

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 18 December 2012**

**BALCA Case No.: 2013-TLN-00015**

ETA Case No.: C-12257-59776

*In the Matter of:*

**INTERNATIONAL PLANT SERVICES, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

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

**DECISION AND ORDER**

This matter is before the Board of Alien Labor Certification Appeals pursuant to Employer International Plant Services, LLC's request for administrative review of the Certifying Officer's denial of labor certification under the H-2B non-immigrant program. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. For the reasons set forth below, the Certifying Officer's denial is **AFFIRMED**.

**BACKGROUND**

*The H-2B Program*

The H-2B non-immigrant program permits employers to hire foreign nationals for temporary nonagricultural positions if there are not sufficient domestic workers who are able, willing, qualified, and available to perform such services or labor. *See* 8 C.F.R. § 214.2(h)(1)(ii)(D). The U.S. Department of Labor (hereinafter "DOL" or the "Department") plays a key role in the admission of H-2B workers. Pursuant to 8 C.F.R. § 214.2(h)(6)(iii)(A), "[p]rior to filing a petition ... to classify an alien as an H-2B worker, the [petitioning employer] shall apply for a temporary labor certification with the Secretary of Labor." To apply for such certification, a petitioning employer must file an *Application for Temporary Employment Certification* (ETA Form 9142) with the Department's Chicago National Processing Center

(“CNPC”). 20 C.F.R. § 655.20. Applications are reviewed by a Certifying Officer (“CO”) in the Department’s Employment and Training Administration (“ETA”), who will either request additional information, or make a determination to grant or deny the requested labor certification. 20 C.F.R. § 655.23. If certification is denied, in whole or in part, the petitioning employer may request administrative review before the Board of Alien Labor Certification Appeals (hereinafter “BALCA” or “the Board”). 20 C.F.R. § 655.33(a). BALCA’s scope of review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the Employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the employer’s application. 20 C.F.R. § 655.33(a), (e).

### *Procedural History*

The Employer, International Plant Services, LLC (“IPS”), filed an *Application for Temporary Employment Certification* (“Application”) with the CNPC on September 14, 2012. AF 762-903.<sup>1</sup> In its Application, IPS requested temporary labor certification for 200 H-2B workers to be employed as Structural Welders from June 1, 2012 through April 1, 2013, based on an intermittent standard of temporary need. AF 764. The Application included a statement signed by IPS Operations Manager, Ed Sholes, confirming IPS had been retained to locate and provide 200 Structural Welders by one of its clients, The Shaw Group, at a project site in Lake Charles, Louisiana. AF 781.

After reviewing the Application, the CO issued a *Request for Further Information* (RFI) on September 18, 2012, identifying multiple deficiencies IPS needed to resolve before certification could be granted. AF 751-761.<sup>2</sup> Among other things, the CO informed IPS that the Department was unable to accept applications submitted by job contractors when the employer contracting with the job contractor has not also submitted an application to the Department. AF 754 (citing *Comite de Apoyo a los Trabajadores Agricolas v. Hilda Solis, et al.*, Civil No. 2:09-cv-240-LP). AF 754. Because IPS based its temporary need on a contract to “provide 200 temporary, skilled workers,” the CO questioned whether IPS was a “job contractor” within the meaning of 20 C.F.R. § 655.4. *Id.* Accordingly, the CO directed IPS to respond to a number of specific questions related to the supervision and control both IPS and The Shaw Group would exercise over the H-2B workers for which IPS requested certification. AF 754-755. The CO instructed IPS that if, based on its responses to these questions, it believed it was a “job contractor,” it must change its response on Section C, Item 17 of its Application to correctly identify itself as such.

IPS responded to the RFI on September 25, 2012. AF 414-750. In an enclosed letter signed by its attorney, IPS asserted that it would maintain supervision and control over the work performed by the H-2B workers, and retain authority to hire, fire, and pay the workers. To support this assertion, IPS provided a notarized affidavit from its Operations Manager, Mr. Ed

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<sup>1</sup> Citations to the Appeal File will be abbreviated “AF” followed by the page number.

<sup>2</sup>The RFI identified five deficiencies, only two of which relate to the CO’s ultimate bases for denial. This decision will only address one—IPS’ status as a contractor—since, as discussed below, I affirm the CO’s denial on this basis.

