

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 21 December 2012**

**BALCA Case Nos.: 2013-TLN-00014  
2013-TLN-00016  
2013-TLN-00017**

ETA Case Nos.: C-12290-59940  
C-12290-59942  
C-12290-59941

*In the Matters of:*

**INTERNATIONAL PLANT SERVICES, LLC,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Before: **PAUL C. JOHNSON, JR.**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**

The above-captioned cases are before the Board of Alien Labor Certification Appeals pursuant to Employer International Plant Services, LLC's petition requesting review of three Final Determinations issued by the above-captioned Certifying Officer resulting in the denial of IPS' applications for temporary labor certification under the H-2B non-immigrant program. Because all three appeals involve the same or a substantially similar set of operative facts and issues, I have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

The H-2B nonimmigrant program allows an employer to employ foreign nationals to perform temporary non-agricultural services or labor on a one-time, seasonal, peak load or intermittent basis, if there are not sufficient domestic workers who are able, willing, qualified, and available to perform such services or labor. *See generally*, 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. The U.S. Department of Labor (hereinafter "DOL" or the "Department") plays a key role in the admission of H-2B workers. Before filing a petition to classify an alien as an H-2B worker, a petitioning employer must obtain a temporary labor certification from the Department's Employment and Training Administration ("ETA"). 8 C.F.R. § 214.2(h)(6)(iii)(A); 20 C.F.R. § 655.00. To apply for such certification, petitioning

employers 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. These applications are reviewed by a Certifying Officer ("CO") within 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 the CO denies certification, in whole or in part, the petitioning employer may request 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).

## **BACKGROUND**

The Employer, International Plant Services, LLC (hereinafter referred to as "IPS" or "Employer"), assists clients in recruiting highly qualified technicians and engineers for oil & gas and construction projects all over the United States. (AF-14 at 25, 88).<sup>1</sup> On July 20, 2012, IPS filed three *Applications for Temporary Employment Certification* with the CNPC seeking temporary labor certification for 60 H-2B workers to be employed as "Electrical Power-Line Installers and Repairers" at three different worksites in Texas (20 H-2B workers per worksite). (AF-14 at 15-304; AF-16 at 16-223; AF-17 at 15-310). IPS listed a period of need beginning on July 1, 2012 and ending on May 1, 2013, and provided the following explanatory statement:

International Plant Services, LLC (hereinafter sometimes referred to as "IPS") is headquartered in La Porte, Texas and provides nationwide engineering and skilled craft services to industrial clients for capital and maintenance work. This includes engineering support, construction, commissioning and startup support, as well as maintenance and turnaround support services for operating facilities. IPS currently requires the temporary services of 20 foreign workers to fill the temporary, intermittent need position of Electrical Lineman at our client, Chapman Construction's, project site in [one of the three towns in Texas: Kileen, Burkburnett, or Goldthwalte]. Please see the statement in support for a detailed statement of the temporary need.

(AF-14 at 17; AF-16 at 18; AF-17 at 17). In the enclosed statement of support, IPS Operations Manager, Ed Sholes, elaborated on the alleged intermittent need. Mr. Sholes stated that IPS is "recognized as a pioneer in solving the great need by many U.S. contractors for qualified, skilled essential construction professionals that are needed to complete industrial projects" and "is often hired to provide hundreds of temporary workers at various skill levels to ensure successful completion of these industrial and oil and gas projects." (AF-14 at 26). Since the number of workers IPS needs to satisfy its contractual obligations varies depending on each contract, Mr. Sholes stated that IPS "often" has "an intermittent, temporary need for additional workers." *Id.* Turning to the instant request for H-2 workers, Mr. Sholes stated that IPS had been "engaged" by

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<sup>1</sup> Citations to the Appeal Files in these matters will be abbreviated as either "AF-14" "AF-15" or "AF-16" followed by the page number. AF14 = Case No. 2013-TLN-00014; AF16 = Case No. 2013-TLN-00016; AF17 = 2013-TLN-00017. Unless otherwise necessary, this decision will only cite to the Appeal File submitted in connection with 2013-TLN-00014.

