



Issue Date: 19 December 2017

BALCA Case No.: 2018-TLN-00019
ETA Case No.: H-400-17177-360344

In the Matter of:

EAGLE PROCUREMENT & INDUSTRIAL CONTRACTOR, LLC,
Employer.

Appearance: Sujata P. Ajmera, Esq.
Strasburger & Price, LLP
Austin, TX
For the Employer

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Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Alan L. Bergstrom
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”) pursuant to the Employer’s request for review of the Certifying Officer’s (“CO”) denial in the above-captioned H-2B temporary labor certification matter. 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, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through

hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”) using an ETA Form 9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 C.F.R. § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.53(b); 20 C.F.R. § 655.61(a). During the administrative review only the material contained within the appeal file (“AF”)³ upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 C.F.R. § 655.61(e). Accordingly, the documents attached to Employer’s filings after the November 2, 2017, denial determination are not considered.

STATEMENT OF THE CASE

On August 18, 2017⁴ the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Eagle Procurement Industrial Contractors, LLC (“EPIC”) for 100 “Combo Welders” as one-time occurrence workers for employment from October 1, 2017 to September 30, 2018. (AF 483-500) with attachments in support of the application (AF 501-774). The position is classified as O*Net Code 51-4121, Welders, Cutters, Solderers, and Brazers, and is to be performed in Corpus Christi, Texas. As a minimum, completion of high school or GED as an educational requirement is specified in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment is required in Section F.b Item 3; but, indicated 36 month of experience as a Combo Welder or related field is required in Section F.b Item 4. (AF 483-486). The Employer also listed special requirements under Section F.b Item 5 requiring –

“the candidates pass an employer paid performance verification and random drug testing within 30 days prior to starting work ... the three years of documented and verifiable Combo Welder experience must be within the last five years. Must be able to weld GTAW and SMAW, Carbon Steel, 2”, and monster coupon in 6G position. Must have experience in GTAW and SMAW welding Sch. 10. Must have industry related knowledge of commonly-used welding concepts, practices, and procedures, including Gas-Metal Arc, Flux-Core Arc, Gas-Tungsten Arc, Submerged Arc, or Shield Metal Arc welding processes. Must be able to work in trenches welding Carbon Steel utility piping and in pipe racks welding in tight positions.

subsequent appropriations legislation, including the current continuing resolution. Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, Division A, § 101 (2017).

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that 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.

³ “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

⁴ Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e)

Must weld with minimal defects to ASME IX, B31.3. Employee will perform only welding and fabrication procedures he/she is certified in.

Experience welding 3047 stainless pipe, welding FCAW Carbon and Stainless pipe, and experience in construction of LNG plants, refineries or similar projects is preferred but not required. ... Must be able to lift/carry up to 50 pounds. ...”

(AF 486, 490). The Employer retained Sujata P. Ajmera, Esq., of Strasburger & Price, LLP, as its attorney in this matter. (AF 485).

On July 12, 2017 the CO issued a “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 474-482):

“Deficiency 1: Failure to establish the job opportunity as temporary in nature.

... The employer did not sufficiently demonstrate the requested standard of temporary need.

The employer is requesting 100 Combo Welders from October 1, 2017 to September 30, 2018 based on a one-time occurrence temporary need. In order to establish a one-time occurrence need, 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.

... the employer did not fully demonstrate how its need meets the regulatory standard. The employer has not submitted sufficient supplemental documentation identifying the source of its need for temporary workers during the requested period of need.

The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer’s response must include, but is not limited to the following:

Signed service contract(s) from customers identifying the specific work to be performed, the worksite(s) at which the work will be performed, and the specific timeframe the work will be performed during the requested period of employment. AND. An explanation describing how the contract(s) to perform the identified job duties under a one-time occurrence temporary need is different than other contracts which may be secured by the employer.

“Deficiency 2: Failure to establish temporary need for the number of workers requested.

... The employer did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bone fide job opportunities.

The employer did not include adequate attestations to justify the number of workers requested. The current application requests 100 Combo Welders from October 1, 2017 through September 30, 2018. It is unclear how the employer determined the number of workers needed to perform the identified job duties during the period of employment.

Further explanation and documentation is required in order to establish the employer’s need for 100 total workers.

... The employer must submit supporting evidence and documentation which explains how it calculated a need for 100 Combo Welders based on the particular contract on which it is basing its one-time need.

“Deficiency 3: Failure to submit an acceptable job order.

... The employer submitted a copy of its job order with its application to the CNPC; however, the Texas SWA has confirmed that the employer has not placed a job order for the requested position.

... In order to be in compliance with [20 C.F.R. § 655.18], the employer must submit its job order to the SWA serving the area of intended employment.

“Deficiency 4: Failure to satisfy the obligations of H-2B employers.

