



**Issue Date: 25 February 2014**

**BALCA Case No.: 2014-TLC-00045**  
ETA Case No.: H-300-14008-667384

*In the Matter of:*

**SHATLEY FARMS, LLC,**

*Employer*

Certifying Officer: Chicago National Processing Center

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

### **DECISION AND ORDER**

Shatley Farms, LLC (“Employer”) appeals the Certifying Officer’s denial of the above-captioned application for H-2A temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and the implementing regulations promulgated by the U.S. Department of Labor (“DOL” or “Department”), Employment and Training Administration (“ETA”) at 20 C.F.R. Part 655.<sup>1</sup> For the reasons set forth below, the Certifying Officer’s denial is REVERSED and this matter is REMANDED for further processing.

### **BACKGROUND**

On July 8, 2014, the Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142A) with ETA’s Chicago National Processing Center (“CNPC”) for 50 Christmas Tree Farm Workers. The Employer seeks to have these workers perform labor or services at multiple farms owned or leased by the Employer in Ashe County, North Carolina and Grayson County, Virginia. AF 63-75.<sup>2</sup>

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<sup>1</sup> The H-2A nonimmigrant visa program enables agricultural employers in the United States to import foreign workers on a temporary basis to perform temporary, agricultural labor or services. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188. Employers who seek to hire H-2A nonimmigrant workers must first apply for and receive a “temporary labor certification” from DOL’s Employment and Training Administration (ETA). 8 U.S.C. 1188(a)(1).

<sup>2</sup> Citations to the 91 page Administrative File will be referenced “AF” followed by the page number.

The Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) on January 15, 2014, to inform the Employer that its application failed to meet the criteria for acceptance. AF 44-51. In an attachment to the NOD, the CO identified one deficiency relevant to the instant appeal: the application included worksites in multiple areas of intended employment.<sup>3</sup> Although the regulations do not explicitly prohibit an individual employer from filing an application containing worksites in multiple areas of intended employment, the CO asserted that he was unable to certify such an application because “the Department premised its regulations and historical practice, unless otherwise explicitly authorized, on an employer conducting recruitment for U.S. workers and filing an H-2A application for a full-time job opportunity covering worksites within the same area of intended employment (i.e., place of employment).” AF 12. “Therefore,” the CO stated, “this application must be limited to a single area of intended employment comprised of normal commuting distances.” Regarding the commuting distance applicable to the worksites listed in the Employer’s application, the CO observed:

According to a study released in February 2013 by the U.S. Department of Commerce titled *Out-of-State and Long Commutes: 2011*, only 5.1% of NC residents had a commute to work of over 1 hour. As such, commutes of over 1 hour are not normal in NC.

Clearly, the labor market does not support travel times in excess of 60 minutes. This holds true even if we narrow our focus to goods producing industries; of which agriculture is one. For instance, a more specific analysis was conducted using the U.S. Census Bureau, Center for Economic Studies' "On the Map" application (<http://onthemap.ces.census.gov>). The first worksite location listed in Section F.c of the ETA Form 9142 is 3509 US Hwy 221 North, Jefferson, NC. The analysis shows in Jefferson, 88% of "goods producing" jobs involved travel of 50 miles or less.

AF 49. Based upon this information, the CO concluded that the following worksites “fall outside the area of intended employment”:

Worksite	Distance from First Worksite	Travel Time
1294 Leafwood Rd, Fries, VA	47.6 miles	1 hour, 6 minutes
218 Meadow Ln, Fries, VA	43.6 miles	1 hour, 6 minutes
373 Mooretown Ln, Fries, VA	48.5 miles	1 hour, 6 minutes
2256 Spring Valley Rd, Fries, VA	47.6 miles	1 hour, 5 minutes
5201 Liberty Hill Rd, Fries, VA	47.4 miles	1 hour, 11 minutes

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<sup>3</sup> Although the CO identified three other deficiencies in the NOD, all three were later resolved and thus immaterial to the instant appeal.

AF 49. The CO informed the Employer that “[i]n order for an application to meet the standard for area of intended employment as set forth in the statute and regulations, each worksite must be 60 minutes or less from the first worksite location indicated in Section F.c, Item 1-6 of the ETA Form 9142.” AF 50 (emphasis in original). Because the worksites in Fries, Virginia fell outside of this 60 minute limit, the CO informed the employer that it must remove these worksites from its application and include them in a new, distinct, application. *Id.* “In the alternative,” the CO stated, “the employer may submit documentation to establish that the commutes proposed in the application are normal.” *Id.*

By letter dated January 16, 2014, the Employer’s Administrative Manager, Ms. Elaine Mash, responded to the NOD. With respect to the CO’s findings about the area of intended employment, Ms. Mash stated:

We are located in a rural, mountainous area of North Carolina in Ashe County, which borders the state of Virginia. Our farms in Virginia are located in Grayson County which also borders Ashe County. Nevertheless, please note and add that we have registered, inspected migrant housing located on one of our farms in Grayson County, Virginia, which puts any commute that workers may have to farms in Virginia to approximately 15 to 20 minutes of the housing.