Chapman Construction, “to provide . . . skilled craft workers to assist with a multi-million dollar project” for approximately 10 months, from July 1, 2012 until May 1, 2013, at three different worksites in Texas (AF-14 at 29).

On August 29, 2012, the CO denied all three applications, citing the IPS’ “failure to establish that the nature of [its] need is temporary,” as required by 20 C.F.R. § § 655.6, 655.21(a), and 655.22(n). (AF-14 at 395-401). Shortly thereafter, IPS timely requested BALCA review, and the matters were assigned to Associate Chief Administrative Law Judge William S. Colwell. (AF-14 at 514-516). After reviewing the record, Judge Colwell questioned whether the IPS was a “job contractor” within the meaning of 20 C.F.R. 655.4. *Id.* Because there was insufficient evidence in the record to make this determination, and the IPS’ classification as a job contractor affected the inquiry into its temporary need, he remanded the matter to the CO to allow IPS to present evidence and argument regarding its status as a job contractor. *Id.*

In accordance with the above remand, the CO issued a *Request for Further Information* (RFI) on October 16, 2012, directing IPS to submit additional information and documentation to assist the Department in determining whether it was a “job contractor,” as defined at 20 C.F.R. § 655.4. (AF-14 at 501-505). Such documentation was to include: (1) a contract between IPS and the client, Chapman Construction, detailing 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 Chapman Construction; (3) a written explanation regarding the amount of time supervisors will spend at the actual worksite location for Chapman Construction; (4) written explanation regarding the primary location of the supervisors; and (5) a written explanation regarding how IPS will provide supervisors for each worksite location for Chapman Construction. (AF-14 at 504). IPS was advised that, if it was a job contractor, it must file as a joint employer with its employer-client, Chapman Construction, and answer certain questions regarding its relationship with Chapman Construction. *Id.*

IPS responded via email on October 23, 2012, providing a cover letter signed by its attorney, and various supporting documentation, including: a letter from IPS President, Craig Crawford, discussing IPS’ anticipated supervision of the H-2B workers; a letter from the Vice President of Chapman Construction, Larry White, confirming that Chapman Construction “will NOT be a joint employer for the temporary H-2B workers”; a contract for services between IPS and Chapman Construction; and a projected payroll for the project with Chapman Construction demonstrating that IPS has budgeted a supervisor for all three of Chapman Construction’s project sites in Texas. (AF-14 at 466-499).

In his letter October 23, 2012 letter, IPS President Craig Crawford wrote to confirm that IPS “is not a job contractor under the regulatory definition.” He explained:

IPS will remain the employer in every aspect with regards to the temporary H-2B workers, and the work to be performed by them, in connection with this short-term project. The scope of IPS’ employer relationship with these employees includes asserting 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. At no time will the H-2B workers be

supervised or have their employment controlled by our client, Chapman Construction.

...

As the enclosed letter from the Willbros Group, Inc., the parent company to our client, Chapman Construction, confirms, Chapman Construction will not have any supervisory authority or employment control over IPS' temporary workers. The workers will be under the purview of IPS' control throughout the duration of the project, and accordingly, Chapman Construction is not considered a joint-employer under the regulations.

Further, IPS does not intend to contract out 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 more importantly, will 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 Chapman Construction.