... The employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.

Specifically, the employer indicated in Section F.b, Items 4 through 4b, that it requires employees to have 36 months of experience as a Combo Welder or related field, which exceeds the standardized descriptor for this occupation in O*Net. O*Net indicates that 24 months of experience is normal and accepted for the occupation of Electrician Technician.

The employer must provide evidence that its job opportunity is a bone fide, full-time temporary position with required qualifications that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupations and area of intended employment.

The employer’s response must include, but is not limited to, the following:

1. Documentation which demonstrates that the employer’s requirements for the job opportunity are consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.
2. A letter detailing the reasons why 36 months of experience as an Electrician Technician is necessary for the specific occupation listed on the employer’s ETA Form 9142.

Or

The employer may amend its experience requirement throughout its application to be no more than 24 months.

Or

The employer may submit an already-amended job order that contains the required content of 20 CFR 655.18 as listed ...

“Deficiency 5: Disclosure of foreign worker recruitment.

... The employer’s application did not include any agreements between itself or its attorney and an agent or recruiter engaging in recruitment of H-2B workers.

The employer and its attorney must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this *Application for Temporary Employment Certification*, including the identity and location of all persons and entities hired by or working for the recruiter or agent. ...

Or

The employer must notify the Department that they will not utilize any agent or recruiter for the recruitment of H-2B workers under this *Application for Temporary Employment Certification*.”

On July 26, 2017 the Employer filed its response to the NOD (AF 421-473).

On September 8, 2017, the CO issued a second “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 413-420):

“Deficiency 1: Failure to establish the job opportunity as temporary in nature.

... The employer did not submit sufficient information in its *Application for Temporary Employment Certification* to establish its requested standard of need or period of intended employment.

Eagle Procurement & Industrial Contractor, LLC is requesting 100 Combo Welders from October 1, 2017 to September 30, 2018 under a one-time occurrence. In order to submit an application under a one-time occurrence, the 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.

... In the supplemental documentation provided with its application, the employer also provided numerous statements why it is filing under a one-time occurrence temporary need. ...

Although the employer states that this one-time occurrence need is tied to a specific contract for a construction project with set completion dates ... it is not clear that this contract/project represents a unique event in its business operations. Eagle Procurement Industrial Contractors, LLC shares contact information associated with numerous other business entities that have previous and current applications for the same type of projects and occupations related to the construction of petrochemical facilities. [CO inserted table for 29 Applications for Temporary Employment Certification from International Plant Services (6), Eagle Procurement & Industrial Contractor, LLC (4), Global Turnaround Services, LLC (9), OGS, LLC (2), Petroleum Services International, LLC (2), Transnational Industrial Process Services, LLC (4) and Worldwide Process Services, LLC (2) to support intertwined business entities requesting H-2B workers in the same or related occupations with same or related periods of need. (AF 417-419).]

... OFCL uses the Single Employer Test to determine whether two or more nominally separate entities are sufficiently intertwined such that they should be treated as a single employer. The test involves a fact-intensive consideration of 4 key factors:

1. Common ownership
2. Common management
3. Interrelated operations
4. Centralized control of labor relations or personnel practices.

No one factor is determinative. Whether two or more entities may be treated as a single employer depends on all the circumstances of the application, and is characterized by the absence of an arm’s length relationship among seemingly independent companies.

... The employer must explain in detail the differences in business operations between: Eagle Procurement & Industrial Contractor, LLC; Global Turnaround Services, LLC; International Plant Services; OGS, LLC; Petroleum Services International, LLC; Transnational Industrial Process Services, LLC; and Worldwide Process Services, LLC.

Supporting evidence and information is also required to substantiate the nature of the relationship between: Eagle Procurement & Industrial Contractor, LLC; Global Turnaround Services, LLC; International Plant Services; OGS, LLC; Petroleum Services International, LLC; Transnational Industrial Process Services, LLC; and Worldwide Process Services, LLC, as it relates to a temporary need based on a one-time occurrence and how the contract underlying this application represents a unique event in overall business operations.

The employer must submit: [21 separately identified items related to management, officers, directors, ownership, complementary / similar duties, dates of need, housing, payroll, insurance programs, bank accounts, documents, officers, billing, personnel policies/records/recruitment, employment decisions, attorneys and agents].”

On September 22, 2017 the Employer filed its response to the second NOD (AF 311-412).

On November 2, 2017, the CO found the Employer’s response to the Notice of Deficiency unacceptable and denied the *Application for Temporary Employment Certification* for the 100 Combo Welders by Employer in accordance with Departmental regulations at 20 CFR §655.32(c). The CO set forth the following reason for the denial of the application (AF 298-302):

“Deficiency: Failure to establish the job opportunity as temporary in nature.

... The employer did not sufficiently demonstrate the requested standard of temporary need.

