

**U.S. Department of Labor**

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**Issue Date: 15 April 2016**

**BALCA Case No.:** 2016-TLN-00029  
**ETA Case Nos.:** H-400-15335-569576

*In the Matter of:*

**GT TRANS, INC.,**

*Employer.*

**Certifying Officer:** Chicago National Processing Center

**Appearances:** Sunyoung Hur, Esquire  
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*For the Employer*

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Washington, D.C.  
*For the Certifying Officer*

**Before:** Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and  
Larry S. Merck, *Administrative Law Judges*

**DECISION AND ORDER REVERSING**  
**DENIAL OF CERTIFICATION**

This case arises from GT Trans Inc.'s ("Employer") request for review of the Certifying Officer's ("CO") decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. 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 United States Department of

Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers seeking to utilize this program must apply for and receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”).<sup>3</sup> A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

## **BACKGROUND**

Employer is a small trucking company located in Elmhurst, Illinois. (AF 204).<sup>4</sup> On December 16, 2015, Employer filed an H-2B application seeking 75 full-time peakload commercial truck drivers (the standard occupational classification title for which is “Heavy and Tractor-Trailer Truck Drivers”)<sup>5</sup> for the period March 1, 2016 to November 30, 2016. (AF 203). The job duties included “deliver[ing] goods while operating a commercial truck, sometimes over intercity routes or spanning several states.” (AF 205). Employer checked “No” in response to the question: “Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above?” (AF 206).

On January 6, 2016, the CO issued a Notice of Deficiency identifying five deficiencies. (AF 192-202). Employer responded on January 20, 2016. (AF 157). On February 5, 2016, the CO issued a second Notice of Deficiency citing only three deficiencies. (AF 150-156). On February 16, 2016, Employer responded. Finally, the CO issued a “Non Acceptance Denial letter” on March 3, 2016 citing one deficiency. (AF 123). Relying on 20 C.F.R. § 655.15(e) and 20 C.F.R. § 655.5, the CO did not accept Employer’s descriptions about the number of worksites. The CO stated that more than one position may be requested on an application if all the workers will perform the same services in the same occupation in the same area of intended employment during the same period of employment but, in this case, “it appears that the employer may have additional worksites which are outside of a single area of intended employment.” (AF 123). The CO added:

the job title of Heavy and Tractor-Trailer Truck Drivers typically requires employees to travel to multiple worksite locations. Additionally, the employer states in the submitted job order that “main routes are: IL-FL; IL-AZ; IL-TX” and

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<sup>1</sup> *See* Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015).

<sup>2</sup> 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.

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> Citations to the Appeal File are abbreviated as “AF” followed by the page number.

<sup>5</sup> For brevity, we will refer in this Decision and Order to the job title as “truck drivers” or “truckers.” However, the application only involves those who qualify as Heavy and Tractor-Trailer Truck Drivers.

“although those are the main routes, we provide service to all lower 48 states, and trips to any of those states are possibility.” [sic]

(AF 123-24). The CO concluded that Employer’s explanation about the truckers delivering loads “clearly states that the workers will be traveling to areas hundreds of miles away” and that “[b]ased on this description, the workers could be hundreds of miles from each other at any given time and clearly, not in the same area of intended employment.” (AF 124).

On March 18, 2016 Employer requested BALCA review pursuant to 20 C.F.R. § 656.61 and characterizes the main issue as whether it has one or multiple worksites. (AF 1-59). Employer argues that DOL should accept as fact that it only has one worksite since there are no other sites which fit the DOL’s definition of “place of employment.” Citing DOL’s definition of “place of employment,” Employer contends that a place where an employee performs only temporary work, such as dropping off or picking up goods, is not a worksite. (AF 3). Employer submits that there is no worksite except the Elmhurst, Illinois location listed on the application. (AF 3). Employer also explains that it is not trying to take advantage of a lower prevailing wage, and submits evidence of prevailing wages for the areas where it provides the most services to demonstrate that the Elmhurst, Illinois location has the highest prevailing wage. Finally Employer indicates that it is an industry standard and general practice for smaller trucking companies, such as itself, to only have one worksite. (AF 4).

The matter was docketed and a Notice of Assignment and Expedited Briefing Schedule issued on March 25, 2016. Employer and CO submitted briefs on April 5, 2016.

