

subdivision can never be larger than a single 'establishment.' The definition's limited use of 'auxiliary facilities' implies that any physically separate operation may be part of a subdivision only if it is merely auxiliary and used in conjunction with the main production unit." *Lloyd v. U.S. Dep't of Labor*, 637 F.2d 1267, 1274 (9th Cir. 1980). In *Lloyd*, the CIT stated that the word "auxiliary" implies that a facility will only be deemed an appropriate subdivision if it is a subsidiary part of a firm that is producing an article. In addition, the phrase "[o]perated in conjunction with" implies that the auxiliary facility must be run by the same firm as the production facility or facilities." *Id.*

Production Worker Analysis

When a worker group applies for assistance, the fundamental test DOL applies is whether the workers' firm or an appropriate subdivision of the workers' firm produced an import-impacted article during the relevant period. If the worker group produces such an article, then they are deemed "production workers."

Because an "appropriate subdivision" is limited to the "workers' firm" and Section 90.2 of the regulations permits the inclusion of multiple entities within the term "firm" only if they are affiliated entities, on remand DOL conducted additional investigation of the relationship between PLS and LTV. The investigation indicates that substantially the same persons do not control PLS and LTV. Supplemental Administrative Record (SAR) 43. No corporate official of one company is also a board member or officer of the other (or of Quadrivius). SAR 42. Substantially the same persons do not own PLS and LTV. LTV was a publicly owned company. PLS is a wholly owned subsidiary of Quadrivius. SAR 36. Quadrivius is a privately owned company. SAR 39. After LTV's bankruptcy, PLS continued business. AR 25. The contract between LTV and PLS indicates that they are separate corporations. SAR 108. Therefore, DOL finds that LTV and PLS are not "controlled or substantially beneficially owned by substantially the same persons." 29 CFR 90.2. They are independent business entities and as the word "firm" is defined by section 90.2, "workers' firm" cannot mean both LTV and PLS.

DOL has considered which factors of employment exercised by a firm establish that it is "the" workers' firm. DOL has consistently determined that the critical employment factor is which firm was obligated to pay the employee

during the relevant period. Because PLS was so obligated, DOL has determined that PLS is "the" workers' firm. SAR 40. Furthermore, the contract establishes that "PLS shall hire and use its own employees to provide the services described in this contract" (SAR 108) and "PLS is supplying its own employees, which is (*sic*) controls and directs for employment purposes." SAR 111. PLS "hired and fired" the relevant worker group. SAR 40. Therefore, DOL finds that the petitioners are employees of PLS and cannot be certified as an appropriate subdivision (or as part of an appropriate subdivision) of LTV.

The CIT Opinion ordered DOL "to explain to petitioners how their work was unrelated to production, not merely state that it was." This suggests that the CIT wants DOL to change the test of whether one qualifies as a production worker to whether the workers' tasks are "related" to production. Such a change would violate section 222(a)(3) which, as stated earlier, requires actual production by the workers' firm or an appropriate subdivision of the workers' firm. In addition, this change conflicts with previous CIT decisions that support DOL's determination that the test for production must involve the transformation of a thing into something "new and different." *Nagy v. Donovan*, 6 CIT 141, 145, 571 F.Supp. 1261, 1264 (1983).

DOL thoroughly investigated and could not find any evidence that any employees of PLS or Quadrivius actually produced any articles. AR 4, AR 11, AR 13, SAR 39. The workers' job descriptions indicate that from their workstations in LTV's Independence, Ohio facility, they managed the transportation of items to and from LTV's production facility in Cleveland, Ohio. SAR 20-28. Because there is no evidence that the petitioners transformed anything into something "new and different," they are not eligible for certification as production workers.

Service Worker Analysis

On the issue of whether the petitioners should be certified as service workers, the petitioners argued that they should be certified because: they performed their job inside an LTV facility, they were supervised by LTV employees, and they were employees of LTV prior to their employment with PLS. (LTV's employees at the Independence, Ohio facility did not produce any articles. AR 16, SAR 37, SAR 48, SAR 50, SAR 68. They were certified as a third type of appropriate subdivision because they provided

services to LTV's Cleveland, Ohio production facility. SAR 57.)

As stated earlier, when a worker group applies for assistance, the fundamental test called for by section 222 of the Trade Act is whether the workers' firm or an appropriate subdivision of the workers' firm produced an import-impacted article during the relevant period. If there is no evidence that the worker group applying for certification produced an import-impacted article, it may only be certified if: (1) The workers' separations were caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control; (2) the reduction in the demand for their services originated at a production facility whose workers independently met the statutory criteria for certification; and (3) the reduction directly related to the product impacted by imports. *Abbott v. Donovan*, 6 CIT 92, 100-101, 570 F.Supp. 41, 49 (1983). This "elaborated" analysis is necessary to determine whether a worker group has met the regulatory requirements of a type three appropriate subdivision: that the worker groups' facility is "auxiliary" and "operates in conjunction with a production facility." This analysis is customarily called the "support service" analysis, but it is actually not much different than the fundamental test that DOL applies to every application for certification.

The first requirement ("the workers' separation were caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control") focuses on the definition of "firm" as it is used in the fundamental test. For multiple entities to be considered a single workers' firm, such entities must be "controlled or substantially beneficially owned by substantially the same persons." 29 CFR 90.2. As discussed earlier, PLS and LTV are not controlled or substantially beneficially owned by substantially the same persons. The regulations establish that DOL cannot certify the petitioners as service workers because their firm is unaffiliated with a firm that produces or produced an import-impacted article.

Conclusion

Whether the performance of services by the petitioners is related or unrelated to production is not relevant to determining their eligibility for certification. Under section 222 of the Act, what is relevant is whether the workers' firm or an appropriate subdivision of the workers' firm