



Issue Date: 26 December 2017

BALCA Case No.: 2018-TLN-00020
ETA Case No.: H-400-17173-801848

In the Matter of:

OGS, LLC,

Employer.

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

Sarah M. Tunney, Esq.
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 July 3, 2017⁴ the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from OGS, LLC for 125 “Combo Welders” as one-time occurrence workers for employment from October 1, 2017 to September 30, 2018 (AF 760-770), with attachments in support of the application (AF 771-1049). The position was listed by the Employer as O*Net Code 47-2152, “Plumbers, Pipefitters, and Steamfitters” in Section B.2 and B.3 of the filed ETA Form 9142B⁵ (AF 760) and is to be performed in Westlake, Louisiana (AF 763). 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 760-770). 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 ... 3 years of experience as a combo welder or related field. 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.

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)

⁵ The discrepancy between the job opportunity of Combo Welders and the O*Net code for Plumbers, Pipefitters and Steamfitters was not corrected to the O*Net code for welders in the denied application (AF 545).

Must be able to work in trenches welding Carbon Steel utility piping and in pipe racks welding in tight positions.

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 763, 767). The Employer retained Sujata P. Ajmera, Esq., of Strasburger & Price, LLP, as its attorney in this matter. (AF 762).

On July 13, 2017 the CO issued a “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 751-759):

“Deficiency 1: Definition of Employer.

... Based on the information in its application, the Chicago National Processing Center (CNPC) was unable to verify the existence of the business associated with this filing.

... The employer must submit evidence that it satisfied the regulatory definition of H-2B employers. The employer’s response must include evidence which shows the employer’s business name and the address provided on the ETA Form 9142 is associated with OGS, LLC. Examples of evidence may include articles of incorporation, a business license, other documents issued by the State of Texas which indicates the business name and address, documentation issued by the IRS which indicates the business name and address, bank account statements that list the requested information or other official documentation which satisfies the requirement.

Deficiency 2: Disclosure of foreign worker recruitment.

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

... The employer and its attorney/agent 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. All agreements must contain the required language prohibiting seeking or receiving payments from prospective employees as indicated at 20 CFR 655.20(p).

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*.

Deficiency 3: Failure to submit a complete and accurate ETA Form 9142.

... The ETA Form 9142, Appendix B submitted by the employer contains a digital signature. The ETA Form 9142, Appendix B must contain original signatures.

... The employer must submit a complete ETA Form 9142, Appendix B. Appendix B must be dated and contain the original signatures of the employer and, if applicable, its agent or attorney.

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

... The employer did not include assurances that the employee will receive pay at least every two weeks.

Specifically, the employer's temporary need statement reads "OGS employees will be paid semi-monthly, and the Petitioner will use a single workweek as its standard for computing wages due." However, [20 CFR 655.20(h)] state that the employer must pay the employee at least every two weeks.

... The employer must amend their temporary need statement to indicate that workers will be paid at least every two weeks.

Deficiency: 5 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, Item 5, that it requires employees to pass an employer paid performance verification and random drug test within 30 days prior to starting work. The employer also states: Any employee who does not pass these tests will be terminated ... and any foreign national who fails either test will be provided return transportation home at the expense of the employer ...

Based on the employer's statement, passing of these tests is a condition of employment, yet free transportation home is not provided equally to those who fail, but only for foreign workers.

Further, the employer did not provide any supporting documentation to establish that its performance verification test is consistent with the normal and accepted qualifications imposed by non-H-2B employers of Journeyman Pipefitters.

... The employer must provide evidence that its job opportunity is a bone fide, full-time temporary position with required qualification that are normal and accepted qualification and requirements imposed by non-H-2B employers in the same occupation 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 accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment; and
2. A letter detailing the reasons why the required test is necessary for the specific occupation listed on the employer's ETA Form 9142. The employer must also provide information in advance as to what constitutes a pass v. fail and the employer must include the test requirement on its ETA Form 9142. Finally, the employer must provide free transportation home to both U.S. workers and foreign national if they fail the test and so indicate this on ETA Form 9142.

Deficiency 6: 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 Welders, Cutters, Solderers, and Brazers.

Additionally, the employer has included a minimum education requirement of a High School/GED. However, this requirement exceeds the standardized descriptor for this occupation in O*Net for the requested occupation.

... 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 a Combo Welder is necessary for the specific occupation listed on the employer's ETA Form 9142; and
3. A letter detailing the reasons why a High School/GED diploma is required 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 and remove its minimum education requirement.