AF 40. Ms. Mash provided a certificate from Virginia’s Department of Health granting the Employer a permit/license to operate a Migrant Labor Camp in Fries, Virginia. AF 42.

By letter dated January 29, 2013, the CO informed the Employer that its application for temporary labor certification had been denied. AF 9-17. The CO cited one basis in support of the denial: “Area of Intended Employment.” As authority for the denial, the CO cited 8 U.S.C. § 1188(a)(1)(a) and 20 C.F.R. §§ 655.103(b), 130(a). Although the Employer had arranged for housing closer to the worksites in Fries, Virginia, the CO found this modification was not sufficient to overcome the deficiency identified in the NOD. AF 16-17. Specifically, the CO stated:

[I]n order for an application to meet the standard for area of intended employment as set forth in the statute and regulations, each worksite must be 60 minutes or less from the first worksite location indicated in Section F.c, Item 1-6 of the ETA Form 9142. The inclusion of additional housing, in acknowledgement of the fact that the commute as filed is abnormal, does not render the commute normal for all those workers, domestic or otherwise, who do not to [sic] reside in employer provided housing. As previously discussed, to require local U.S. workers to engage in extended commutes to get to one or more worksites would produce precisely the adverse effect that the statute and regulations are designed to prevent.

The Chicago NPC conducted analyses of distance and travel time from of [sic] all worksites listed on the employer’s application to the first worksite location. Of those, all worksites in Fries, VA fall outside of the 60 minute limit.

AF 16-17. The CO stated that the Employer’s application was denied because the Employer “failed to remove the worksite locations in Fries, Virginia, or submit sufficient documentation to establish that the commutes proposed in the application are normal.” AF 17.

On February 4, 2014, the Employer filed a request for expedited administrative review before the Office of Administrative Law Judges (“OALJ”). OALJ received a copy of the Administrative File from the Director of the CNPC on February 12, 2014.

## **DISCUSSION**

The regulations do not explicitly speak to whether an individual employer may file an *Application for Temporary Employment Certification* (ETA Form 9142A) for labor or services to be performed at worksites in multiple areas of intended employment. Section 655.131(b) explicitly permits an association of agricultural employers to file a single, master application covering multiple areas of intended employment so long as the association’s employer-members are located in no more than two contiguous states. 20 C.F.R. § 655.131(a) (2013). At the same time, however, section 655.132(a) explicitly limits the scope of an application filed by an H-2A Labor Contractor (“H-2ALC”) to a single area of intended employment. 20 C.F.R. § 655.132(a) (2013).

The CO argues that that an individual employer may not file a single application for H-2A temporary labor certification if the labor or services it seeks to certify will be performed at worksites in multiple areas of intended employment because “the Department premised its regulations and historical practice, unless otherwise explicitly authorized, on an employer conducting recruitment for U.S. workers and filing an H-2A application for a full-time job opportunity covering worksites within the same area of intended employment (*i.e.*, place of employment).” AF 12.<sup>4</sup> But the regulatory history preceding the Final Rule promulgated in

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<sup>4</sup> Specifically, the CO maintains:

The Department has historically defined and utilized an “area of intended employment” concept in the H-2A and other temporary visa programs, as well as the permanent labor certification program, for purposes of determining (a) the local recruitment requirements an employer must follow to locate qualified and available U.S. workers, and (b) whether the wages and working conditions of the job opportunity will not adversely affect U.S. workers similarly employed in that area of intended employment. The Department recognizes that a fixed-site employer may have multiple properties or physical worksite addresses where the services or labor must be performed. The Department has therefore historically permitted an employer to recruit for U.S. workers and granted temporary labor certification where all such properties or physical worksites are located within the same area of intended employment. Moreover, in circumstances where the job opportunity is located in more than one State within the same area of intended employment, the Department’s regulations permit the employer to submit a job order to any one of the State Workforce Agencies (SWAs) having jurisdiction over the anticipated worksites. *See 20 C.F.R. § 655.121(a)*. A job order with any one of the SWAs having jurisdiction over the area of intended employment establishes a distinct labor market, providing adequate job order coverage of the labor market within that area of intended employment. So filed, the job offer reflects worksites all within the same area of intended employment and recruits for a job opportunity reflecting normal requirements, terms, and conditions of employment for that area, thereby ensuring that there is no

December 2008 and the Final Rule promulgated in February 2012 do not provide any indication that the Department has historically limited employers from seeking H-2A temporary labor certification for work that will be performed in multiple areas of intended employment.

