*Id.*)

The bone of contention between the CO and Employer is the proper interpretation of the regulatory language. Under 8 C.F.R. section 214.2, subsection (h)(6)(ii)(B)(1), Employer “must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” Employer urges me to read the alternative requirement as an entirely independent basis for establishing a one-time need. Thus, in Employer’s view, I should regard the West White Rose project as a temporary event of short duration which creates a need for temporary workers, and there my analysis begins and ends.

By contrast, the CO appears to understand the first requirement (“has not employed workers . . . in the past and . . . will not need workers to perform the services or labor in the future”) as establishing a general rule that “one-time occurrences” never recur, while the alternative requirement creates a kind of limited exception to non-recurrence. In the CO’s view, then, serial “temporary” needs do not constitute “one-time occurrences,” except, for example, when a permanent worker has been injured and must be replaced until he or she returns to regular duty – *even if the injured employee has been injured and temporarily replaced by an H-2B worker before.*<sup>4</sup> Hence, the CO finds Employer’s involvement in several local projects virtually determinative (AF pp. 245-246), while Employer considers anything outside the West White Rose project completely irrelevant (AF pp. 5-6).<sup>5</sup>

---

<sup>4</sup> Thus, non-recurrence is the essential feature of “one-time occurrences” in most cases, but repeated “one-time occurrences” may also qualify, so long as they are not calculated to expand the employer’s work force indefinitely.

<sup>5</sup> Employer implicitly suggests – correctly, in my view – that the regulation could have been written more clearly to say so, if that is what it means (*see* AF pp. 6-7). But, as discussed more fully below, the Employment and Training Administration has interpreted the regulation in this manner for at least eleven years – a fact Employer’s own evidence demonstrates.

I sustain the CO's interpretation of the regulation for these reasons.

First, Employer's argument to the contrary notwithstanding, the December 19, 2008, *Federal Register* publication attached as Exhibit "E" to Employer's Motion for Administrative Review (AF p. 228) supports the CO's view. The examples set forth in that publication are consistent with the CO's interpretation of the regulation in this case, and those examples were published eleven years ago. There is no reason to believe the CO interpreted the regulation differently in this case than it does for any other employer, or that the CO's interpretation represents any departure from its previous practice, going back at least eleven years. Accordingly, the CO's interpretation is entitled to deference.

Second, the CO appears in this case reasonably to have concluded the West White Rose project was more typical than exceptional in Employer's business (AF p. 246):

. . . in the document entitled "Projects in Corpus Christi/Calhoun Texas MSA during Calendar Year 2018 to date," the employer indicates a list of five projects in the area of intended employment all of which appear to be in-progress and have anticipated end dates from as early as early-2019 through 2021-2024, depending on the individual project. This list of current projects indicates that the employer has a history of soliciting, securing, and implementing similar contracts. Therefore, it does not appear that the Kiewit Offshore Services Ltd. West White Rose project is unique to this employer as it is one of several ongoing projects it currently has in-progress in the Corpus Christi/Calhoun Texas MSA.

To be sure, Employer had told the CO it would "not continue to accept these type of client projects in the future, and it will not need workers to perform the services or labor in the future . . ." (AF p. 263). But because the burden of proof is on the employer to show it is entitled to the labor certification, 8 U.S.C. §1361, the CO is not bound by this self-serving statement, and may properly inquire as to its meaning. Employer disclaims any intent to participate in "these type of client projects in the future," but does not deny its past use of H-2B welders at the same job site. Likewise, Employer never specifically denies being involved in other projects in the area, or continuing to solicit such business either from Kiewit or other contractors. Instead, Employer carefully asserts "[t]he fact that IES may or doesn't know or can't project its future client project opportunities is not an appropriate legal basis for denying its present request which is supported by a representation in writing from IES that it will not seek H-2B welders in the future" (AF p. 7). Employer does not deny its intention to seek more business in the Corpus Christi/Calhoun Texas MSA, but implicitly argues that until it formally secures a contract, that intention is irrelevant.

In the ordinary sense of the words, perhaps, the West White Rose project is a "one-time occurrence" in that it is only going to be completed once. But in that sense of the words, *every* contract Employer undertakes in Texas is a "one-time occurrence," because every job is a project which ends when it is finished. I find the CO reasonably considered all of Employer's business activity in the area – including Employer's previous application for temporary workers at the same work location, and its involvement in other projects locally – when determining whether

the West White Rose project was a “one-time occurrence” as defined in the regulation. The CO was not bound by Employer’s own conclusionary declaration.

Third, as set forth above, the CO’s function is to protect the wages and working conditions of domestic U.S. workers by ensuring 1) that employment of foreign workers will not usurp job opportunities for domestic workers, and 2) that employment of foreign workers does not depress wages or working conditions in the domestic labor market. The CO’s interpretation of the regulation is calculated to secure those purposes, while the Employer’s interpretation would allow employers to hire large numbers of foreign workers for extended periods through the simple expedient of characterizing its ongoing business efforts as a series of discrete “temporary” projects. If foreign workers can be employed in the United States indefinitely, working on serial “temporary” projects, they are more likely to displace domestic workers.

I sympathize with any employer who feels a government agency is preventing him or her from operating his or her business in the manner he or she believes most efficient. In fairness to the CO, of course, Employer can hire all the domestic workers it likes, regardless of what the CO thinks about it. But when an employer seeks to hire foreign workers, the CO has a job to do.

**ORDER**

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

**SO ORDERED.**

For the Board:

Christopher Larsen  
Administrative Law Judge