The employer is requesting 100 Combo Welders from October 1, 2017 to September 30, 2018 based on a one-time occurrence need, 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.

Section B, Item 9, of the ETA Form 9142 indicates the following:

At this time, (the employer) is submitting an Application for Temporary Employment Certification for 100 Combo Welders based on our current need for temporary workers to successfully fulfill a one-time unique contract. This one-time construction project is finite, has a set completion date, and will not yield the need for such workers after the end date of need has passed.

... In response to the Notice of Deficiency, the employer, through its attorney, reiterated that the employer’s basis for a temporary, one-time need is the fact that it never had a contract for its services of this size and scope. The attorney pointed out that the contract is most significant contract that the company has ever been awarded and it does not anticipate being given this opportunity at any time in the near future.

The employer also provided extensive discussion and verification of the size and scope of the underlying project – the construction of the M&G Chemicals petro-chemical plant in Corpus Christi, Texas. The information suggests that this is a multi-billion dollar construction project that the employer considers one-of-a-kind due to its full integration as a chemical manufacturing complex. This construction project, in fact, is the basis for one-time need requests by several other employers in the family of companies that this employer is part of.

Although the employer has been engaged to provide services in furtherance of a very large project, and although the employer has not previously been granted a contract of this size and scope, it is reasonable to expect that the company will continue to be in the business of continually seeking

out and performing similar services in support of the construction and/or petrochemical industries, alone or, as in this case, in concert with its family of companies. While these workers are being sought for a specific contract, there is no reason to expect that, when the project is complete, other similar projects will not present themselves. The very nature of the employer's business model would mean that, in order for the company to survive, other contracts must follow this contract. Therefore, the employer did not overcome the deficiency."

... Based on the foregoing reason(s), the employer's application is denied."

On November 16, 2017, the Employer filed a timely formal request for administrative review of the denial determination with attachments that were duplicative of those before the CO when the denial determination was made. (AF 1-297). In its "Request for Administrative Review," the Employer's attorney argues that the CO summarily dismissed evidence related to establishing a temporary need based on a one-time occurrence which amounted to an abuse of discretion; argues that the CO already approved applications from Employer for pipefitters and instrument technicians for the same project on a temporary need based on a one-time occurrence such that denial of the request for combo welders is inconsistent reasoning; submits that "the request to provide craft service workers is truly unique for the company and is markedly different from its ongoing business contracts ... [and] EPIC does not intend to make contracts of this type a part of its regular business practices ... [and argues] consideration must be given to the unique nature of the opportunity, as well as the overall mission of the company." He submits that "the standard of review requires that the Certifying Officer analyze whether or not EPIC, and EPIC alone, has a bona fide one-time need for workers associated with the M&G PTA/PET project." Employer's counsel requests the denial "be reversed and that the CNPC be instructed to issue a Notice of Acceptance to allow EPIC to engage in active recruitment."

The Solicitor filed notice on December 14, 2017, that she would not file a legal brief in this case.

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The qualifications and requirements for the job "must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment," 20 CFR §655.20(e). Additionally, the employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary ... The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by [the Department of Homeland Security] regulations.

Here the Employer has filed its application as a "one-time occurrence" in Item B.8 of its filed ETA Form 9142B. (AF 483). Departmental regulations provide that in order for an employer to establish the intended employment is temporary as a "one time occurrence," the 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." 8 CFR §214.2(h)(6)(ii)(B)(1). "The use of this [one time

occurrence] category is limited to those circumstances where the employer has a non-recurring need which exceeds the 9 month limitation.” 80 Fed Reg. 240056 (Apr. 29, 2015).

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b). BALCA may only consider the documentation considered by the CO in its final denial determination as contained in the AF and may also consider the arguments set forth in the request for review and legal briefs submitted to BALCA. 20 CFR §655.61(e). Accordingly, the documents attached to the request for review filed with the CO and contained in the AF, as well as the documents filed with BALCA cannot be considered beyond argument.

After giving the Employer the opportunity to distinguish its operations from that of identified related companies who have filed applications for temporary labor certifications in the construction industry, including work on the M&G Chemicals plant, the CO found, based on the original information submitted by the Employer in the AF, that the Employer has failed to sufficiently establish that the need for 100 Combo Welders is temporary under Departmental regulations. The CO points to Employer’s argument made that the need is because of a large contract involved with the multi-billion construction of M&G Chemicals petro-chemical plant in Corpus Christi, Texas and that it is reasonable that the Employer and its interrelated companies will continue to seek subsequent recurring contracts for Combo Welders as part of its business model.

In response to the second Notice of Deficiency (“NOD”), the Employer filed numerous documents related to it as well as associated Limited Liability Companies (“LLC”) and Industrial Maintenance International Manpower, Inc. of Manila, Philippines (“IMIMI”). The Employer’s counsel made a detailed statement as to the points raised in the second NOD. (AF 320-331).