Or

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

On July 27, 2017 the Employer filed its response to the NOD (AF 692-750).

On September 8, 2017, the CO issued a second "Notice of Deficiency" ("NOD") indicating the following deficiencies (AF 680-687):

"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.

OGS, LLC is requesting 125 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 reference to its one-time occurrence temporary need, the employer indicates the following in Section B., Item 9 of the ETA Form 9142:

OGLS, LLC provides services and solutions supporting the design and management of petrochemical installations and pipelines. At this time, OGS, LLC is submitting an Application for Temporary Employment Certification for 125 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. OGS is on a highly structured project timeline and must meet its project goals.

This is a one-time need project and temporary Combo Welders will be engaged from October 1, 2017 through the project's completion on September 30, 2018. The labor requirements for these services will end after we complete the welding/pipefitting phase of work on the LACC project, and as such, the labor need is a one-time occurrence that will end after the completion of the final phase of this project in September 2018. ...

... 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. ... [such as]:

- OGS, LLC has never had a project of this size and scope and considers this a unique opportunity to provide services in the petrochemical sector.
- OGS, LLC is an ideal candidate for H-2B temporary workers because we have an employment situation that is not permanent, but a temporary event of short duration that has created a need for skilled welders for a well-defined and unique project in the U.S.
- At this time, OGS, LLC, is submitting an Application for Temporary Employment Certification for 125 Combo Welders to successfully fulfill their contract with CB&I to complete the LACC Project.

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. OGS, 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: OGS LLC; Global Turnaround Services, LLC; International Plant Services; Eagle Procurement & Industrial

Contractor, 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: OGS LLC; Global Turnaround Services, LLC; International Plant Services; Eagle Procurement & Industrial Contractor, 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 551-679).

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 125 Plumbers, Pipefitters, and Steamfitters⁶ 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 535-550):

“Deficiency: 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.

OGS, LLC is requesting 125 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 reference to its one-time occurrence temporary need, the employer indicates the following in Section B, Item 9, of the ETA Form 9142:

OGLS, LLC provides services and solutions supporting the design and management of petrochemical installations and pipelines. At this time, OGS, LLC is submitting an Application for Temporary Employment Certification for 125 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

⁶ In the text of the Denial Letter the CO properly refers to 125 Combo Welders for this specific ETA Case No. H-400-17173-801848. BALCA finds the erroneous reference to “Plumbers, Pipefitters, and Steamfitters” is the result of the Employer’s erroneous entries in Section B.2 and B.3 of its application and that the Employer has not been misled or prejudiced by the CO’s reference to “Plumbers, Pipefitters, and Steamfitters.” It is specifically noted that the Employer has an appeal pending before BALCA for 125 Plumbers, Pipefitters, and Steamfitters in ETA Case No. H-400-17178-278337, OALJ Case No. 2018-TLN-00021 and that no documentary evidence in that appeal file is considered in this appeal decision.

workers after the end date of need has passed. OGS is on a highly structured project timeline and must meet its project goals.

This is a one-time need project and temporary Combo Welders will be engaged from October 1, 2017 through the project's completion on September 30, 2018. The labor requirements for these services will end after we complete the welding/pipefitting phase of work on the LACC project, and as such, the labor need is a one-time occurrence that will end after the completion of the final phase of this project in September 2018. ...

... 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. ... [such as]:

- OGS, LLC has never had a project of this size and scope and considers this a unique opportunity to provide services in the petrochemical sector.
- OGS, LLC is an ideal candidate for H-2B temporary workers because we have an employment situation that is not permanent, but a temporary event of short duration that has created a need for skilled welders for a well-defined and unique project in the U.S.
- At this time, OGS, LLC, is submitting an Application for Temporary Employment Certification for 125 Combo Welders to successfully fulfill their contract with CB&I to complete the LACC Project.

Although the employer states that this one-time occurrence need is tied to a specific contract for a construction project with set completion dates, which the employer characterizes as unique in size and scope, it is not clear that this contract/project represents a unique event in its business operations.

... In response to the Notice of Deficiency issued on September 8, 2017, the employer, through its attorney, explained the specific service this employer provides to the oil and gas and petrochemical industry,

OGS was established to provide professional, technical and staff augmentation services to the mid-stream and infrastructure segments of the energy sector. A major component of any new capital project is the environmental and infrastructure impact that the work will bring to the site location as well as the surrounding community. Through its professional services component, OGS provides technical personnel to work with the asset owner and other contractors to develop and submit for governmental review the environmental impact statement before construction work can proceed. The impact study and statement also addresses the upgrades and/or additives to the infrastructure from utilities, highways, transportation and other services impacted by the construction work. Once the project is approved to proceed, OGS works as either a contractor or a subcontractor to provide supervision and skilled workforce to implement the environmental and infrastructure program and facilities.

