

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 26 October 2012**

**BALCA Case No.: 2013-TLN-00001**

ETA Case No.: C-12237-59662

*In the Matter of:*

**PREFERRED LANDSCAPE & LIGHTING, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the temporary labor certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These provisions, referred to as the “H-2B program,” permit employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient domestic workers who are able, willing, qualified, and available to perform such services or labor. *See* 8 C.F.R. § 214(2)(h)(1)(ii)(D).

Prior to applying for a visa under the H-2B program, employers must file an *Application for Temporary Employment Certification* (ETA Form 9142) with the U.S. Department of Labor (“DOL” or “the Department”), Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. Employers’ applications are reviewed by a Certifying Officer (“CO”), who makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, an employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a). BALCA’s scope of review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the Employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer’s application. 20 C.F.R. § 655.33(a), (e).

## **BACKGROUND**

The Employer in this appeal, Preferred Landscape & Lighting, LLC (“The Employer”) provides holiday décor and landscaping services in the San Antonio, Texas area. AF 70.<sup>1</sup> In order to fulfill its peakload need for labor during the holiday décor installation season, the Employer filed an *Application for Temporary Employment Certification* (“Application”) with ETA on August 24, 2012, requesting certification for twenty “Laborers and Freight, Stock and Material Movers, hand” from October 1, 2012 through January 31, 2013. *Id.* In this Application, the Employer stated that it requires “the services of laborers to perform manual labor associated with installation of holiday décor such as: organize and prepare stock of holiday décor material; install and/or remove holiday décor materials from jobsites; load and unload holiday décor materials and prepare for storage.” The Employer indicated that this work would be performed at its office in San Antonio, Texas, as well as local Bexar County jobsites, Travis County area job sites, Dallas County area job sites, and Harris County area job sites. AF 73. The Employer stated that it provided transportation to and from these job sites from a centralized pick up location, and paid for overnight accommodations when necessary. AF 70, 78.

On August 29, 2012, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that its Application failed to satisfy the requirements of the H-2B program. AF 61-69. Among other things, the CO questioned whether the Employer sought certification for positions in multiple areas of intended employment, since its Application listed worksites “located a significant distance from one another.”<sup>2</sup> Specifically, the CO remarked:

It is 284 miles from Bexar County to Dallas County and 205 miles from Bexar County to Harris County. The locations listed by the employer require up to 5 hours and 47 minutes to travel between them. Based on the geographic distance between the worksites, the Department does not find the worksites to be within the same area of intended employment.

AF 64. Citing 20 C.F.R. sections 655.20(d) and 655.4, the CO informed the Employer that it “may not submit one application for multiple worksites which are not within the same area of intended employment.” AF 64. Accordingly, the CO directed the Employer to: (1) submit an amended application “that complies with the requirement that all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment”; or (2) “provide evidence that the locations are “within normal commuting distance and are in the same area of intended employment.” AF 65 (emphasis in original).

The Employer responded to the RFI on September 5, 2012, submitting, *inter alia*, a written, notarized statement from its President, David Dunne, and a screen shot of Frequently Asked Questions (“FAQ page”) from the website of one of its competitors—Holiday Lighting of

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<sup>1</sup> Citations to the Appeal File will be abbreviated “AF” followed by the page number.

<sup>2</sup> The RFI identified three additional deficiencies in the Employer’s application; however, none of these deficiencies are listed as a basis for denial in the CO’s Final Determination. Accordingly, they are not at issue in the instant appeal.

Texas. AF 24-60. In the statement, Mr. Dunne explained that the Employer's office is located in San Antonio, Texas (Bexar County), and that this is where "75% or more" of the jobsites are located; "the remainder" of the jobsites are "spread out between" Dallas County, Travis County, and Harris County. AF 25. Mr. Dunne elaborated:

On our ETA 9141, Prevailing Wage Request, we included all the worksite counties so that we would be able to offer the highest of all the wages. Any employee that travels to these different counties to work on a job is paid hourly for their travel time. Also, if it is necessary for the employee to stay overnight in the area, our company will pay for the employees overnight accommodations. They travel in company vehicles to these different work locations.

AF 25. Mr. Dunne stated that the Employer required its workers to travel because it has customers in these counties, and it needs its workers to complete the lighting décor projects it has been hired to do. *Id.* The FAQ page included in the Employer's response states that holiday light installation takes anywhere from 2-12 hours depending on the complexity of the design. AF 51.

On October 2, 2012, the CO denied certification based on "multiple areas of intended employment." AF 18, 21 (citing 20 C.F.R. §§ 655.20(d), 655.4). The CO acknowledged receipt of Mr. Dunne's statement, but concluded that the Employer "failed to provide any supporting evidence to demonstrate that the locations are within normal commuting distance and are in the same area of intended employment as required by the RFI." AF 23. Specifically, the CO noted:

The employer offered the following explanation: "The workers are not required to commute to these other counties on a daily basis and when they do travel, we pay for their overnight accommodations if necessary."

The Department has determined that the worksite locations are not within normal commuting distances from each other and are, therefore, in different areas of intended employment.