IMIMI is “a domestic corporation duly organized and existing under the laws of the Philippines with office address at 2nd Floor Eagle Bldg., No. 2621 Alejo Aquino St., Singalong, Manila, Philippines.” Its identified president is Luzviminda Kalaw. (AF 402). On December 8, 2015, the Secretary of State of the State of Texas accepted a “Certificate of Formation” for Eagle Engineering & Contractor LLC as a Domestic Limited Liability Company effective December 9, 2015. (AF 351). The filing identified the organizer as IMIMI and the governing authority as manager 1 – IMIMI, manager 2 – Maylene Santiago of La Porte, TX, and manager 3 – Karim Ayed of La Porte, TX. (AF 345-346). On January 28, 2016, Maylene Santiago filed a “Certificate of Amendment” with the Secretary of State of Texas to change name from Eagle Engineering & Contractor LLC to Eagle Procurement & Industrial Contractor, LLC (the “Employer” in this BALCA appeal; also referred to hereafter as “EPIC”). (AF 342-344, 348-350).

In June 2016 IMIMI entered into a “Recruitment Agreement” with EPIC, “an entity organized and existing under the laws of the United States with postal address at 1602 Old Underwood Rd.,

La Porte, TX” as a “Foreign Principal.” Its identified president is Karim Ayed. The contract was “for the purpose of pre-selecting, recruiting, processing and documenting Filipino workers hired for through [IMIMI] for [EPIC’s] operation in the USA. (AF 402). The Employer failed to attach “Master Contract of Employment” which was integral part of contract authorizing IMIMI all powers as agent of EPIC. Luzviminda Kalaw signed for IMIMI as president. Karim Ayed signed as president for EPIC. (AF 402-406). On June 27, 2016, Karim Ayed, as president of EPIC filed an “Employers Information Card” with the Embassy of the Philippines for Philippine workers to be hired by EPIC. (AF 352).

It is specifically noted that EPIC was owned, in part, by IMIMI at the time the “Recruitment Agreement” was entered. Karim Ayed is minority owner & president and Maylene Santiago is the remaining owner/manager.⁵ Tom Schanze is listed as a consultant with Jack McClain listed as account operations manager, Strasburger & Price listed as legal representative, Consolacion Saludes listed as accounting & finance. Laysander Bustamante is listed as plant operations under Jack McClain with oversight of “craftsmen.” While “Skilled Professionals and Specialists” are listed under Jack McClain. (AF 336). EPIC indicated in its 2016 “Texas Franchise Tax Public Information Report” that Karim Ayed was the sole director and was president; Maylene Santiago was listed as EPIC’s registered agent at same business address. (AF 355-356). In the second NOD the CO indicated the following applications for temporary labor certification were submitted by EPIC (AF 413-420):

H-400-17179-856470	50 Electrician tech requested – under modification	10/1/2017-9/30/2018
H-400-17179-501874	50 Instrument tech requested – pending	10/1/2017-9/30/2018
H-400-17177-360344	100 Combo welders requested – pending	10/1/2017-9/30/2018
H-400-17009-538313	200 Journeyman pipefitters requested – pending	10/1/2017-9/30/2018

Karim Ayed is also the president of Global Turnaround Services LLC. Tom Schanze is listed as vice president with Elgin Galang as plant operations, Strasburger & Price as legal consultant, and Aileen Galang as accounting. “Skilled Workers” are listed under Elgin Galang. (AF 335). Other than an inference created by Employer’s counsel statement at AF321 and 330, there is no indication of whether Karim Ayed is the sole owner of this LLC or if either IMIMI or Maylene Santiago is an owner of this LLC. In the second NOD the CO indicated the following applications for temporary labor certification were submitted by Global Turnaround Services, Inc. (AF 413-420):

H-400-16313-087598	75 Welders requested	71 certified	2/15/2017-3/1/2018
H-400-16319-804805	130 Pipefitters requested	126 certified	2/15/2017-3/1/2018
H-400-17020-326972	75 Welders requested – withdrawn pre-acceptance		4/5/2017-4/1/2018
H-400-17020-506717	130 Pipefitters requested – withdrawn pre-acceptance		4/5/2017-4/1/2018
H-400-17004-028366	124 Combo welders requested – pending		10/1/2017-8/31/2019
H-400-17188-218639	50 Instrument tech requested – rejected		10/1/2017-8/31/2019
H-400-17188-114636	100 Electrician tech requested – rejected		10/1/2017-8/31/2019
H-400-17207-893971	100 Electrician tech requested – pending		10/1/2017-8/31/2019
H-400-17207-571385	50 Instrument tech requested – pending		10/1/2017-8/31/2019

⁵ This is contrary to the inference created by Employer’s counsel at AF 330 that Karim Ayed is the owner of all the associated companies.

