

**U.S. Department of Labor**

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**Issue Date: 29 May 2014**

OALJ Case No.: 2014-TLC-00087

ETA Case Nos.: H-300-14107-535733

*In the Matter of:*

**T. Bell Detasseling LLC,**  
*Employer*

Certifying Office: Chicago National Processing Center

Appearances: Leon R. Sequeira, Esq.  
Prospect, Kentucky  
*For the Employer*

Vincent C. Constantino, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
Washington, DC  
*For the Certifying Officer*

Before: Stephen R. Henley  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. On May 8, 2014, T. Bell Detasseling, LLC (“Employer”) filed a request for a *de novo* administrative hearing to review the Certifying Officer’s (“CO”) denial of an H-2A application pursuant to 20 C.F.R. § 655.171(b). The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

## Statement of the Case

On April 17, 2014, the United States Department of Labor (“the Department”), Employment and Training Administration (“ETA”) received an ETA Form 9142 *Application for Temporary Labor Certification* (“Application”) from Employer. (AF 96-107).<sup>1</sup> Employer requested H-2A labor certification for 210 farm workers; diversified for the period June 3, 2014 to August 10, 2014.

On April 18, 2014, the Certifying Officer (“CO”) issued a Notice of Acceptance (“NOA”) stating that the application “contains the required assurances of U.S. workers similarly employed will not be adversely affected.” However, on April 23, 2014, the CO notified Employer the NOA had been issued in error and that the application “did not meet the standards for certification because [eleven] of the worksites were located more than one hour from another.”<sup>2</sup> The CO then issued a Notice of Deficiency (“NOD”) instructing Employer to either remove the affected worksites from the application and/or submit a new H-2A application for each area of intended employment.<sup>3</sup> In the alternative, Employer could also submit documentation to establish the commutes proposed in the application were normal. (AF 33-39).

Employer responded on April 24, 2014, averring that “some of the mapping analysis was incorrect and that, even if some of the work site locations fall outside of a one hour commute, that is normal in the detasseling industry<sup>4</sup> which normally has commutes of 1 ½ to 2 hours.”

On May 1, 2014, the CO denied Employer’s application for temporary labor certification. (AF 6-12). Although Employer explained in response to the NOD that 90 minutes is a normal commute, the CO ultimately found that “five locations were determined to be justifiably considered outside the area of intended employment” because they are “more than one hour from its primary worksite address. Employer has failed to establish the commutes proposed in the application are normal and/or remove these [five] locations from the application.”<sup>5</sup> Therefore,

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<sup>1</sup> As used in this decision, “AF” refers to the Administrative File; “DX” refers to the Department of Labor’s Exhibits; “EX” refers to Employer’s Exhibits; and “ALJ” refers to Administrative Law Judge Exhibits, if any.

<sup>2</sup> Relying on a 2011 U.S. Department of Commerce study issued in 2013 entitled “Out-of-State and Long Commutes,” the CO concluded that, because only 3.7% of Iowans have more than a one hour commute, any commute over 60 minutes is “long,” in other words, not a normal commuting distance. Of the 16 work site locations Employer listed on the ETA Form 9142 and 790, the CO initially determined eleven sites were more than a 60 minute commute from Lone Tree, Iowa, the first work site on the application.

<sup>3</sup> On appeal, Employer argues that the Department cannot issue a deficiency notice after issuing a Notice of Acceptance and the CO’s denial should be reversed on this basis. Citing to 20 C.F.R. § 655.121(e)(1), the Department responds that a certifying officer has the authority to require modifications to an application if the application is later found to be deficient. Given the outcome of the case, it is not necessary for this Court to decide today whether an alleged violation of a procedural right warrants the specific relief Employer requests.

<sup>4</sup> “Detasseling” corn is removing the pollen producing flowers, the tassel, from the tops of corn plants and placing them on the ground. This is done either by having “detassellers” walk through the corn field removing the tassels or by having detassellers ride through the corn field on a detasseler carrier. (AF 330).