The employer also explained that [its] dates of need were determined by its client and the overall project budget and timeline.

... The employer provided extensive discussion and verification of the size and scope of the underlying project – the LACC Ethane Cracker Project in Westlake, Louisiana. Furthermore, in its temporary need statement, the employer stated,

The labor requirements for these services will end after we complete the welding/piping phase of work on the LACC Project, and as such, the labor need

is a one-time occurrence that will end after completion of the final phase of this project in September 2018.

Although the employer has been engaged to provide services in furtherance of a very large construction project, 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 duplicitous of those before the CO when the denial determination was made. (AF 1-534).

In its "Request for Administrative Review," the Employer's attorney argues that "the Employer was engaged to provide temporary Combo Welders for [the LACC Project] for the sole purpose of assisting with its construction. The need for workers ... will no longer exist upon completion of this project. Additionally, OGS confirmed on multiple occasions throughout the labor certification process that it has not previously employed Combo Welders and does not intend to employ them in the future. ... [The company's stated] primary mission does NOT include provision of skilled craft labor, such as that of Combo Welders which are the subject of the present application. Instead, its primary purpose will be to focus on the above mentioned environmental and regulatory compliance issues related to the infrastructure impact of industry projects. ... The Employer has no intention of regularly engaging clients in the provision of craft service workers and as a new company, accepted this contract for services as a way to introduce itself to the industry." He argues that the Employer "does not wish to be a craft service provider – it intends to be a provider of environmental and infrastructure impact services" and that the work on the LACC Project "will allow the Employer to make itself known to the petrochemical industry as a company that provides high quality services and can handle projects of any size and scope." He submits that the LACC Project "is the only one of its kind currently underway in the entire country." He also submits that "OGS is not related in any fiduciary or financial capacity to any other company ... [and] operates as a separate, independent entity with its own well-defined scope of services that are distinctly different from any other company that may be owned or operated by common management." He submits that "the standard of review requires that the Certifying Officer analyze whether or not OGS, and OGS alone, has a bone fide one-time need for workers associated with the LACC project." Employer's counsel requests the denial "be reversed and that the CNPC be instructed to issue a Notice of Acceptance to allow OGS to engage in active recruitment for qualified, willing, and able US Workers for the position of Combo Welder."

On November 27, 2017, the Associate Solicitor for Employment and Training Legal Services filed the "Certifying Officer's Motion to Consolidate Related Appeals." She requested the above-referenced case be consolidated with OALJ Case No. 2018-TLN-00021. The Motion was denied by Order issued November 28, 2017. 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 760). 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 is a “job contractor” and has filed an application on a one-time occurrence basis, “it must demonstrate through documentation its own temporary need, not that of its employer-client.” 20 C.F.R. §655.6(c). A “job contractor” is defined as an entity “that meets the definition of an employer and 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.” 20 C.F.R. § 655.5. However, “the provisions of services to another company, under a contract alone, does not render an employer a job contractor; rather, each employment situation must be evaluated individually to determine the nature of the employee-employer relationship and, accordingly, whether the petitioning employer is in fact a job contractor.” 80 Fed. Reg. 24042, 24044-24055 (Apr. 29, 2015).

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).” 20 C.F.R. § 655.5. 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).

Where an employer has submitted an application for temporary employment 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.

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”). The Employer’s counsel made a detailed statement as to the points raised in the second NOD. (AF 562-571).

Eagle Procurement & Industrial Contractor, LLC is owned, in part, by Industrial Maintenance International Manpower, Inc. (IMIMI) with Karim Ayed as a minority owner and president. Tom Schanze is listed as a consultant with Jack McClain listed as account operations manager, Strasburger & Price listed as legal representative, and 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 577). In the second NOD the CO indicated the following applications for temporary labor certification were submitted by Eagle Procurement & Industrial Contractor, LLC (AF 684-685):

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 576). In the second NOD the CO indicated the following applications for temporary labor certification were submitted by Global Turnaround Services, Inc. (AF 685):

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

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 574). In the second NOD the CO indicated the following applications for temporary labor certification were submitted by International Plant Services LLC (AF 684):