Karim Ayed is also the president of International Plant Services LLC. Tom Schanze is listed as vice president/operations with Strasburger & Price as legal consultant, Maylene Santiago as controller, and Pierce Mulvaney as site manager who oversees the workforce coordinators. (AF 333) Maylene Santiago is part owner/manager of IMIMI as is Karim Ayed. Other than an inference created by Employer’s counsel statement at AF 321 and 330, there is no indication of whether Karim Ayed is the sole owner of this LLC or if either IMIMI or Maylene Santiago is an owner of this LLC. In the second NOD the CO indicated the following applications for temporary labor certification were submitted by International Plant Services LLC (AF 413-420):

H-400-16015-880879	400 Pipefitters requested	250 certified	4/1/2016-10/1/2016
H-400-16020-842246	200 Welders requested	67 certified	6/1/2016-10/6/2016
H-400-16019-079792	400 Pipefitters requested	358 certified	6/1/2016-10/6/2016
H-400-16029-752844	50 Instrument tech fitters requested – withdrawn pre-acceptance		
H-400-16189-534508	39 Welders requested	25 certified	10/1/2016-3/31/2017
H-400-16197-275709	236 Pipefitters requested	226 certified	10/1/2016-3/31/2017

Karim Ayed is also president of OGS LLC.⁶ Tom Schanze is listed as vice president with Strasburger & Price as legal representative, and Hammack Co. & CPAs as bookkeeper. The submitted document indicates that the plant operations manager is to be determined. (AF 337). Other than an inference created by Employer’s counsel statement at AF 321 and 330, there is no indication of whether Karim Ayed is the sole owner of this LLC or if either IMIMI or Maylene Santiago is an owner of this LLC. In the second NOD the CO indicated the following applications for temporary labor certification were submitted by OGS LLC (AF 413-420):

H-400-17178-278337	125 Journeyman pipefitter requested – pending		10/1/2017-9/30/2018
H-400-17173-801848	125 Combo welders requested – pending		10/1/2017-9/30/2018

Karim Ayed is also president of Petroleum Services International LLC. Tom Schanze is listed as adviser with Jack McClain as account manager, Strasburger & Price as legal representative, and Hammack Co. & CPAs as accountant. (AF 338) Other than an inference created by Employer’s counsel statement at AF 321 and 330, there is no indication of whether Karim Ayed is the sole owner of this LLC or if either IMIMI or Maylene Santiago is an owner of this LLC. In the second NOD the CO indicated the following applications for temporary labor certification were submitted by Petroleum Services International LLC (AF 413-420):

H-400-17178-278337	100 Journeyman pipefitter requested – pending		10/1/2017-9/30/2018
H-400-17177-419820	100 Combo welders requested – pending		10/1/2017-9/30/2018

Karim Ayed is also president of Transnational Industrial Process Services LLC. Tom Schanze is listed as adviser with Alex Smith as account representative, Strasburger & Price as legal representative, and Hammack Co. & CPAs as bookkeeper. (AF 339). Other than an inference created by Employer’s counsel statement at AF 321 and 330, there is no indication of whether Karim Ayed is the sole owner of this LLC or if either IMIMI or Maylene Santiago is an owner of this LLC. In the second NOD the CO indicated the following applications for temporary labor certification were submitted by Transnational Industrial Process Services LLC (AF 413-420):

⁶ OGS, LLC has pending before BALCA two related appeals: 2018-TLN-00020 for 125 Combo welders [H-400-17173-801848] and 2018-TLN-00021 for 125 Journeymen pipefitters [H-400-17178-278337]. No information contained in those respective appeal files has been considered in this current BALCA appeal.

H-400-17179-154692	150 Journeyman pipefitter requested – rejected	10/1/2017-9/30/2018
H-400-17170-640605	100 Combo welders requested – rejected	10/1/2017-9/30/2018
H-400-17205-841198	150 Journeyman pipefitter requested – pending	10/1/2017-9/30/2018
H-400-17205-486964	100 Combo welders requested – pending	10/1/2017-9/30/2018

Karim Ayed is also president of Worldwide Process Services LLC. Tom Schanze is listed as adviser with Alex Smith as account representative, Strasburger & Price as legal representative, and Hammack Co. & CPAs as accountant. (AF 340). Other than an inference created by Employer’s counsel statement at AF 321 and 330, there is no indication of whether Karim Ayed is the sole owner of this LLC or if either IMIMI or Maylene Santiago is an owner of this LLC. In the second NOD the CO indicated the following applications for temporary labor certification were submitted by Worldwide Process Services LLC (AF 413-420):