<sup>5</sup> The five locations, and the estimated commute time from the initial work site location, are:

Work Site Location	Distance from Primary Work Site Location	Commute Time from Primary Work Site
Eldridge	61 miles	1 hour 5 minutes
Garrison	77.8 miles	1 hour 21 minutes

this application covers more than one area of intended employment.” (AF 13).<sup>6</sup> The CO then denied the application because it “was not properly limited to a single area of intended employment.” 20 C.F.R. § 655.132(a).

As noted above, the Employer requested a *de novo* hearing.<sup>7</sup> The Office of Administrative Law Judges received the Administrative File (“AF”) on May 12, 2014 and a hearing was held on May 23, 2014.<sup>8</sup> At the hearing, Director’s Exhibit (“DX”) 1-5<sup>9</sup> and Employer’s Exhibit (“EX”) 1-2<sup>10</sup> were admitted into evidence.<sup>11</sup> Both parties filed their briefs electronically on May 27, 2014.

### Testimonial Evidence

*Mr. John T. Rotterman.*<sup>12</sup> Mr. Rotterman is a certifying officer with the Office of Foreign Labor Certification within the Department of Labor and his primary responsibility is the H-2A program. (DX 5 at 27-8). Applications for temporary employment certification filed by an H-2ALC must be limited to a single area of intended employment. We have access to data that speaks to what a normal commute is and then overlay that data with the application. All job sites must be within that normal commuting area. (DX 5 at 42-42). In February of 2013, the Commerce Department published a study where they found that only 3.7% of Iowa residents had a commute to work of over one hour. That would have determined the area of intended employment for where this application was filed. We then looked at each work site and determined whether it was within a 60 minute radius of the first work site or else it would be outside the area of intended employment. (DX 5 at 44). The Commerce Department study created for us a sense as to what is normal. (DX 5 at 47). We then analyzed the Employer’s application and issued a notice of deficiency without findings and asked him to either limit it to one area or provide evidence to rebut the data we are using. While the Employer did provide

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Keystone	70.2 miles	1 hour 9 minutes
Vinton	73 miles	1 hour 13 minutes
Dysart	87.2 miles	1 hour 26 minutes

<sup>6</sup> The CO agreed that “six of the initial eleven locations were mapped incorrectly by the Chicago NPC...and within 1 hour of the 1<sup>st</sup> work site location.” The CO determined the five remaining work site locations “are more than one hour from its primary worksite address. The employer has failed to provide documentation to establish that the commutes proposed in the application are normal.” (AF 12)

<sup>7</sup> In a *de novo* review, the ALJ must affirm, reverse or modify the CO’s determination, or remand to the CO for further action. Since the Immigration and Nationality Act does not contain a specific standard of review for ALJs of decisions by the CO, I will review the evidence presented *de novo*, but will also review the CO’s decision for abuse of discretion. *See RP Consultants, Inc.*, 2009-JSW-00001 at p. 8 (June 30, 2010), *citing Hong Video Technology*, No. 1988-INA-202 (BALCA Aug. 17, 2001).

<sup>8</sup> When a party requests a *de novo* hearing, the administrative law judge has five business days to schedule a hearing after receipt of the administrative file, upon request of the Employer, and ten calendar days after the hearing to render a decision. 20 C.F.R. §§ 655.171(b)(1)(ii), (iii).

<sup>9</sup> DX 1 is the administrative file; DX 2-4 are “On the Map” analyses and DX 5 a transcript of the Certifying Officer’s testimony given on May 13, 2014 in the case of *Catnip Ridge Manure Applications, Inc.*, Case 2014-TLC-00078.

<sup>10</sup> EX 1 and 2 include various letters from individuals in the detasseling industry attesting to normal commuting times of 90 minutes and more.