On appeal, the CO argues that Employer has not complied with the regulatory requirements because the truckers will work at multiple worksites located across different areas of intended employment. The CO submits that Employer concedes that travel will occur on a daily basis and to any of the lower 48 states, and that this fact is in “direct conflict” with the notion that work will not be performed at multiple worksites over different areas of employment. The CO argues that the workers could be miles away from each other at any given time. The CO cites to recent decisions in which BALCA has upheld denials of certification for truckers whose employers only submitted one application for the job opportunities. *See Four Queens Transp., LLC et al.*, 2015-TLN-60 (Oct. 29, 2015); *Manuel Huerta Trucking, Inc.*, 2015-TLN-59 (Oct. 16, 2015).<sup>6</sup> The CO argues that the definition of “place of employment” upon which Employer relies is a definition relevant only to the H-1B program, not to the H-2B program. In response to Employer’s argument that it is not trying to take advantage of a lower wage rate in Illinois, the CO asserts that it is irrelevant for H-2B approval as “[n]either the Employer’s intent, nor payment of a comparatively high wage, is a basis upon which the CO may approve the Employer’s H-2B application.” (CO Brf. 7-8). Finally, the CO explains that it has no issue with the business decision of having only one trucking terminal, and concludes by stating that the travel requirement with service to all 48 contiguous states “makes plain that [Employer’s] worksite and trucking terminal is not the location where the truckers perform their work, and is therefore also not the worksite.” (CO Brf. 8).

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<sup>6</sup> The CO also cites to a case involving the denial of certification of multi-lingual tour guides. *See American Tours Int’l, LLC*, 2011-TLN-9 (Mar. 16, 2011).

## DISCUSSION

The CO determined that Employer failed to comply with the regulatory obligations of H-2B employers because Employer's workers would not work within the same area of intended employment. 20 C.F.R. § 656.15(e) provides:

(e) *Requests for multiple positions.* Certification of more than one position may be requested on the *Application for Temporary Employment Certification* as long as all H-2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

The regulations at 20 C.F.R. § 656.5 provide the following definition of “area of intended employment”:

*Area of intended employment* means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that 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, or quality of the regional transportation network). 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.

The CO determined that Employer failed to comply with the regulatory obligations of H-2B employers by submitting only one application when its H-2B employees would be at multiple worksites across many areas of intended employment.

In past decisions, BALCA has affirmed denials of certification in trucking cases where the truckers would be working in locations “miles away from each other at any given time” and where the workers would not be performing services in the same geographic area within normal commuting distance of the worksites. *See, e.g., Four Queens Transp., LLC, et al, supra; Manuel Huerta Trucking, Inc., supra.* These decisions, and the CO's denials, were based on an assumption that a worksite is simply any place where the employees perform job duties. However, these prior cases did not address the definition of worksite; it simply assumed that the “trucking terminal is not the location where the truckers perform their work, and is therefore also not the worksite” implying that the worksite is where the work is performed. (CO Brf. 8). *See Four Queens Transp., LLC, et al., supra.* As a result, these prior BALCA decisions concluded that if a truck driver travels to multiple locations to perform his or her duties, such as delivering goods, and these locations are not all within the same area of intended employment, the application is in contravention of 20 C.F.R. § 656.15(e).

If Employer is correct, then submitting one application is in compliance with the regulation because there is only one worksite in one area of intended employment, the trucking terminal. If, however, the CO is correct in asserting that each delivery and pickup location is a worksite, then there are multiple worksites throughout multiple areas of intended employment, and separate applications would be required for each area of intended employment. *See* 20 C.F.R. § 655.15(e)-(f).

The CO does not explicitly address the definition of a worksite. He does make the implicit argument that a worksite is any and all places where an employee performs job duties. (CO Brf. 8). While this definition appears simple and easy to enforce, it also would be patently unsuited to the trucking industry. The very nature of trucking requires movement from one place to another and stopping at multiple locations along a route. Under the CO's definition of "worksite," an employer's H-2B application would be certified only if the trucking terminal, its delivery locations and the roads between them were either in one area of intended employment, or if the employer obtained certification for every area of intended employment including those locations. These requirements would be manifestly unreasonable.

Employer argues that a "worksite" definition for truckers should be closer to the definition of "place of employment" and, in support, cites a DOL Fact Sheet issued by the Wage and Hour Division relating to the H-1B program. (Emp. Brf. 3 and Exhibit 7).<sup>7</sup> The CO's response is that the H-1B regulations are inapplicable to H-2B cases. However, the H-2B regulations do not define the term "worksite" or "place of employment." The CO provides no definition of "worksite," and provides no argument as to why the H-1B regulations on "place of employment" could not be applied here, or why they could not at least be persuasive.

The relevant portion of the Fact Sheet contains the Wage and Hour Division's interpretation of the H-1B regulation at 20 C.F.R. § 655.715. Because the H-2B regulations do not define "worksite," or "place of employment," we will look to DOL's other immigration-related regulations for guidance on defining the terms. *See generally Chase v. Buncombe Cnty*, 1985-SWD-4 (Sec'y Nov. 3, 1986) (one interpretation of the word "employee" under the Energy Reorganization Act used to interpret the word under the Solid Waste Disposal Act; nothing in the statutes or legislative histories suggested interpreting the term differently between the two Acts). Pursuant to § 655.715:

*Place of employment* means the worksite or physical location where the work actually is performed by the H-1B, H-1B1, or E-3 nonimmigrant.