H-400-17177-950750	100 Combo welders requested – pending	10/1/2017-9/30/2018
H-400-17178-556179	150 Journeyman pipefitter requested – pending	10/1/2017-9/30/2018

Employer submitted a “Corporate Network Visualizer” to assist in the understanding of the relationship of “the Ayed family of companies.” (AF 321). The document places Karim Ayed as owner/president at center of the diagram with International Plant Services LLC, Global Turnaround Services LLC, Petroleum Services International LLC, OGS LLC, Transnational Industrial Process Services LLC, Worldwide Process Services LLC and EPIC reporting into Karim Ayed and Karim Ayed reporting out to the Philippine company IMIMI. (AF 334). Employer’s counsel asserts in her response to the second NOD that “In all instances, [Karim] Ayed has authority to hire, fire, direct and supervise the work of employees, as he is the President and Owner of all companies.” (AF 330).

Jack McClain signed as Account Manager for EPIC on the “Statement in Support of Application for Temporary Employment Certification” for EPIC. (AF 510-521). He also signed EPIC’s employer 9142B-Appendix B attestations (AF 493, 500); signed a declaration he requested Strasburger & Price LLP, to provide legal representation (AF 495-496); was identified as EPIC’s point of contact on the 9142B application (AF 484); and signed an undated TX legal counsel retainer contract with Strasburger & Price, LLP (AF 412). He also signed as “Client Manager” for EPIC on the “Agreement for Supply of Agency Personnel” with Jacobs Field Services North America, Inc. (“Jacobs”) to furnish employees identified in Exhibit A to the contract, though no Exhibit A listing personnel needs was submitted for consideration. (AF 440-449).

Jack McClain as EPIC’s account manager also signed the July 25, 2017, “Supplemental Statement in Support of H-2B application” in which he confirmed that EPIC had a contract with Jacobs for “craft workers” to work in constructing “the world’s largest PTA/PET plant which EPIC sees as “a one-time opportunity ... to provide services on this industry-changing project, a crowning achievement for EPIC and will become the basis for future market opportunities for the company.” He stated “the significance of this project is acknowledged throughout the industry an (sic) opportunity to provide services like this is not likely to come around again. ... This project is finite in scope, will come to a definite end, and is distinctly different from other construction projects that upon conclusion of work, EPIC will no longer require the services of these temporary workers in the United States.” He stated that the number of 100 Combo

Welders was based on the request of Jacobs. As EPIC's account manager, Jack McClain provided in underlined and bold print that "**Finally, in addition to our pervious confirmation in the underlying statement in support, please accept this letter as EPIC's additional confirmation that it does not plan to use a recruiter or agent to hire temporary workers and will instead rely on its own internal resources to conduct this recruitment.**" (AF 451-453). This position was contradicted by Employer's counsel in her response to the second NOD when she acknowledged EPIC's "relationship with a foreign recruiter and has retained them in the Philippines to assist with the recruitment and hiring of foreign workers should the underlying H-2B application be accepted and ultimately certified." (AF 331).

Scott Marshall, who was vice president / human resources for Jacobs, and whose name appears on the "Agreement for Supply of Agency Personnel", provided a statement on June 29, 2017, that "Jacobs currently has major capital projects in South and Southeast Texas" and that EPIC is to provide "one-hundred (100) unnamed temporary alien workers to be employed in Corpus Christi, Texas as Combo Welder as subcontractor to Jacobs." He reports "Jacobs is under contract with M&G Chemicals for the construction of the largest Polyethylene Terephthalate (PET) plant in the world. ... EPIC has been contracted to supply, retain, and supervise a number of craft construction teams of skilled Combo Welders and management support teams to support construction of the two new plants at the M&G Chemical Plant in Corpus Christi, TX. The need for Combo Welders for the M&G project is expected to peak in December 2017..." (AF 455-456).

Sujata P. Ajmera, Esq., of Strasburger & Price, LLP, filed EPIC's Application for PWD 9141; signed EPIC's 9142B – Appendix B attorney declaration (AF 491, 498); is identified as EPIC's attorney on the 9142B application (AF 485); signed EPIC's response to first NOD (AF 433-438); signed the undated Texas legal counsel retainer contract for Strasburger & Price, LLP with EPIC (AF 411); stated in the retainer contract that there was no conflicts of interest with other clients; and signed the response to 2nd NOD. (AF 320-331). Josie Rubio as Immigration Paralegal of Strasburger & Price, LLP prepared EPIC's 9142B. (AF 488).