<sup>11</sup> The rules also allow for the introduction of new evidence during the hearing. 20 C.F.R. § 655.171(b)(1)(ii).

<sup>12</sup> Mr. Rotterman did not testify in person. Instead, the parties agreed to offer the transcript of his testimony given in a prior proceeding.

letters from Iowa-based employers that are similarly situated or that have knowledge of the Employer's industry regarding the necessity for long travel and commute times, I did not find the evidence persuasive. (DX 5 at 54). I believe the purpose of the area of intended employment limitation is to prevent an adverse effect on potential applicants because they might be dissuaded from taking the job because it requires a commute that was long.<sup>13</sup> (DX 5 at 69-70). I agree that if an employer was located at the outer edges of an MSA (Metropolitan Statistical Area) and the commute from the two furthest points within the MSA was two and a half hours, then the Department would find that to be an acceptable commute. (DX 5 at 72). I also agree that a commute of two and a half hours is perfectly fine if it is within an MSA but if the job site happens to be outside of an MSA, a commute of two and a half hours is too long. (DX 5 at 74). There is no definition of a "normal" commute in the regulations so we've determined that the census data is the best evidence to use. (DX 5 at 77). Even if 25% of Iowans traveled more than 60 minutes, I would still not define that as a "normal" commute. (DX 5 at 81-2). I am not aware of any circumstance where the Department has accepted a commute of longer than 60 minutes with regard to area of intended employment. (DX 5 at 87). If we did not provide the employer with a chance to challenge the 60 minutes, then it would be a rigid measurement. But since we do allow the employer to present evidence, it is not. Industry specific commute time is not relevant to the inquiry. (DX 5 at 111). The Department has determined that in cases of H-2A applications, 60 minutes is the maximum normal commute. Anything beyond that has to be rebutted by the Employer. (DX 5 at 115). We haven't found anything yet to specifically rebut the 60 minute measure. But if an Employer came in with overwhelming evidence that showed that an hour and a half was appropriate, I would consider it. (DX 5 at 120).

### Discussion

The Employer in this case is an H-2A Labor Contractor ("H-2ALC"). Pursuant to 20 C.F.R. 655.132(a), an Application for Temporary Labor Certification filed by an H-2ALC must be limited to a single area of intended employment. The CO ultimately determined that the Employer's application was in violation of this requirement because it covered five worksites located more than 60 minutes from the first worksite that the Employer listed in the application. In applying this 60-minute cutoff, the CO relied on a report issued in 2013 by the U.S. Census Bureau entitled *Out-of-State and Long Commutes: 2011*, which found that 3.7% of workers in Iowa commute 60 minutes or longer. Based solely on this report, the CO concluded that commutes in excess of 60 minutes are not normal in Iowa, and that the labor market in Lone Tree, Iowa<sup>14</sup> does not support travel times in excess of one hour. Accordingly, 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) of the [Employer's application]." As noted above, the CO then directed the Employer to remove all worksites located outside of this

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<sup>13</sup> But the CO's remedy is to require the employer to simply file a new application for the five affected work sites, all located in Iowa. Since each job order would still be posted in the same state workforce agency, a prospective applicant would still see the same work site locations. In other words, instead of all potential work sites listed on one piece of paper, they would be on two or more, presumably side by side, a difference unlikely to have any effect on whether a U.S. worker would take a job because of the commute given that a work site that is 65 miles away is still 65 miles away, whether it is included in one application or two.

<sup>14</sup> The location of the first worksite in Employer's application.

60-minute threshold and include them in a “new, distinct, application,” or “submit documentation establishing that the proposed commutes are normal.”

On appeal, the Employer implicitly contends that the CO’s imposition of this 60-minute cutoff is contrary to the Department’s regulations, and arbitrary and capricious. The undersigned agrees, and finds that the imposition of a 60-minute commute cutoff is both inconsistent with the governing regulations and contrary to the Department’s intent at the time the regulations were promulgated.