(AF-14 at 478). Mr. Crawford stated that IPS plans to hire one supervisor for each of the three project sites in Texas to “oversee all work conducted by the 20 temporary Electrical Linemen and ensure that the standard of care taken with the work meets the quality control standards of IPS.” *Id.* Mr. Crawford confirmed that a supervisor would be “onsite for the entire duration of each workday (when the H-28 workers are onsite) and remain onsite with the H-2B workers until the scheduled completion of the project in May 2013.” *Id.*

On November 8, 2012, the CO issued a *Final Determination* denying IPS' applications. Citing *Comité de Apoyo a los Trabajadores Agrícolas v. Solis* [CATA], No. 2:09-cv- 240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), the CO informed IPS that the Department may not accept an H-2B application filed by a job contractor unless the job contractor's employer-client also submits an application. (AF-14 at 460). The CO acknowledged receipt of IPS' response to the RFI, but found 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-14 at 462). In arriving at this determination, the CO noted:

The RFI instructed IPS to provide a contract which detailed the provisions concerning the supervision of the workers. The contract does not specify or define the supervision or control of the project.

The RFI also instructed IPS to provide summarized payroll report showing the number of supervisors available to supervise this specific project for Chapman Construction. The letter from Craig Crawford, President of IPS, indicates that IPS typically assigns supervisors on a per project basis, as needed and that upon approval of the underlying H-2B filing, one supervisor will be hired and provided to oversee the 20 temporary workers. The payroll summary submitted is merely a "projected" payroll summary and does not demonstrate any supervisors being employed by IPS throughout the establishment of its company in 2003.

*Id.* The CO also reiterated his earlier finding that IPS had failed to establish a temporary need, as detailed in his August 29, 2012 denial. (AF-14 at 463). Specifically, the CO stated:

The original RFI dated July 30, 2012 instructed IPS to provide a complete, signed contract between IPS and the client, Chapman Construction, supplemented with documentation which specified the actual dates when work would commence and end, and clearly showed the work that would be performed for each month during the requested period of need. IPS provided a detailed description of job duties, but failed to indicate what the electrical linemen will be building, and failed to indicate specifically what work they will be performing for each month of the employer's requested dates of need. The letter also failed to indicate with specificity, what work the electrical linemen must complete in order to end its temporary need. The employer failed to provide an explanation and evidence to indicate how they will not have this need in the future. Additionally, the contract previously submitted, is a general contract for services and is not project specific, but is rather an ongoing engagement for services between IPS and Chapman Construction. In its initial RFI response, IPS indicated that the contract covered all services that IPS may provide to Chapman Construction, including engineering support, design support, planning support, management consulting, as well as the provision of skilled craftsman support, if needed, on present and future projects.

*Id.* Based on his finding that IPS did not present sufficient evidence regarding its status as a job contractor and the temporary nature of the work to be performed, the CO determined that IPS “does fall under the job contractor category and therefore, should have filed under the job contractor filing procedures which require examination of IPS’ own need for the services or labor in addition to the need of its client, Chapman Construction.” *Id.* Since the Department could not accept an application filed by a job contractor under the H-2B program unless the job contractor's employer-client submits an application as well, the CO concluded: “The deficiency remains with the application. Therefore, the application is denied.” *Id.*

By letter dated November 16, 2012, IPS requested administrative review of the denials pursuant to 20 C.F.R. § 655.33. (AF-14 at 1-12). BALCA issued a Notice of Docketing on November 21, 2012, setting forth an expedited briefing schedule. Counsel for the CO filed a brief on November 27, 2012; the Employer did not file an additional brief or statement of position.

## **DISCUSSION**

IPS concedes that it did not provide all of the documentation requested in the RFI, but maintains that it “provided as much of the requested documentation as was possible to produce,” and contends that its inability to produce “overly burdensome” documents should not prohibit certification. (AF-14 at 2-4). While IPS recognizes the Certifying Officer may request additional information and documentation, it argues that the regulations “should not be construed so strictly as to allow the Certifying Officer to deny an application simply because every piece of requested documentation was not provided in the RFI.” (AF-14 at 2).

The Department's H-2B regulations provide that "failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application." 20 C.F.R. § 655.23(d). On its face, this regulation appears to permit the CO to deny an application based solely on the employer's failure to provide all of the documentation requested in an RFI. Yet where, as here, the employer explains why it cannot produce the requested documentation and provides alternative evidence, it is an abuse of discretion for the CO to deny certification without considering whether such alternative evidence is sufficient to carry the employer's burden.