The Final Rule promulgated in December 2008 explicitly permitted H-2A Labor Contractors (“H-2ALCs”) to file applications with worksites in multiple areas of intended employment. In the preamble to this rule, the Department explained:

As with other employers with multiple work locations, H-2ALCs may submit job orders “to any one of the SWAs having jurisdiction over the anticipated work areas.” The SWA receiving the job order is responsible for circulating the job order to “all States listed in the application as anticipated worksites, as well as those States, if any, designated by the Secretary as traditional or expected labor supply States for each area in which the employer’s work is to be performed.”

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The Department considered, as an alternative, requiring H-2ALCs to file a separate application for work to be performed in each separate area of intended employment, but rejected the idea for several reasons. First, it is far more administratively convenient for both the Department and the employer if all of the employer’s seasonal work for the year with the same initial date of need is included in a single application. Filing multiple applications in such a situation is needlessly duplicative, wasting valuable time and resources. In theory, an H-2ALC could be conceived of as having a separate date of need for each new work site or for each new area of intended employment, but the reality of labor contract work is that the responsibilities of workers to the labor contractor employer, as well as their associated job duties, continue from work location to work location and do not re-start with each new work site. Second, the “single application” method will maximize recruitment of U.S. workers through posted job orders, since the SWAs for all the areas of intended employment will refer workers for jobs opportunities in all of the other areas of intended employment. Third and finally, the “single application” method will better manage the expectations of incoming H-2A workers, who will know at the outset whether the H-2ALC expects to employ them for the entire season, or rather only for a more limited duration.

H-2ALCs are free to file separate applications for separate areas of intended employment where it makes sense for them to do so. Indeed, they may be required to file separate applications where, for example, they need extra workers with a different date of need to report for work in areas of intended employment that they will reach later in the season. For purposes of administrative convenience, however, and to comport with the realities of the nature of the underlying job

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adverse effect on the wages and working conditions of similarly employed U.S. workers in that area.

positions, the Department will permit single applications to be filed by H-2ALCs covering extended itineraries.

73 Fed. Reg. 77110, 77161-62 (Dec. 18, 2008). Nothing in this preamble indicates that the Department was changing the alleged long-standing policy of requiring employers to file a separate application for each area of intended employment.

In September 2009, the Department issued a Notice of Proposed Rulemaking (“NPRM”) proposing, *inter alia*, a rule limiting the scope of applications filed by H-2ALCs to a single area of intended employment. 74 Fed. Reg. 45906, 45947 (Sept. 4, 2009). Although the NPRM does not explain why the Department wished to make this change, the CO asserts:

This regulatory language was intended to provide unambiguous clarification that H-2ALC job orders and applications would be treated in a manner similar to other employers, unless otherwise authorized, filing under 20 CFR 655.130. The 2008 Final Rule permitted H-2ALCs to depart from the normal practice of requiring H-2A applications to cover a single area of intended employment because of what the authors of the regulation believed to be the unique characteristics of H-2ALCs, as discussed in the preamble. (73 FR 77110, Dec. 18, 2008) The 2008 regulations at 20 CFR § 106(a)(2) also required H-2ALCs with worksites in multiple areas of intended employment to conduct separate recruitment in each area of intended employment where work would be performed, consistent with the Department’s historical implementation of its statutory obligation to test the local U.S. labor market, as discussed above (73 FR 77221, Dec. 18, 2008) Again, the Department intended its explicit limitation of H-2ALC applications to a single area of intended employment in the 2010 Final Rule to unambiguously inform H-2ALCs that their applications must once again be limited to one area of intended employment, like all others [sic] employers not subject to an exception.

AF 15. This explanation lacks persuasive value, as it provides no support for the premise that the Department historically prohibited employers from filing applications with worksites in more than one area of intended employment. The NPRM also proposed “narrow[ing] the scope of what constitutes an acceptable master application” as follows:

The Proposed Rule continues to require a single date of need as a basic element for a master application. The Department proposes to retain the longstanding requirement that a master application may be filed only by an association acting as a joint employer with its members; the Proposed Rule reiterates this joint responsibility by requiring that the association identify all employer-members that will employ H-2A workers. The Application must demonstrate that each employer has agreed to the conditions of H-2A eligibility.

The Department also proposes to revert to the long-established practice of permitting a master application only for the same occupation and comparable work within that occupation. However, the Department proposes to modify that practice to limit such Applications to a single State.

74 Fed. Reg. at 45916. The latter paragraph suggests that it was not the Department's "long-established practice" to limit applications to a single state of intended employment.