Sholes, which states, in relevant part:

IPS will remain the employer in every aspect of the temporary work to be performed, this includes asserting complete control, supervision, payroll and human resources responsibility over the workers. At no time will the H-2B workers be supervised or have their employment controlled by our client, The Shaw Group. . . . Our professional and administrative operations are conducted from our U.S. headquarters, and this includes deployment of temporary craft workers to the designated project worksite under the purview of IPS' own supervisors, managers, and professional engineering employees.

Further, IPS does not intend to contract the services of the H-2B workers covered by the underlying ETA 9142. As mentioned above, these employees will be placed on IPS payroll and be under the control and supervision of IPS throughout the duration of their temporary employment. At no time will these individuals be considered employees or contractors to The Shaw Group. Further, The Shaw Group will not supervise or control the employment of these temporary workers.

AF 428. IPS also provided a General Services Agreement between itself and the Shaw Group.

The CO considered IPS' response, but found that "the submitted documentation did not fully address how supervision of the workers would be structured." Specifically, the CO noted that while Mr. Sholes indicated "that [the H-2B workers for which IPS requests certification] will be under the control and supervision of IPS throughout the entire duration of their employment," he did not explain "whether this supervision would be administrative or operational, the amount of time supervisors would be able to supervise the actual worksite location, and the primary location of the supervisors." AF 332. The CO further noted that the General Services Agreement between IPS and The Shaw Group did not include language detailing how the requested H-2B workers would be supervised. *Id.* Accordingly on, October 19, 2012, the CO issued a second RFI requesting additional information to assist the Department in determining whether IPS is a "job contractor" under 20 C.F.R. § 655.4, including (1) a contract between IPS and the client, The Shaw Group, which details the provisions concerning the supervision of the requested workers; (2) a summarized payroll report showing the number of supervisors available to supervise this specific project for The Shaw Group; (3) a written explanation regarding the amount of time supervisors will spend at the actual worksite location for the Shaw Group at 3191 W. Lincoln Road, Lake Charles, LA; and (4) a written explanation regarding the primary location of the supervisors. AF 332. The CO believed this documentation was "necessary for the Department to appropriately evaluate an *Application for Temporary Employment Certification* for joint employment," and informed IPS that an application involving more than one employer-client would result in denial. AF 333.

IPS responded to the second RFI on October 26, 2012. AF 378-401. In a cover letter signed by its attorney, IPS asserted that it "will maintain complete control and supervision over the H-2B employees performing work for its client, The Shaw Group, " and thus, "is not a job contractor. "Conversely," IPS stated, "The Shaw Group does not meet the definition of an employer or joint employer under the regulations because the company will not supervise or

control the employment of the H-2B workers in any way.” *Id.* To address the CO’s concern about the supervision and control of the requested H-2B workers, IPS provided: (1) a letter signed by its President, Mr. Craig Crawford, confirming that “IPS will remain the employer in every aspect with regards to the temporary H-2B workers” and “at no time will the H-2B workers be supervised or have their employment controlled by . . . the Shaw Group” (AF 388-390); (2) a contract between IPS and The Shaw Group, entitled “Terms and Conditions for Professional Services,” which, according to IPS, confirmed “all workers provided by IPS will remain employees of IPS, not The Shaw Group, throughout the duration of the work to be performed”; and (3) and a projected payroll report indicating that the company intends to hire one supervisor for the project. AF 388-390, 393-395, 397-401.<sup>3</sup> In particular, IPS pointed to the portion of Mr. Crawford’s letter stating:

IPS plans to deploy one supervisor to the above mentioned worksite in Lake Charles, Louisiana for the entire duration of this project, and this individual will oversee all operational work performed by the 200 Structural Welders and ensure that the standard of care taken with the work meets the quality control standards of IPS. The supervisor will be onsite for the entire duration of each workday (when the H-2B workers are onsite) and remain onsite with the H-2B workers until the scheduled completion of the project in April 2013. Upon conclusion of the project, the H-2B workers will return to their home countries and the assigned supervisor will re-deploy to IPS headquarters, or to another project location, as needed.

Please note that the supervisor is not already on IPS' payroll, as the enclosed summarized payroll report confirms. IPS typically assigns such supervisors on a per project bases [*sic*], as needed, and accordingly, upon approval of the underlying H-2B filing, one supervisor will be hired and provided to oversee the 200 temporary workers for the underlying project in Lake Charles, Louisiana. Each supervisor has access to company vehicles to travel to and from project sites, or is reimbursed for costs associated with travel to and from each project site, which is common in our industry.