Upon reviewing the record, I agree with IPS, and find that the CO largely failed to address the veracity or value of IPS' alternative evidence. Nevertheless, IPS bears the ultimate burden of demonstrating entitlement to certification, and the CO's failure to address such evidence does not automatically constitute grounds for reversal. *See, e.g., Carlos UY III*, 1997-INA-304 (March 3, 1999) (*en banc*) (applying similar standard for denial of permanent labor certifications).

In all three cases, the CO found that IPS did not provide documentation and evidence sufficient to rebut the Department's belief that IPS was a job contractor under the regulations. (AF-14 at 463). Based on this failure, CO presumed IPS "fall[s] under the job contractor category" and denied the applications, stating that the Department may not certify a job contractor's application under the H-2B program unless the job contractor's employer-client files as a joint-employer.<sup>2</sup> IPS does not challenge the CO's authority to deny certification based on this basis; rather, it contends the CO erred in concluding that IPS was a "job contractor," as that term is defined at 20 C.F.R. § 655.4. (AF-14 at 8-11).

At the outset, I note that IPS is clearly a staffing services firm. On its website, IPS describes itself as a "contracting entity providing Pilipino Nationals for the United States such as engineers, project management, planners, schedulers, supervisors and skilled craftsmen." (AF-17 at 105). It also advertises its "staffing services" and promotes its ability to "provide personnel to augment your company's temporary staffing needs." (AF-17 at 105). Indeed, IPS' applications in these matters explicitly state that "Chapman Construction was unable to locate [Electrical Linemen] at each worksite through its own recruitment efforts, and accordingly has engaged IPS to assist them in locating temporary workers for this specific project." (AF-17 at 29).

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<sup>2</sup> *See Comité de Apoyo a los Trabajadores Agrícolas v. Solis [CATA]*, No. 2:09-cv- 240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010). 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 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.

Nevertheless, IPS argues that it is not a “job contractor” within the meaning of the regulations, since it “is the employer and will exercise supervision and control of the performance of services and/or labor to be performed.” The Department’s H-2B regulations define a “job 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 or 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 (2008).<sup>3</sup> In his brief, counsel for the CO argues that IPS falls under this definition because it “was unable to substantiate that it would be exercising supervision and control over its temporary employees.” Specifically, he argues:

The mere fact that IPS alleges that it will have a supervisor over these workers, without any supporting documentation, shows that it is a labor contractor under the regulations. The client, Chapman, controls and maintains the specific work assignments and duties of the workers and their use is contingent on Chapman’s own needs and not based on IPS’ instructions. It is clear that IPS does not exercise any significant “supervision or control in the performance of the services or labor to be performed” under its contractual arrangements with its client. The minimal supervision and activity that it may perform does not rise to the level that it may be considered a valid and appropriate employer under the H-2B regulations.

However, there no citations to the record, and I am left to guess which evidence in the 520 page Appeal File supports these conclusions.

IPS argues that a thorough review of the record reflects that it is not a “job contractor.” First, IPS points to the signed Support Services Agreement between itself and Chapman Construction (Willbros), and asserts that this document “states clearly that any temporary workers seconded are deemed employees of IPS, not Willbros, Chapman Construction’s parent company.” (AF-14 at 9). Second, IPS cites to the letter it provided from Mr. Larry White, and maintains that this letter “confirms the details surrounding the supervision of the temporary workers, and confirms that Chapman Construction will not have any control or supervisory duties in connection with the Electrical Linemen.” (AF-14 at 9-10). Third, IPS contends that Mr. White’s statements are further substantiated by Mr. Crawford’s letter, which confirms that “IPS’ employer relationship with [the H-2B workers] includes asserting complete supervisory

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<sup>3</sup> The Final Rule promulgated in 2012 defines a “job contractor” as a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor **and where the job contractor will not exercise substantial, direct day to-day supervision and control** in the performance of the services or labor to be performed other than hiring, paying and firing the workers. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Final Rule, 77 Fed. Reg. 10038, 10150 (Feb 21, 2012). However, on May 16, 2012, after the Department’s enforcement of the 2012 regulations had been enjoined by U.S. District Court for the Northern District of Florida, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. See *Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK (April 26, 2012); Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

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.” (AF-14 at 10). Finally, IPS asserts that it provided a payroll summary that listed its total revenue and outlined the exact number of skilled craftsmen on its current payroll, as well as a projected payroll summary, which identifies where the supervisor would fall in the budgetary and payroll records. *Id.*

Indeed, Mr. Crawford’s letter does confirm the number of supervisors assigned to each worksite location for Chapman Construction (one per worksite), and the amount of time each supervisor will spend at his or her assigned worksite (“the supervisor will be onsite for the entire duration of each workday and remain onsite with the H-2B workers until the scheduled completion of the project in May 2013). (AF-14 at 478). Mr. Crawford’s letter also provides a brief explanation regarding “how IPS will provide supervisors for each worksite location for Chapman Construction”:

[T]he supervisor is not already on IPS' payroll, as the enclosed summarized payroll report confirms. IPS typically assigns such supervisors on a per project bases, as needed, and accordingly, upon approval of the underlying H-2B filing, one supervisor will be hired and provided to oversee the 20 temporary workers for the underlying project In Killeen, Texas. Each supervisor has access to company vehicles to travel to and from project sites [or are reimbursed for costs associated with travel to and from each project site] which is common in our Industry.

*Id.* But it does not provide the factual background necessary to determine the actual extent of the alleged supervision; Mr. Crawford simply parrots the language necessary to escape classification as a “job contractor” under the section 655.4. In fact, the letter only provides one example of supervision and control that exceeds “hiring, paying, and firing the workers”— IPS’ “quality control of the work to be performed.” But the letter does not provide any explanation or detail as to how the alleged supervision over quality control will actually play out. In light of the aforementioned evidence that IPS is a staffing services firm, Mr. Crawford’s self-serving and undocumented assertions do not serve as credible evidence that IPS 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.”

The remaining evidence IPS relies upon similarly lacks probative value. Mr. White’s letter merely parrots Mr. Crawford’s statements, and lacks any additional explanation or factual detail. Like Mr. Crawford’s letter, IPS’ proposed payroll summary is self-serving. It does not serve as a suitable alternative to the CO’s request for “a summarized payroll report showing the number of supervisors available to supervise this specific project” in the RFI, since in making this request, the CO clearly sought evidence to corroborate any alleged supervision. Moreover, the fact that the Support Services Agreement between IPS and Chapman Construction confirms that “the employees seconded to [Chapman Construction] by IPS are deemed employees of IPS” is irrelevant; labeling workers IPS employees does not address IPS’ level of supervision or control. Indeed, the following provision—wherein Chapman Construction agrees to assume sole responsibility for documenting, on the appropriate OSHA forms, any injuries, accidents, illness or deaths of IPS employees at Chapman Construction’s project locations—suggests that IPS will not even be onsite to supervise these workers. (AF-14 at 488).

IPS concedes “it was engaged . . . to assist [Chapman Construction] in locating temporary workers for [a] specific project.” (AF-14 at 29.). Given this statement, one can only assume that while these workers will be hired, paid, and fired by IPS, their work will be supervised by Chapman Construction. The record contains no probative evidence indicating otherwise. The CO thus reasonably assumed that IPS met the definition of a “job contractor” at section 655.4. And, since IPS did not file as a joint-employer with Chapman Construction, the CO had no choice but to deny its applications.

### **ORDER**

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

For the Board:

**PAUL C. JOHNSON, JR.**  
Associate Chief Administrative Law Judge