Here EPIC argues that the need for 100 Combo Welders is a unique opportunity tied to a single contract with Jacobs and "it is not likely" EPIC will have another such opportunity. However, the second NOD the CO noted EPIC "shares contact information associated with numerous other business entities that have previous and current applications for the same type of projects and occupations related to the construction of industrial petrochemical facilities." The CO directed EPIC to "explain in detail the differences in business operations" of the limited liability companies set forth above in order to address the "Single Employer Test" used by OFLC "to determine whether two or more nominally separate entities are sufficiently intertwined such that they should be treated as a single employer." The CO advised the factors considered include common ownership, common management, interrelated operations, and centralized control of labor relations or personnel practices and is characterized by the absence of arm's length relationship among seemingly independent companies. (AF 418-419).

Under Departmental regulations, an "Employer" is "a person including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust or other organization with legal rights and duties) that: (1) has a place of business (physical location) in

the U.S. and a means by which it may be contacted for employment; (2) has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and (3) possesses, for the purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).” Under Departmental regulations, an employer and its attorney must identify and provide copies of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under the Application for Temporary Employment Certification. 20 C.F.R. § 656.9(a). Except for employers in the seafood industry, only one Application for Temporary Employment Certification may be filed for worksites within one area of intended employment for each job opportunity with an employer for each period of employment. An association or other organization of employers are not permitted to file master applications on behalf of its employer-members under the H-2B program. 20 C.F.R. § 655.15(f).

Since IMIMI does not have a place of business in the United States it cannot qualify as an employer or job contractor under the H-2B program. 20 C.F.R. § 655.5. However, the documents submitted by EPIC demonstrate that under the H-2B program IMIMI is a foreign labor recruiter in the Philippines for EPIC, notwithstanding the interlocking ownership and management of EPIC by IMIMI and contrary to the bold assertion of EPIC’s accounts manager at AF 453.

The remaining issue is whether the U.S companies involved with IMIMI and Karim Ayed are so integrated that they are considered a single employer for purposes of the H-2B program. The CO has asserted that the remaining identified companies which have filed *Applications for Temporary Employment Certification* are to be considered as a single employer in evaluating their respective applications and that EPIC has failed to demonstrate otherwise.

The CO submits that the single employer test requires consideration of (1) common ownership, (2) common management, (3) interrelated operations, (4) centralized control of labor relations or personnel practices, and (5) the absence of arm’s length relationship among seemingly independent companies; though no one factor is controlling. Similar factors are used in “single employer test,” “single-entity test,” and “integrated employer test” used in Worker Adjustment and Retraining Notification Act (WARN) cases, the Rehabilitation Act and Vietnam Era Veteran’s Readjustment Assistance Act (VEVRAA) cases, employment discrimination cases⁷ based on protected status of individuals, and whistleblower complaints under numerous Federal Statutes. See *Manheim Auctions, Inc. & Manheim Auction Government Services, d/b/a Manheim Government Services*, 2011-OFC-0005 (BALCA June 14, 2011); *Watts v. Marco Holdings, L.P.*, 1997 WL 578783 (N.D. Miss. 1997)(unpub); *Pearson v. Component Technology Corp.*, 247 F.3d 471 (3rd Cir. 2001) and cases cited therein; *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332 (11th Cir. 1999); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998) A similar factor test is used by the Department in determining a “successor in interest” for employers who

⁷ Under the aggregation test in discrimination cases, the most important factor is “What entity made the final decisions regarding employment matters related to the person claiming discrimination”, *Roberts v. Fulton County Railway, LLC*, 2008 WL 5115053, *2 (N.D. Ga. 12/2/2008) citing *Trevino v. Celanese Corp.*, 701 F.2d 397, 404-405 (5th Cir. 1983)

have violated H-2B duties and obligations and have ceased doing business or cannot be found. See 82 Fed. Reg. 24042 at 24112 (Apr. 29, 2015).

Based on the AF, IMIMI is a foreign labor recruiter and is part owner and manager of Employer EPIC. The other two owners/managers of EPIC are Karim Ayed and Maylene Santiago. IMIMI was also the organizer for EPIC. Employer EPIC did not provide further information on the involvement of IMIMI in the organization, ownership, or management of the other identified companies that filed *Applications for Temporary Labor Certification* noted above; but did provide sufficient documentation to establish that Karim Ayed is a manager and president in every one of the noted companies; that Maylene Santiago is the controller for International Plant Services LLC; that Tom Schanze is listed as the number two official (vice president, operations manager, or advisor) in every one of the noted companies; that Strasburger & Price LLP is listed as the company law firm in every one of the listed companies; and accounting is provided by Hammack Co. & CPAs for OGS LLC, Petroleum Services International LLC, Transnational Industrial Process Services LLC, and Worldwide Process Services LLC. Additionally, EPIC submitted an overview indicating that all U.S. companies reported to Karim Ayed who in turn reported to IMIMI.