AF 389-390. Mr. Crawford further maintained that IPS would assert “complete supervisory control, payroll control, quality control of work to be performed, and control over all aspects of human resources, including decisions to hire and fire each worker,” and “[a]t no time will the H-2B workers be supervised or have their employment controlled by our client, The Shaw Group.” AF 389. IPS acknowledged that it did not provide all of the documentation requested in the second RFI, but maintained that its accounting team was unable to sort through and compile the requested information “in the incredibly short amount of time” provided for its response (seven days). AF 383, 390.

On November 8, 2012, the CO issued a *Final Determination* denying certification. AF 368-377. The CO based this denial, in part, on his finding that IPS failed to provide sufficient

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<sup>3</sup> This contract is identical to the contract submitted in connection with IPS’ initial Application, and does not contain a signature from a representative of the Shaw Group. *Compare* AF 393-395 *with* AF 786-788.

explanation and documentation to allow the Department to determine whether it was a job contractor and whether the H-2B workers covered in its Application would perform services for, or receive training from, more than one employer. AF 371-374. The CO acknowledged the statements made by IPS' attorney in response to the second RFI, but determined that IPS "failed to provide sufficient evidence supporting its claim that it does not meet the definition of a job contractor under the regulations." AF 373. In arriving at this determination, the CO noted that the contract between IPS and the Shaw Group "does not specify or define the supervision or control of the project," and that the projected payroll summary IPS provided "does not demonstrate any supervisors being employed by IPS throughout the establishment of its company in 2003." AF 373-374. Consequently, the CO stated: "The deficiency remains with the application. Therefore, the application is denied."

IPS requested BALCA review of the denial by letter dated November 16, 2012. AF 2 (citing 20 C.F.R. § 655.33). The Board issued a Notice of Docketing on November 21, 2012, setting forth an expedited briefing schedule. The CO filed a brief on November 27, 2012; the Employer did not file an additional brief or statement of position.

## DISCUSSION

IPS asserts that the CO "failed in its denials to consider and accept the validity of sworn statements and documents in the record, without giving a detailed reason for why such evidence is insufficient," and argues that it is an abuse of discretion for the CO "not to even consider the totality of the evidence in the record when making a decision on the merits." AF 3, 6. While IPS concedes that it did not provide a few of the "overly burdensome documents" requested in the RFIs, it argues that the regulations should not be construed so strictly as to allow the CO to deny an application simply because every piece of requested documentation is not provided. AF 4.

While I agree that the CO largely failed to address the veracity or value of IPS' evidence, the CO's brevity in dismissing the Employer's application does not affect the Employer's burden to produce sufficient evidence to demonstrate entitlement to certification. *See, e.g., Carlos UY III*, 1997-INA-304 (March 3, 1999) (*en banc*), *citing Top Sewing, Inc. and Columbia Sportswear*, 1995-INA-563 and 1996-INA-38 (Jan. 28, 1997) (*per curiam*). Thus, even in the absence of a fully reasoned *Final Determination*, I cannot rule out affirming the CO's denial if IPS' documentation is so lacking in persuasiveness that certification would necessarily be precluded. *Id.*

### *IPS' Status as a Job Contractor*

Due to a Federal court order in *Comité de Apoyo a los Trabajadores Agricolas v. Solis [CATA]*, the Department determined that it cannot certify an *Application for Temporary Employment Certification* filed by a job contractor under the H-2B program if the job contractor's employer-client has not filed as a joint-employer. No. 2:09-cv- 240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010).<sup>4</sup> The Department's H-2B regulations define a "job

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<sup>4</sup> In *CATA*, the Eastern District of Pennsylvania invalidated various provisions of the Department's 2008 H-2B Final Rule, 73 Fed. Reg. 78020 (Dec. 19, 2008). Among the provisions that the court invalidated and vacated was 20 C.F.R. § 655.22(k), insofar as that provision permitted the clients of job contractors to use the services of H-2B

contractor” as “a person, association, firm, or corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one of more employers, which is not an affiliate, branch, or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the service or labor to be performed other than hiring, paying, and firing the workers.” 20 C.F.R. § 655.4.

In its Application, IPS indicated that it had been retained by one of its clients, The Shaw Group, to locate and provide 200 Structural Welders at a project site in Lake Charles, Louisiana. AF 781. Based on this statement, the CO reasonably questioned whether IPS met the definition of a “job contractor” at section 655.4. IPS asserts that the documentation and explanation it provided in response to the RFIs demonstrates that it “is not a job contractor and that it will maintain complete supervision and control over the temporary workers for the duration of the temporary project.” AF 4. “Accordingly,” IPS argues, “the Shaw Group is not considered a joint-employer under the regulations and is not required to submit a separate ETA 9142 under CATA.” I disagree.

In response to the first RFI, IPS provided an affidavit signed by its Operations Manager, Mr. Ed Sholes, and a General Services Agreement between IPS and its client, The Shaw Group. In reviewing the affidavit, the CO noted that although Mr. Sholes “indicates that [the H-2B workers for which IPS requests certification] will be under the control and supervision of IPS throughout the entire duration of their employment,” he does not explain “whether this supervision would be administrative or operational, the amount of time supervisors would be able to supervise the actual worksite location, and the primary location of the supervisors.” AF 332. The CO also observed that the signed General Services Agreement between IPS and The Shaw Power Group, Inc. did not include language detailing how workers were to be supervised. Unsatisfied with IPS’ explanations and documentation, the CO issued a second RFI seeking further explanation and documentation, specifically requesting: (1) a contract between IPS and the client, The Shaw Group, detailing IPS’ supervision of the requested H-2B workers; and (2) a summarized payroll report showing the number of supervisors available to supervise this specific project for The Shaw Group. AF 333. In response to this request, IPS provided a letter from the company’s CEO, Mr. Craig Crawford; a “projected” payroll report for the project; and a “signed” Support Services Agreement between itself and The Shaw Group.<sup>5</sup> IPS did not provide the requested contract detailing its supervision of the requested H-2B workers or a summarized payroll report demonstrating the number of supervisors available to supervise this specific

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workers without each client submitting its own *Application for Temporary Employment Certification* to the Department. The court found that this practice violated the clear language of the governing regulations promulgated by the Department of Homeland Security (“DHS”) at §§ 214.2(h)(2)(i)(C) and 214.2(h)(6)(iii)(A), which, when read together, “mandate that (1) every employer must file a petition with DHS, and (2) before doing so, the employer must also file a certification application with DOL. By allowing certain employers not to file certification applications, DOL’s regulations unambiguously contradict this mandate.” *Id.* at \*16 (E.D. Pa. Aug. 30, 2010). Accordingly, the Court vacated 20 C.F.R. § 655.22(k) “insofar as that provision permits the clients of job contractors to hire H-2B workers without submitting an application to the DOL.” *Id.* at \*26.

<sup>5</sup> IPS asserts that Article 2.1 of the Support Services Agreement clearly states “that any temporary workers seconded are deemed employees of IPS, not The Shaw Group.” AF 5. But even if this document were signed (which, despite IPS’ numerous representations to the contrary, it is not), such a statement does not detail IPS’ supervision over the requested H-2B workers.

project for The Shaw Group.

IPS acknowledges that it did not produce all of the documentation requested in the second RFI, “due to the burdensome nature of the request,” but maintains it provided “sufficient and meritorious alternative evidence . . . to confirm IPS’ status as the only employer under the regulations.” AF 4. An examination of the record reveals that IPS failed to provide sufficient evidence to corroborate the vague and generalized statements made by its officials. Mr. Sholes and Mr. Crawford simply employed the “buzz words” necessary to escape the definition of a “job contractor” at 655.4., without providing any specific detail as to how IPS’ supervision and control over the H-2B workers would actually play out. It is unclear, for instance, how IPS expects one supervisor to supervise and control 200 Structural Welders. And, despite the CO’s request for a more detailed explanation in the second RFI, Mr. Crawford did not address whether IPS’ supervision over the H-2B workers would be administrative or operational. Indeed, aside from Mr. Crawford’s vague references to “quality control,” it is unclear what supervisory authority IPS will actually exercise over the requested H-2B workers “other than hiring, paying, and firing.”

The Board has consistently held that mere statements of intent are not sufficient to meet the employer’s burden. *See, e.g., Costal Ventures Management, LLC*, 2011-TLN-00008 (BALCA February 15, 2011). Given the vague and self-serving nature of the statements upon which IPS relies, and their seeming implausibility, the CO reasonably rejected this evidence when determining that IPS was a “job contractor” under the regulations. Having determined that IPS was a job contractor, the CO had no choice but to deny its Application, since IPS had not filed it as a joint-employer with The Shaw Group.

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s denial of H-2B temporary labor certification is **AFFIRMED**.

For the Board:

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