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. 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 578). In the second NOD the CO indicated the following applications for temporary labor certification were submitted by OGS LLC (AF 685):

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 consultant with Jack McClain as account manager, Strasburger & Price as legal representative, and Hammack Co. & CPAs as accountant. (AF 579). In the second NOD the CO indicated the following applications for temporary labor certification were submitted by Petroleum Services International LLC (AF 685):

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 business consultant with Alex Smith as account representative, Strasburger & Price as legal representative, and Hammack Co. & CPAs as bookkeeper. (AF 580). In the second NOD the CO indicated the following applications for temporary labor certification were submitted by Transnational Industrial Process Services LLC (AF 685):

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. (AF581). In the second NOD the CO indicated the

following applications for temporary labor certification were submitted by Worldwide Process Services LLC (AF 685-686):

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

The Employer submitted a “Corporate Network Visualizer” to assist in the understanding of the relationship of “the Ayed family of companies.” (AF 575). 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 Eagle Procurement & Industrial Contractor, LLC reporting into Karim Ayed and Karim Ayed reporting out to the Philippine company IMIMI.⁷ (AF 575). Without supporting documentation, Employer’s counsel in her response to the second NOD broadly asserts that “each entity listed in the NOD has common ownership by Mr. Karim Ayed ... Mr. Ayed is the President and Owner of each organization ... The President of the organization is responsible for providing strategic leadership for the company by working with management to establish long-range goals, strategies, plans and policies ... The Vice-President, Operations is responsible for supporting the President in ensuring the day-to-day operations of the company and to follow the overall business and strategic plan of each company. This includes direct oversight of all staff and the authority to hire and fire personnel, make business decisions, and operate with little to no daily supervision.” (AF 561). Employer’s counsel also states, without supporting documentation, that Tom Schanze serves as “consultant” to other “Ayed family companies” where he “does not maintain managerial authority – but rather, he counsels management and staff on effective organization and operation to ensure that they provide quality client services as they grow and expand their respective market shares. Mr. Schanze is the individual relied upon by Mr. Ayed to ensure each entity is operating in accordance with its specific mission and within the quality expectations that he has set for each company.” (AF 562-563).

On September 21, 2016, Bruce A. Hammack prepared a “State of Delaware Limited Liability Company Certificate of Formation” listing the Employer’s company name as OGS, LLC with a registered office at 1111B South Governors Avenue, Dover, Delaware 19904. The unsigned document listed the Registered agent as First State Corporate Services, Inc. (AF 585, 713). Hammack & Co. CPAs LLC billed OGS, LLC on July 31, 2017 for DE Correspondence \$80.00; Delaware Tax Notice \$56.25; and DE Delinquent Tax Notice \$64.00. (AF 629).

The “Operating Agreement” for OGS, LLC, identified Karim Ayed and Nourreddine Ayed as the sole members of the company wherein each contributed 50% to the company assets and each retained a 50% interest and control in the company. The stated purpose of OGS, LLC provide “The company may engage in any lawful business, investment, or other activity permitted under the [laws governing limited liability companies in the State of Delaware] or the laws of any jurisdiction in which the Company may transact its affairs.” It provided that “Any member may engage in or possess an interest in other business or investment ventures of any nature, whether

⁷ As set forth *In the Matter of Eagle Procurement & Industrial Contractor*, OALJ Case No. 2018-TLN-00019 (BALCA, Dec. 20, 2017), “IMIMI” is known as “Industrial Maintenance International Manpower, Inc.” of Manila, Philippines.

or not similar to or competitive with the activities of the Company” and that “The business, investment, or other activities and affairs of the Company shall be managed by its members ... Unless authorized to do so by this Operating Agreement or by its Members, no attorney-in-fact, employee, or other agent of the Company shall have the power or authority to bind the Company in any way, to pledge its credit or to render it liable pecuniarily for any purpose.” (AF 590-500, 601-617).

On September 21, 2016 the Internal Revenue Service, Cincinnati, Ohio office, issued an “Employer Identification Number” to “OGS, KARMID AYED GEN PTR, 1602 OLD UNDERWOON ROAD, LAPORTE, TX 77571.” (AF 586-588,710-712)

On April 10, 2017 the Secretary of State for the State of Texas issued authorized OGS, LLC to conduct business in the State of Texas as a “Foreign Limited Liability Company.” The underlying Texas Nexus Questionnaire indicated the business address in Texas as 1622 Old Underwood Road, La Porte, Texas 77571 and that OGS, LLC had been formed in Delaware on September 22, 2016 “to provide skilled and professional workers to construction and oil/gas industries.” It indicated Maylene Santiago as the contact person; Karim Ayed as 50% owner/member and Secretary for OGS LLC; and Nouredine Ayed as 50% owner/member and Chairman of OGS LLC. (AF 618-620).

The Employer submitted an undated, unsigned IRS Form 8822-B indicating that OGS, LLC was changing its business mailing address from 1662 Old Underwood Rd, La Porte, TX 77571-9649 to a new business location at 2318 Center St. Suite 205, Deer Park, TX 77536 (AF 583).

In the filed ETA Form 9142 OGS LLC identifies 2318 Center St., Suite 205, Deer Park, TX 77536 as its business address. (AF 761). This is the same address Tom Schanze as vice president of operations used in entering a retainer agreement with the law firm of Strasburger & Price, LLC. (AF 675-678)

By letter of July 26, 2017, Tom Schanze, as vice president of operations for OGS, LLC, made the statement “though already included in the above mentioned Statement of Support submitted with the underlying H-2B Application, please accept this letter as OGS’ confirmation that it does not intend to utilize an agent or recruiter to locate qualified, willing, and able foreign workers for the temporary position. Instead, we will conduct this search using our internal resources.” (AF 715).

With its response to the second NOD, the Employer submitted a “Recruitment Services Agreement” between Parman, Incorporated, “a corporation duly organized and existing under the laws of the Republic of the Philippines with a business address at ... Legaspi Village, Makati City, Philippines, represented in this Act by its President, Joel S. Ferrer ... and OGS, LLC, a corporation duly organized and existing under the laws of the United States with business address at 1622-B Old Underwood Road, La Porte, TX 77571, represented in this Act by its President, Karim Ayed ...” The Agreement provided that Parman “agrees to provide recruitment services to OGS, including, but not limited to, personnel recruiting (temporary and regular employment), name hire employee processing, payroll and subcontracting services, by providing Philippine personnel/workers to OGS per the terms and conditions of this Agreement ... OGS

shall utilize the facilities and services of Parman for the purpose of pre-selecting, recruiting, processing and documenting Philippine workers hired through Parman for its operation in the United States of America. ... OGS shall have the final authority on the selection in Manila of workers for employment and that shall satisfy the requirements of its clients for all intents and purposes. ... Workers recruited by Parman pursuant to this Agreement shall be considered direct employees of OGS. OGS shall be responsible to pay these workers their basic monthly salaries as indicated in the employment contracts. ... Parman shall complete the recruitment processing and have the workers ready for mobilization within a maximum of thirty (30) days following receipt of a written personnel requisition or manpower request from OGS or on a date previously agreed upon [specific exceptions listed].” The Agreement is undated but bears the signature of a labor attaché to the Embassy of the Philippines with the verification date of May 23, 2017. OGS, LLC is also identified as “Oil & Gas Services, LLC” in the signature portion of the Agreement. (AF 663-673).

In the job Order placed with the State Workforce Agency (SWA) the Employer states that the “Employer will provide site specific orientation ... Employees will be responsible for securing his or her lodging ... Employer will make all deductions from the worker’s paycheck required by law ... workers will be reimbursed in the first work week for all visa, visa processing, border crossing and other related fees, including those mandated by the government (except passport fees) ... Employer will provide workers, at no charge, all tools, supplies and equipment required to perform the job” and provide transportation and subsistence to and from worksites from the place of recruitment, or reimburse the costs incurred by workers. (AF 1043).

The Employer asserted in its application cover letter signed by Tomas Schanze as VP Operations, that Chicago Bridge and Iron (CB&I) “is partnering with OGS for identification, testing, hiring and processing of skilled welders to augment its current active workforce ... CB&I has not been able to hire sufficient U.S. workers who are able, willing, qualified, and available to meet this temporary, one-time need for Combo Welders” for the LACC project. (AF 1027-1034). The Employer states it has entered into an agreement with CB&I to provide “125 Combo Welders during the welding/pipefitting phase of the project to prepare and permanently install associated components at a petrochemical construction project. This engagement supports OGS’ need to hire temporary workers to fulfill its business obligations to its client and a failure to do so will result in a significant loss of business for the company. OGS has already committed significant resources to the project and will certainly breach its contract with CB&I if the Department denies this Application for Temporary Employment Certification.” (AF 1036). The Employer states “OGS, LLC, is submitting an Application for Temporary Employment Certification for 125 Combo Welders to successfully fulfill our unique one-time occurrence contract with CB&I ... OGS has never engaged in a project of this enormity and has never been asked to provide such a significant number of craft workers since its inception ... [and] OGS confirms that it will provide Foremen, General Foremen and Site Managers to manage and supervise the Combo Welders at the worksite on a daily basis at the project site. ... Further OGS is not a job contractor seeking to contract the workers on behalf of CB&I. We are the applicant in this application for temporary employment certification, and indeed the employer who will have a direct relationship with respect to the H-2B employees.” (AF 1029).

