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The Department contacted the Wackenhut official at the Phoenix, Arizona, office about who would be the Wackenhut person most knowledgeable about the day-to-day activities for the Wackenhut employees at BHP in San Manuel. Although the TAA petition for workers of Wackenhut identified the Area Manager as the contact person, the plaintiffs cited that this individual would not have the day-to-day knowledge of the work performed by Wackenhut employees at the BHP operations. The Area Manager, however, identified himself and the Captain/OIC at BHP in San Manuel, Arizona.

The Department asked the Area Manager for Wackenhut how the workers were involved in production and shipping of copper cathodes at BHP in San Manuel, Arizona. He responded that the workers of Wackenhut did not produce any sort of tangible product for BHP; involvement of copper cathode production was limited to access/egress control and building/perimeter patrol at the mine site. He added that Wackenhut did perform some OSHA/MSHA and First Responder training to BHP mine personnel in support of mine operations. The Area Manager was also asked if the Wackenhut employees at BHP in San Manuel did work other than that specified in the contract. He responded that all duties would be detailed in the site's security Post Orders and any amendment to those Orders. Furthermore, Wackenhut employees were not authorized to perform any duties other than those in the Post Orders.

Under the Post Orders, Wackenhut provided security services. The Department determined that such services are not related to the production of copper cathodes.

Since the services described by the OIC cannot be considered producing the article, on remand the Department asked the Wackenhut OIC to explain how they prepared the finished copper cathodes for shipment. She responded that after the BHP Shipping Clerks were laid off, Wackenhut was left with the responsibility to inspect the load and complete the paperwork. Without the proper paperwork completed and signed by security, the load was not allowed to leave BHP San Manuel. She made similar statements with respect to the receipt and delivery of a wide variety of products and by-products essential to BHP manufacturing.

The former Corporate Manager for Safety, Health and Security for BHP was asked how Wackenhut workers were engaged in the production of copper

cathodes. He responded that they would weigh out and count the number of copper cathodes leaving the BHP premises. Furthermore, they would weigh in copper anodes that were entering the BHP premises for further processing.

When a worker group applies for Trade Adjustment Assistance TAA, the fundamental test the Department of Labor applies is whether the workers' firm or appropriate subdivision is producing an import-impacted article during the relevant time period. If the worker group produces an article they are considered production workers.

Section 222 of the Trade Act establishes that the Department must not certify a group unless increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production. The phrase of particular importance in this case is "articles produced by such workers' firm or an appropriate subdivision thereof." Under this requirement, the Department cannot issue a certification of eligibility to a worker group unless the workers' firm or an appropriate subdivision of the workers' firm produces an import-impacted article.

An appropriate subdivision is limited to the workers' firm and section 90.2 of the Trade Adjustment Assistance program regulations permits the inclusion of multiple entities within the firm only if they are affiliated entities. The Department's investigation indicates that substantially the same persons do not control Wackenhut or BHP. The contract between Wackenhut and BHP indicate that they are separate corporations. Therefore, the Department finds that Wackenhut and BHP are not controlled or substantially beneficially owned by the same persons. They are independent business entities and as such the word firm as defined in section 90.2, workers' firm cannot mean both Wackenhut and BHP.

The Department's interpretation of "appropriate subdivision hereof" is limited to related or affiliated firms and cannot be expanded to encompass an unaffiliated firm. This interpretation is consistent with section 222 of the Trade Act of 1974 which requires the Department to consider whether a significant number of workers have been separated from the workers' firm or appropriate subdivision of the firm.

The contract between BHP and Wackenhut (the independent contractor) establishes that all persons employed by

the contractor shall be deemed to be employees of the contractor; in this case Wackenhut. The Department has consistently determined that the critical employment factor is which firm was obligated to pay the employee during the relevant period. Because Wackenhut was so obligated, the Department has determined that Wackenhut is the workers' firm.

Therefore, the Department finds that the petitioners are employees of Wackenhut and cannot be certified as an appropriate subdivision (or as part of an appropriate subdivision) of BHP.

In order to consider the petitioners producing articles, the Wackenhut workers would have to transform a thing into something new and different. Security services, weighing incoming and outgoing shipments, completing paperwork for incoming and outgoing shipments, escorting trucks to the proper location, and providing safety training for both BHP and Wackenhut employees could be considered "services" related to the production of the articles produced at BHP. The Department thoroughly investigated and could not find any evidence that any employees of Wackenhut actually produced any articles or that the petitioners transformed anything into something new and different. Consequently, they are not eligible for certification as production workers.

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 produces an article. The workers' firm in this case is Wackenhut. Wackenhut is not affiliated with BHP. The evidence clearly establishes that Wackenhut does not produce, directly or through an appropriate subdivision, an import-impacted article. Once the Department concludes that the workers' employer was not a firm that produced an import-impacted article, it may conclude that the workers are not eligible for assistance without further analysis. Because the petitioners are employees of a firm or subdivision that does not produce a trade-impacted article, they are not eligible for certification.

After reconsideration on voluntary remand, I affirm the original notice of negative determination of eligibility to apply for adjustment assistance for workers and former workers of The Wackenhut Corporation, San Manuel, Arizona.