The applicable regulations define an “area of intended employment” as:

The geographic area within normal commuting distance of the place 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.

20 C.F.R. § 655.103 (emphasis added). Although this definition explicitly states that there “is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area,” the CO nevertheless applies a 60-minute commute cutoff to all applications for H-2A labor certifications where the place of intended employment is not located within the boundaries of an MSA. (Tr. 44, 71-74, 115, 120.) The CO maintains that this 60-minute threshold does not constitute a “rigid measure of distance” because “the Employer is expressly afforded the opportunity to provide evidence” in rebuttal. (Tr. 88).<sup>15</sup> Whether or not an Employer is afforded an opportunity to provide “rebuttal” ignores the fact that the imposition of a generally applicable cutoff of distance or time is in direct conflict with the regulatory text defining “area of intended employment,” which specifically provides that there “is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area,” and expressly contemplates “widely varying factual circumstances among different areas.” 20 C.F.R. § 655.103.

In other words, there can be no specific distance or time such that anything more constitutes an abnormal commute. In this case, the CO relies on a false premise that, because only 3.7% of Iowans commute more than 60 minutes, anything beyond a sixty minute commute

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<sup>15</sup> The CO appears to place an extraordinarily high burden on employers to overcome this threshold. When asked what type of evidence would be sufficient to rebut the 60-minute ceiling, the CO replied, “[i]t’s difficult to say.” (Tr. 88, *see also* Tr. 81, 116.) At one point, he even suggested that an employer would need to present “overwhelming” evidence. (Tr. 120, 126.) Exactly what type of evidence this might be is unclear since, as of the date of the hearing, no employer has successfully rebutted the presumption. (Tr. 81.)

is “long” and a long commute is not a normal commute. Therefore, as the CO concluded, any worksite located more than 60 minutes from the first worksite listed on an application is presumptively outside a normal commuting distance. While 60 minutes may, in fact, be a long commute, a long commute can still be a normal commute. The two terms are not mutually exclusive and the CO has unreasonably conflated the two terms.<sup>16</sup>

It is noteworthy that the Department has previously indicated the term “area of intended employment” is “used [by the Department] primarily for recruitment purposes to ensure that the designated SWAs (state work force agencies) receive the job order so that U.S. workers have the opportunity to apply for the job.” Federal Register, Vol. 75. Page 6884, 6885 (February 12, 2010). It does not appear the term was ever intended to be used by a CO to place limits on H-2A applications as the Department considered and rejected the CO’s rigid approach to defining an area of intended employment when it revised the H-2A regulations in February 2010. The preamble to the Final Rule published in the Federal Register states, in pertinent part:

One commenter suggested that the Department add a definite number of miles, such as 75 miles, within which all work locations must be located. The commenter suggested that because of the size of the area of intended employment coupled with the length of the certification period, U.S. workers who only want to do one kind of agricultural job may be dissuaded from applying. Another commenter suggested narrowing the area of intended employment because commuting distances within an area of intended employment could be upwards of 90 miles and it would be unreasonable for the Department to expect U.S. workers to commute such a distance every day without being provided housing.

The Department understands the concerns of both commenters; however, their concerns are misplaced. The term area of intended employment is used in conjunction with recruitment, which should cast a net as wide as possible to inform all potential U.S. workers of an upcoming contract in their area. U.S. workers are entitled to the same housing as the H-2A workers if they are not reasonably able to return to their residence within the same day as discussed under § 655.122(d)(1).

As for the commenter’s concern that a worker who only wanted to do one type of agricultural activity would be precluded from applying, changing the definition of an area of intended employment would not alleviate such a situation. The term is used primarily for recruitment purposes to ensure that the designated SWAs receive the job order so that U.S. workers have the opportunity to apply for the job. Therefore, the Final Rule adopts the definition as proposed in the NPRM, with the exception of a minor editorial change.