In the NOD the CO noted that EPIC's sister companies which all report to Karim Ayed, had filed *Applications for Temporary Labor Certification*, some of which involved work at the M&G Chemical Plant, and provided the control numbers for 29 applications involving EPIC and the sister companies. EPIC did not provide any information to distinguish the applications by time, scope or place of intended employment, even though Karim Ayed and Tom Schanze are involved in each identified company and would be well aware of how and where each company would be utilizing the requested temporary H-2B foreign labor.

In view of all the foregoing, the Employer, EPIC, has failed to establish that common ownership, common management, and integrated operations does not exist among the identified eight companies.⁸

For centralized control of labor relations or personnel practices, Employer, EPIC, provided its own employee handbook and an assertion that each company supervises their own respective employees. However, EPIC failed to provide sufficient information to determine whether the requested 100 Combo Welders would be employees of EPIC or Jacobs. Scott Marshall reported that EPIC is to provide 100 unnamed temporary alien workers to be employed in Corpus Christi, Texas as Combo Welder as subcontractor to Jacobs. But EPIC reported that it had a contract with Jacobs for "craft workers" to work in construction to provide services where the number of 100 Combo Welders was based on the request of Jacobs. EPIC also alludes that it will provide separate management or supervision in other areas for Jacobs. However, EPIC did not provide the full contract it states exists with Jacobs as requested by the CO in the NOD. This leaves open whether EPIC is using the 100 Combo Welders to complete specific subcontracted construction

⁸ Employer's counsel made an effort to explain how "Each Ayed company was formed to address a specific and separate area of the industry and none of them overlap with the other in pursuit of appropriate clients and projects" but failed to submit organizational documents, mission statements, underlying contracts and/or subcontracts identifying specific work or separate areas of intended employment, from each of the "Ayed family of companies" for consideration, though she made broad assertions as to those factors in her cover letter at AF 325-328.

tasks, such as installing pipelines or conduits under EPICS' supervision, or merely providing the number of Combo Welders requested by Jacobs for it to supervise, assign work, and control on a daily basis. If the later event is true, EPIC is a "job contractor"⁹ at best, though its organizational and contractual relationship with IMIMI, combined with a lack of the referenced Jacobs contract submission and EPIC's statement that it will use its own internal resources to recruit foreign workers, infers that EPIC will function as Jacobs' foreign labor recruiter and not as a true subcontractor using welders to complete identifiable and specific construction tasking overseen by EPIC as a subcontractor for a finite period of time.

When the credible evidence submitted to the CO prior to November 2, 2017 is considered as a whole, EPIC has failed to establish that it is operating independently of IMIMI, International Plant Services, Global Turnaround Services LLC, OGS LLC, Petroleum Services International LLC, Transnational Industrial Process Services LLC, and Worldwide Process Services LLC. Accordingly, the 67 welders certified for International Plant Services for June 1, 2016 through October 6, 2016 (H-400-16020-842246); the 39 welders certified for International Plant Services for October 1, 2016 through March 31, 2017 (H-400-16189-534508); and the 71 welders certified for Global Turnaround Service LLC for February 15, 2017 to March 1, 2018 (H-400-16313-087598) demonstrate that the companies led by Karim Ayed have utilized welders in the past, prior to EPIC's requested period of need October 1, 2017 to September 30, 2018. Additionally the request for 124 combo welders filed by Global Turnaround Services LLC (H-400-17004-028366) for the period from October 1, 2017 to August 31, 2019 demonstrates a continued need for welders beyond EPIC's requested period of October 1, 2017 to September 30, 2018. Finally, when the pending applications for welders, that overlap EPIC's stated period of need, submitted by OGS, LLC (125 combo welders under H-400-17173-801848), Petroleum Services International LLC (100 combo welders under H-400-17177-419820), Transnational Industrial Process Services LLC (100 combo welders under H-400-17205-486964) and Worldwide Process Services LLC (100 combo welders under H-400-17177-950750) are considered, the CO is correct in considering the identified U.S. companies as an interrelated application for 525 combo welders in Southeast Texas which requires further investigation and employer justification in each application.

In view of all the foregoing, the Employer, EPIC, has failed to meet its burden to establish that it has a singular, independent, non-recurring temporary need for 100 foreign combo welders on a one-time occurrence basis for the period from October 1, 2017 to September 30, 2018, that will not be again needed in the future, as required by 20 C.F.R. § 655.6(a) and (b) and 8 C.F.R. 214.2(h)(6)(ii)(B)(1).

⁹ A "job contractor" is only permitted to file Applications for Temporary Labor Certification based on a seasonal need or a one-time occurrence for its own temporary need. 20 C.F.R. § 656.6(c).

ORDER

It is hereby ORDERED that the Certifying Officer's DENIAL of the Employer's August 18, 2017, *Application for Temporary Employment Certification* is AFFIRMED.

SO ORDERED.

For the Board:

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, VA