(1) The term does not include any location where either of the following criteria—paragraph (1)(i) or (ii)—is satisfied:

...

(ii) *Particular worker's job functions.* The nature and duration of an H-1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be

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<sup>7</sup> *See* [www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62j.htm](http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62j.htm).

considered a “place of employment” or “worksites” if the following three requirements (*i.e.*, paragraphs (1)(ii)(A) through (C)) are all met—

(A) The nature and duration of the H-1B worker’s job functions mandates his/her short-time presence at the location. For this purpose, either:

(1) The H-1B nonimmigrant’s job must be peripatetic in nature, in that the normal duties of the worker’s occupation (rather than the nature of the employer’s business) requires frequent travel (local or non-local) from location to location; or

(2) The H-1B worker’s duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

(B) The H-1B worker’s presence at the locations to which he/she travels from the “home” worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.*, not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H-1B nonimmigrant is not at the location as a “strikebreaker” (*i.e.*, the H-1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

Pursuant to this definition, truckers’ delivery and pickup locations would not qualify as “worksites.” The job functions of a truck driver necessitate frequent changes of location with little time spent at any one location and the nature of the occupation mandates this short-term presence. The H-1B regulations provide a reasonable definition of “place of employment,” and one which is derived under immigration provisions relating to the DOL’s enforcement of H visa programs.

Furthermore, even within the H-2B regulations, the word “worksites” is used in such a manner that would contradict the CO’s broad definition of *any* place where work is conducted. For example, pursuant to 20 C.F.R. § 655.45, “the employer must post the availability of the job opportunity in at least 2 conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers.” The preamble explains this provision and states that “the posting of the notice *at the employer’s worksite*, . . . is intended to provide . . .” notice to the employer’s U.S. workers of the job. 80 Fed. Reg. 24,042, 24,077 (emphasis added). To hold that each delivery location where a truck driver may offload goods is a “worksites” would require the odd result of having to post a notice at each delivery and pickup location, even if that location is on a customer’s premises. Because the truck driver at that one delivery or pickup location is the only employee there, no notice would actually be provided to a U.S. worker employed by Employer.

A narrower definition of “worksite” is also consistent with the definition of “job opportunity” as that phrase is used in the definition of area of intended employment. “*Area of intended employment* means the geographic area within normal commuting distance of the place (**worksite** address) of the job opportunity for which the certification is sought.” 20 C.F.R. § 655.5 (bold emphasis added). The place of the “job opportunity” is therefore the worksite address. “*Job opportunity* means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.” *Id.* In the case of trucking, there is only one job opportunity for one trucker. There is only one opening for full-time employment and it is where the trucking terminal is located. There is no “job opportunity” or opening for employment at the delivery location or on the road between the terminal and that location. Therefore, in the case of a Heavy and Tractor-Trailer trucker, the trucking terminal is the only worksite address within the meaning of the regulations, and the area of intended employment encompasses the geographic area within normal commuting distance of that location.

Under the CO’s approach, trucking companies would be excluded from using the H-2B program since they would be required to file a new application for each delivery location; yet such applications, as a practical matter, could not be filed since those locations do not constitute job opportunities. There is nothing in the regulation or its preamble, and the CO does not make a policy argument, supporting the exclusion of Heavy and Tractor-Trailer Truck Drivers from the H-2B program. It is clear the drafters of the regulations were capable of singling out certain types of employers, as they did with job contractors, but they did not do so here. *See* 20 C.F.R. § 655.19.<sup>8</sup>

We emphasize that this decision is limited to the facts of Heavy and Tractor-Trailer Truck Driver cases. We make no determination on what a “worksite” is in any other context for the H-2B visa program. The nature of this particular occupation dictated the outcome in this case.

We also acknowledge that there may be conflicting case law. To the extent these cases are in conflict with this opinion, we find those cases inapposite as they did not focus on the definition of “worksite” as applied to commercial trucking employers.

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<sup>8</sup> Congress also had the ability to single out industries, as they did with the seafood industry. The statutory provision is articulated by 20 C.F.R. § 655.15(f).

**ORDER**

Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of Employer's *Application for Temporary Employment Certification* is **REVERSED** and that this matter is **REMANDED** for certification.

Entered at the Direction of the Panel:

TODD R. SMYTH  
Secretary to the Board of Alien Labor  
Certification Appeals