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<sup>16</sup> Employer provides several credible letters attesting to the fact that a “normal” commute in the detasseling industry is 1 ½ to 2 hours. For example, the letters state that “due to isolation requirements, field selection and crop rotation, detasseling crews travel an hour and a half to the fields;” “fields range up to an hour and a half from the pickup site;” and “normal practice is to travel an hour and a half up to two hours to the fields.” In other words, a two hour commute may be “long,” albeit “normal” in this instance.

75 Fed. Reg. 6884, 6885 (Feb. 12, 2010).

This explanation clarifies that the Department actually intended the CO to utilize the concept of ‘area of intended employment’ in conjunction with the recruitment of U.S. workers, and aim to cast as wide a net as possible. It is significant that the Department considered a commenter’s suggestion that it specify a definite number of miles within which all work locations must be located and not only refused to do this but explicitly rejected this commenter’s concern as “misplaced.” Given that the Department considered and rejected a maximum commuting distance when it promulgated the rule at issue, it stands to reason that a CO cannot deny an H-2ALC application solely because a particular work site might be located more than 60 minutes away from another work site.

Additionally, the Department’s own regulations contemplate even longer commutes than 60 minutes as “normal,” given that work site locations within the same MSA are deemed by the Department to be within normal commuting distance. So, for example, just using travel between cities within the Iowa City, Iowa MSA,<sup>17</sup> where the initial work site location of Lone Tree is located, a prospective H-2A worker could have an hour and 18 minute commute from Rubio to Solon. Even though that commute would exceed the CO’s sixty minute threshold, it is still considered a “normal” commute given the two work site locations are within the same MSA. Additionally, if the work site was in the Cedar Rapids MSA, adjacent to the Iowa City MSA, travel could exceed an hour and 30 minutes between work sites in Oxford Junction and Belle Plaine. Again, given the 90 minute commute was within the same MSA, the Department would view this as “normal.” Even the Washington, DC MSA has a two hour thirty eight minute commute between Spotsylvania, Virginia to Thurmont, Maryland, a “normal” commute given the two towns are in the same MSA. I include these examples simply to demonstrate that a 60 minute cutoff to define what is a “normal” commute, that is then used to deny an H-2A application, is arbitrary and unreasonable.<sup>18</sup> While a CO can generally consider commute times, among other factors, to determine whether all listed work sites are within a single area of intended employment, I reject use of a 60 minute commute ceiling to deny an Application for Temporary Labor Certification.<sup>19</sup>

I find that the additional evidence submitted on appeal demonstrates that all work site locations in this case are within the same area of intended employment and the CO’s denial of Employer’s H-2ALC on this basis constitutes an abuse of discretion.

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<sup>17</sup> Iowa City, Iowa MSA is comprised of Johnson and Washington counties.

<sup>18</sup> Even the drafters of the census bureau report relied upon by the CO to establish the 60 minute commute ceiling concede the relative difficulty in establishing what is a “normal” or “typical” commute. In fact, the term “normal commute” does not appear once in the report. Instead, the report uses sixty minutes as an arbitrary benchmark and admits “as a relative concept, the definition of a long commute varies across people and communities. For simplicity, this report defines long commute as those of 60 minutes or longer (one way).” *Out-of-State and Long Communities: 2011*, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau (Issued February 2013). (AF 55)

<sup>19</sup> As noted above, the regulations specifically reject use of a “rigid measure of distance that constitutes a normal commuting distance or normal commuting area” to determine the area of intended employment. 20 CFR 655.103(b).

**ORDER**

**IT IS HEREBY ORDERED** that the Certifying Officer's denial of temporary alien labor certification in the above captioned case be, and hereby is, **REVERSED**, and that it is hereby, **REMANDED**, and the Certifying Officer is instructed to accept the application for further processing.

So Ordered:

STEPHEN R. HENLEY  
Administrative Law Judge