Jerry M. McClain, as Senior Director Project Staffing Services for CB&I, supplied a June 9, 2017 “Statement in Support of I-129 Petition for Nonimmigrant Worker” by OGS for 250 temporary alien workers for the positions of “Combo Pipe Welders (125) Pipefitter (125).” He states “The general contractors including CB&I are partnering with the technical school in the local and regional communities to recruit and train new combo pipe welders and pipefitters to produce a new workforce that with experience will obtain journey level status in a minimum of three (3) years. A normal offset to local and regional skilled craft labor shortages is to recruit ‘travelers’ from around the United States. To date these efforts [by] CB&I has been only limited success. ... The [125 H-2B] combo pipe welders and [125 H-2B] pipefitters that we have requested from OGS, LLC are required from October 2017 to September 2018 to augment the total number of mechanical crafts required for the site erection of the ethane cracker.” (AF 919-920, 1010-1011).

In the second NOD the CO recognized several statements by Employer “explaining why it is filing under a one-time occurrence temporary need.” The CO listed Employer’s statement “At this time, OGS, LLC, is submitting an Application for Temporary Employment Certification for 125 Combo Welders to successfully fulfill their contract with CB&I to complete the LACC Project.” The CO noted that “Although the employer states that this one-time occurrence need is tied to a specific contract for a construction project with set completion dates, which the employer characterizes as unique in size and scope, it is not clear that this contract/project represents a unique event in its business operations.” (AF 684).

In this case the Employer did not submit a copy of the underlying contract between it and CB&I that is used as the Employer’s justification for the one-time occurrence need of 125 temporary H-2B workers. When the statement of J.M. McClain of CB&I is compared to the statements of OGS’ Tom Schanze, its legal counsel, and those made at the time of the original application, it is established that CB&I has recruited available welders and pipefitters for its portion of the LACC Project, has exhausted recruitment in the pool of available, qualified and willing welders and pipefitters in the area of intended employment, the State of Louisiana, and the United States, and has entered into work agreements to develop welders and pipefitters through local vocational high school and apprenticeship programs. It also appears that CB&I has engaged OGS, LLC to solely provide foreign H-2B workers as welders and pipefitters for CB&I’s LACC Project. The credibility of statements by Tomas Sanchez are undermined by his bold assertion that no foreign recruiter will be used to obtain the foreign workers and internal resources will be utilized while the AF indicates OGS has contracted with Parman to provide workers from the Philippines and CB&I has turned to OGS, LLC because CB&I has exhausted recruitment efforts for qualified and willing U.S. workers throughout the United States. Statements made by Employer’s counsel regarding OGS, LLC’s contractual relationship with CB&I and relationship with the requested H-2B workers are not supported by documentation submitted for consideration by the CO beyond the statement of OGS’ VP for Operations and that OGS, LLC will pay the foreign works at least every two weeks and reimburse the H-2B workers for certain transportation, subsistence, visa, and border crossing expenses. Without the actual contract between CB&I and OGS, LLC, the Employer has failed to demonstrate that it has the need for H-2B welders to augment its own employer workforce on a one-time occurrence basis; has failed to demonstrate that it has its own temporary need as a job contractor for the requested H-2B workers on a one-time occurrence

need basis; and has demonstrated it is no more than a conduit for Parman to recruit and supply foreign workers to CB&I through OGS.

After giving the Employer the opportunity to distinguish its operations, the CO found that the Employer had failed to sufficiently establish that the need for 125 Combo Welders is temporary under Departmental regulations. The CO stated 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.

When the credible evidence submitted to the CO prior to November 2, 2017 is considered as a whole, OGS, LLC has failed to meet its burden to establish that OGS, LLC has a singular, independent, non-recurring temporary need for 125 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).

ORDER

It is hereby ORDERED that the Certifying Officer's DENIAL of the Employer's July 3, 2017, *Application for Temporary Employment Certification* is AFFIRMED.

SO ORDERED.

For the Board:

Alan L. Bergstrom
Administrative Law Judge