In February 2010, the Department published a Final Rule implementing many of the changes proposed in the NPRM, with some minor modifications. 75 Fed. Reg. 6884 (Feb. 12, 2010). With respect to the rules governing Master Applications filed by associations, the Department stated:

As explained in the NPRM, master applications filed by associations are clearly contemplated by the INA, and the Department has permitted master applications as a matter of practice. In the 2008 Final Rule, the Department recognized their use. The NPRM proposed to continue the use of master applications but in a more limited fashion. . . . In response to many comments received on this issue, the Department has reconsidered the one-State limitation and has expanded the area of intended employment for associations filing master applications to at most two contiguous States.

The Department has modified the provision governing master applications to expand the area of intended employment. The modification strikes a balance between the programmatic goals of protecting job opportunities for U.S. workers and ensuring uniform enforcement of the terms and conditions and the need to provide flexibility for employer associations. Monitoring program compliance becomes more difficult and the potential for violations increases when workers under a single application are dispersed across several States. Limiting the area of intended employment to two contiguous States will make it more likely that employers under the same application will learn of and have the ability to correct potential problems and avoid liability.

*Id.* at 6917-18. In making this change, the Department was silent as to the appropriate areas of intended employment for individual employers.

The CO asserts that, under these regulations, an *Application for Temporary Employment Certification* (ETA Form 9142) cannot contain worksites in multiple areas of intended employment unless (1) the employer has expressly granted special procedures; or (2) the employer is an agricultural association and filed a Master Application pursuant to section 655.131. AF 14. With respect to the latter exception, the CO maintains:

Although these "master" job orders and applications covering multiple areas of intended employment were not mentioned in the Department's regulations until the 2008 Final Rule, they are clearly contemplated by 8 U.S.C. 1188(d), and the Department has permitted this type of application to be filed by associations as a matter of long-standing practice. *See* 52 FR 20496, 20498, Jun. 1, 1987 (cited in ETA Handbook No. 398). The Department's 2010 Final Rule retained this long-standing practice, but permitted its use only where the association files as a joint employer with its members covering multiple areas of intended employment within no more than two contiguous states. Under this regulatory exception, the

Department reviews and processes the association's job order and H-2A application as if it were a "single employer," despite the fact that each individual employer-member will also offer full-time job opportunities covering its worksites within its area of intended employment. That is, the cumulative effect of an association filing as a joint employer with a number of its employer-members, each offering full-time employment within an area of intended employment, would logically include applications covering multiple areas of intended employment. Under this circumstance, **the Department's long-standing practice has been to treat the association as essentially a large "single employer" permitted to file and sign a single job order and H-2A application on behalf of its individual employer members**, with the associations agreeing to ensure that the wages and working conditions offered by employer-members in each distinct area of intended employment does not create adverse effect; coordinate and manage referrals of U.S. workers who apply and offer local employment with employer-members that are within reasonable commuting distance; and ensure that the referral and/or transfer of workers among its named employer-members are done without disparate treatment to U.S. workers, as expressly permitted by statute. **No other employment situation, including those of an individual fixed-site employer or agent on behalf of one of its members, is permitted by the Department to operate in this manner.**

AF 14 (emphasis added). But the CO's explanation is internally inconsistent; if the Department treats agricultural associations as a large "single employer," and the Department permits agricultural associates to file applications with worksites in multiple areas of intended employment, so long as all of its employer-members are located in no more than two contiguous states, then why would the Department deny an individual employer whose worksites are located in no more than two contiguous states the same opportunity?

As I observed in *Red Diamond Enterprises*, 2013-TLC-46 (Aug. 14, 2013), the plain language of 20 C.F.R. § 655.131(a) suggests that individual employers may also file applications with worksites in multiple areas of intended employment, so as long as the worksites are not located in more than two contiguous states. Specifically, section 655.131(b) provides that "[a]n association may submit a master application covering the same occupation or comparable work available with a number of its employer-members in multiple areas of intended employment, just as though all of the covered employers were in fact a single employer, as long as a single date of need is provided for all workers requested by the *Application for Temporary Employment Certification* and all employer-members are located in no more than two contiguous States." (emphasis added).

The record indicates that the worksites listed in the Employer's application are located in two states and no farther than 60 miles apart. AF 49. Even assuming that these worksites fall within two separate areas of intended employment,<sup>5</sup> the regulations do not clearly prohibit the Employer from filing an application with worksites in multiple areas of intended employment, and the CO has not provided a reasonable explanation as to why the Employer cannot include

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<sup>5</sup> The Employer did not argue that its worksites fall within the same area of intended employment; accordingly, for purposes of this decision, I presume that the worksites are located in two separate areas of intended employment.

worksites that would be acceptable if the Employer was an agricultural association comprised of multiple employers. In light of these circumstances, I find that it was an abuse of discretion for the CO to insist that the Employer remove its worksites in Fries, Virginia from the application. Because this was the only basis that the CO cited in support of the denial, the denial in this matter must be reversed.

**ORDER**

In light of the foregoing, I hereby REVERSE the denial and REMAND this matter to the CO with instructions to continue processing the Employer's application.

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