AF 23. The CO maintained that employers "can only request certification for provision of labor or services in one area of intended employment, except when employers can demonstrate, upon written application to the Office of Foreign Labor Certification (OFLC) Administrator, that special procedures are necessary." *Id.* Because there were no special procedures permitting a variance for the positions requested in this matter, the CO found that the Employer "failed to adequately respond to the RFI and failed to provide sufficient documentation." *Id.*

The Employer's BALCA appeal followed. The Board issued a Notice of Docketing on October 11, 2012, setting out an expedited briefing schedule. The CO filed a brief on October 19, 2012; the Employer filed brief on October 22, 2012.

## **DISCUSSION**

The CO based his denial of the Employer's Application on only one deficiency: Multiple Areas of Intended Employment. AF 21 (citing 20 C.F.R. §§ 655.20(d) and 655.4). According

to the CO, sections 656.20(d) and 656.4 “clearly show that one application may not include worksites in more than one area of intended employment.” But the regulations cited by the CO do not directly support this assertion.

Section 656.20(d) provides: “Certification of more than one position may be requested on the application as long as all H–2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.” 20 C.F.R. §§ 655.20(d). It does not require *all* applications to be within one area of intended employment; indeed, it says nothing about applications for a single position. Rather, it permits employers to file a single application for multiple positions, so long as the workers in those positions meet the enumerated criteria, including the performance of labor or services in the same area of intended employment. Section 656.4 defines an “area of intended employment” as:

**[T]he geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought.** There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

20 C.F.R. § 655.4 (emphasis added).

The Employer maintains that the positions described in its Application are within the same “area of intended employment” because “there is no commuting—as that term is normally understood to mean from home to work and back on a daily basis—outside the San Antonio area at all.” Employer’s Brief at 1. Specifically, the Employer explains:

All workers show up for work on a daily basis at the “central pick up location”—i.e., the San Antonio main office—and are then taken to work sites in company vehicles. Most of those work sites are in the San Antonio area, so the workers are brought back to the “central pick up location” at the San Antonio main office at the end of the work day. If the work site is further away, such that workers cannot be taken to the site and brought back to the San Antonio main office on the same day, overtime and hotel accommodations and food are provided at company expense, and when the job is done the workers are driven back to San Antonio.

*Id.* According to the Employer, “it would make no sense to file four separate [applications], one each for Bexar, Travis, Dallas and Harris counties,” since its workers emanate out of, and return to, a central pick up location in San Antonio, and “[p]otential applicants who live (and would commute from) outside of San Antonio would not logically apply for a job based in San Antonio.” Employer’s Brief at 2. The Employer points out that it sought to protect the wages and working conditions of U.S. workers in all four counties where its customers jobsites are

located by offering and advertising a wage range—8.42 to \$10.00 per hour—that meets or exceeds the prevailing wage in each of the counties listed in its Application. *Id.*<sup>3</sup>

The CO presumes, without explanation, that any jobsite where the Employer’s workers install or remove holiday décor constitutes a “worksite” for purposes of section 655.4. The Employer, however, makes a reasonable argument that San Antonio/Bexar County is the only area of intended employment for the positions listed in its Application. Notably, the definition of “area of intended employment” at section 655.4 focuses almost exclusively on commuting distance. The preponderance of the evidence before me indicates that the positions for which the Employer requests certification will, for the most part, be performed in the San Antonio/Bexar County area, at both the Employer’s San Antonio office, and at customer jobsites in the local Bexar County area. AF 25. It further demonstrates that the Employer occasionally sends its workers in these positions to customer jobsites in Travis county, Dallas county, or Harris county. AF 25. On such occasions, the Employer provides transportation from a central pick-up location in the San Antonio/Bexar County area, and pays workers an hourly wage for their travel time to and from the jobsite. AF 25, 70, 78. If an overnight stay at the jobsite is required, the Employer pays for any necessary accommodations. AF 25. It is thus clear that the positions for which the Employer requests certification only require H-2B workers to commute to the San Antonio/Bexar County area. The CO’s denial summarily rejects this fact without explanation, and the CO’s brief provides no additional basis of explanation.

Because the San Antonio/Bexar County area is the only location where the Employer’s workers must commute, I find that it is the only area of intended employment for purposes of 20 C.F.R. § 655.20(d). As the Employer points out, it is “impossible to imagine what other process or procedure under the DOL H-2B regulations would better encompass this particular situation.” Employer’s Brief at 2. Notably, had the Employer requested certification for only one position, section 655.20(d) would not have prohibited it from including jobsites in all of the counties listed on its Application. The CO failed to explain why the regulations should be interpreted to prohibit the Employer from requesting multiple positions to be performed under the exact same terms. Accordingly, I find that the CO erred in denying the Employer’s *Application for Temporary Employment Certification* based on “multiple areas of intended employment.”<sup>4</sup>

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<sup>3</sup> The Employer applied for a prevailing wage determination for all four counties listed in its Application. AF 79-84. The Department issued the following four prevailing wage determinations: Bexar County (\$8.13 per hour), Dallas County (\$8.18 per hour), Travis County (\$8.25 per hour), and Harris County (\$8.42 per hour). AF 84.

<sup>4</sup> This finding is limited to the particular facts presented in this appeal, and the CO’s failure to fully address the arguments presented by the Employer. It should thus hold little future precedential value.

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's determination is **VACATED** and this matter is **REMANDED** for further processing consistent with this decision.

For the Board:

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge