

U.S. Department of Labor

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Issue Date: 28 May 2014

OALJ Case No.: 2014-TLC-00078
ETA Case No.: H-300-14059-489672

In the Matter of:

CATNIP RIDGE MANURE APPLICATION INC.,
Employer.

Certifying Officer: John T. Rotterman
Chicago National Processing Center

Appearances: Leon R. Sequeira, Esquire
Prospect, KY
For the Employer

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U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural guest worker provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184 and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B (collectively, H-2A program). It is before the undersigned on Catnip Ridge Manure Application, Inc. (Employer)'s request for a hearing pursuant to 20 C.F.R. § 655.141(b)(4). Per the agreement of the parties, a hearing was held in Washington, DC on May 13, 2014. At that time, the undersigned admitted ALJ Exhibits (ALJX) one through five, and Employer Exhibits (EX) one through five. For

reasons stated below, the undersigned REMANDS this matter to the Certifying Officer for further processing consistent with this decision.

BACKGROUND

Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a certification that—

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a).¹ The implementing regulations at 20 C.F.R. Part 655, Subpart B set forth a multi-step process by which this certification—known as a “temporary labor certification”—may be applied for and granted or denied. First, the petitioning employer must file a job order with the State Workforce Agency (SWA) serving the area of intended employment. 20 C.F.R. § 655.121. The SWA will review the job order for compliance with the regulations and, if it finds the job order acceptable, post the job order on its intrastate clearance system and begin the recruitment. 20 C.F.R. § 655.121(b), (c). If the SWA does not locate able, willing, and qualified workers to fill the positions for which the employer seeks certification, the employer may file an *Application for Temporary Employment Certification* (ETA Form 9142A) with the U.S. Department of Labor (Department), Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC). A Certifying Officer in the OFLC will review the application for compliance with the requirements set forth in the regulations. 20 C.F.R. § 655.140. If the application is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the Certifying Officer will notify the employer within seven calendar days. 20 C.F.R. § 655.141(a).

In the instant case, the Employer filed an *Application for Temporary Employment Certification* with the Office of Foreign Labor Certification (OFLC) on February 28, 2014. Certifying Officer John Rotterman (CO) issued a Notice of Deficiency (NOD) ten days later, March 10, 2014, to inform the Employer that its application failed to meet the criteria for acceptance. The NOD specified seven reasons why the application could not be accepted for consideration and identified the modifications required for acceptance. The Employer declined to make the modifications and filed a request for a de novo hearing with the Office of Administrative Law Judges on March 17, 2014. Shortly thereafter, the case was assigned to the undersigned for hearing.

¹ The Secretary of Labor delegated the authority to make this determination to the Assistant Secretary for the Employment and Training Administration, who in turn delegated it to the Office of Foreign Labor Certification. 20 C.F.R. § 655.101.

JURISDICTION & STANDARD OF REVIEW

The undersigned has jurisdiction pursuant to 20 C.F.R. §§ 655.141(c), 655.171(b)(2). The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). The Employer, therefore, must demonstrate that the Certifying Officer's determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible.

DISCUSSION

The Employer argues that the CO's NOD should be declared invalid and void because it failed to comply with statutory and regulatory mandates and was procedurally and substantively flawed. (ALJX-4 at 1-4; ALJX-2.) Specifically, the Employer contends that the NOD is invalid and void because the CO issued it after the seven-day period prescribed by the statute and governing regulations. But "in the event the NOD is determined to not be void," the Employer alternatively argues that two of the seven deficiencies identified in the NOD are substantively flawed and invalid.² In particular, the Employer challenges the CO's finding that the worksites in its application must fall within a 60-minute radius of the first worksite in order to comply with 20 C.F.R. § 655.132(a). The Employer also disputes the CO's requirement that it modify its application to increase the subsistence reimbursement rate on its job order, which was sufficient at the time the Employer submitted its application, but is less than the minimum rate published in the *Federal Register* after the Employer filed its application. Each of these challenges is discussed in turn below.

Untimely Notice of Deficiency

The INA, as amended by the Immigration and Nationality Act ("INA"), as amended by the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1188, establishes specific timeframes within which the Secretary of Labor must process and reject or certify applications for H-2A labor certification. It provides, in pertinent part:

(A) The employer shall be notified in writing within seven days of the date of filing if the application does not meet the standards (other than that described in subsection (a)(1)(A) of this section) for approval.

(B) If the application does not meet such standards, the notice shall include the reasons therefore and the Secretary shall provide an opportunity for the prompt resubmission of a modified application.

8 U.S.C. § 1188(c)(2)(A). The Employer contends that the CO's failure to issue the NOD within the required statutory deadline prejudiced its interests by delaying the processing of its application and, consequently, its ability to secure H-2A workers in a timely fashion. Although the undersigned does not disagree, he is unable to remedy this prejudice. The regulatory scheme contemplates that the CO will be the one to determine whether to accept an application for

² The Employer is prepared to provide the requested information and /or modifications regarding the other five deficiencies. (ALJX-2 at 3.)

processing, and to make the determination whether to grant or deny certification. *See* 20 C.F.R. §§ 655.143, 655.160. Although the statute and corresponding regulations impose a deadline by which the CO must make a determination, they do not specify the consequences that result from a failure to meet this deadline. The regulatory language provides no indication that a failure to comply with the timeliness requirements entitles an aggrieved employer to any specific procedural or substantive rights or remedies. *See Frey Produce & Frey Brothers #2*, 2011-TLC-403 (June 3, 2011), slip op. at 6. Although the CO's delay may have prejudiced the Employer's interests, this is not a forum of equity, and neither the statute nor the regulations support the relief which the Employer requests, *i.e.*, an order directing the CO to issue a Notice of Acceptance and Final Determination certifying the application. Accordingly, the undersigned declines to order such relief.

Area of Intended Employment

The first deficiency that the Employer challenges involves the CO's determination that certain worksites are outside of the area of intended employment. The regulations define several types of employers and prescribe varying requirements for each the type of employer. The Employer in the instant case is an H-2A Labor Contractor (H-2ALC). (ALJX-4 at 31.) Pursuant to 20 C.F.R. § 655.132(a), an application filed by an H-2ALC "must be limited to a single area of intended employment in which the fixed-site employer(s) to whom the H-2ALC is furnishing employees will be utilizing the employees." 20 C.F.R. § 655.132(a). The CO determined that the Employer's application was in violation of this requirement because it covered six worksites located more than 60 minutes from the first worksite that the Employer listed in the application. (ALJX-4 at 4-6.) In applying this 60-minute threshold, the CO cited a report issued by the U.S. Census Bureau entitled *Out-of-State and Long Commutes: 2011*, (ALJX-4 at 8-10), which found that only 3.7% of workers in Iowa commute 60 minutes or longer. (ALJX-5 at 152.) Based on this report, the CO concluded that commutes of over 1 hour are not normal in Iowa, and that the labor market in Conesville, Iowa—the location of the first worksite in the Employer's application—"clearly" does not support travel times in excess of 60 minutes. (ALJX-4 at 9.) 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]." (ALJX-4 at 6.) The CO directed the Employer to remove all worksites located outside of this 60-minute threshold and include them in a "new, distinct, application," or "submit documentation establishing that the proposed commutes are normal." (ALJX-4 at 6.)

The Employer contends that the CO's imposition of this 60-minute threshold is contrary to the Department's regulations, and arbitrary and capricious. The undersigned agrees, and finds that the imposition of a 60-minute rebuttable presumption 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 applies the above-explained 60-minute threshold to all applications for H-2A labor certification 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).³ This disregards the fact that the imposition of a generally applicable threshold 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.

The CO did not consider any factual circumstances specific to the Employer’s proposed area of intended employment, aside from the report published by the Census Bureau, before he determined that the Employer’s worksites were not located within the same area of intended employment. Rather, as discussed above, the CO relied on a generalized report published by the Census Bureau to conclude that the labor market in Conesville, Iowa “clearly” does not support travel times in excess of 60 minutes. The CO’s own documentation, however, reveals that the data upon which the Census Bureau report is based only included responses from two persons in Conesville, Iowa, one of whom commuted between 10 to 24 miles, and the other of whom commuted between 25 and 50 miles. (ALJX 3.) Responses from two individuals hardly lends itself to a clear conclusion on what the labor market in Conesville, Iowa does or does not support. Yet the CO relied on this data to reject the testimonial evidence from four agricultural employers in Iowa, all of whom supported the Employer’s assertion that in Iowa, it was normal to commute 3+ hours for positions involving farming operations and manure application.

It is noteworthy that 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:

³ As an aside, the CO appears to place an extraordinary 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” data. (Tr. 120, 126.) Exactly what type of data this might be is not yet clear, since as of the date of the hearing, not one employer had successfully rebutted the presumption. (Tr. 81.)

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.

75 Fed. Reg. 6884, 6885 (Feb. 12, 2010). This explanation clarifies that the Department intended the CO to construe the "area of intended employment" in conjunction with the recruitment of U.S. workers, and to aim to cast as wide a net as possible.⁴ It is telling that the

⁴ The CO's testimony at the hearing indicates that he overlooked this purpose, and instead focused on whether the commutes proposed in the Employer's application would dissuade U.S. workers from applying for the job opportunity. (*See, e.g.*, Tr. 61.) To remedy this concern, the CO directed the Employer to remove those worksites outside of a 60-minute radius from the first worksite, and include them in a "new, distinct, application." But the CO failed to recognize that the Employer's underlying job opportunity (i.e., the Employer's need for a set amount of workers at a particular work site at a particular time) would remain the same whether or not the job opportunity was divided among separate applications for temporary labor certification. Each of the worksites that the CO directed the Employer to remove from its application is located in Iowa. Thus, pursuant to the CO's instructions, the Employer would go back to the same SWA and request that it post separate job orders for each group of worksites outside of the 60-minute radius. The commuting distance between each of the worksites and the dates on which the Employer requires its employees to work at these worksites would remain the same; the only difference would be that the Employer's job opportunity is now divided among several different job orders, each for a shorter duration of time and of more limited scope than the Employer's original job order. Viewed in this light, the purpose of the CO's requirement that the Employer limit the worksites in each application to a 60-minute radius from the first is not readily apparent; it would simply result in the Employer's job opportunity being divided among different job orders on the same intrastate clearance system. Such an outcome risks the possibility that U.S. workers who are interested in working for longer periods and who are willing to commute further distances may not be apprised of the complete job opportunity. The positions that the employer seeks to fill are temporary and at will. Persons who do not wish to commute to further worksites may decline to do so (obviously at the risk of losing the position, but this places them in a position no worse than if they responded to a job order with only close worksites but of a more limited duration).

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 so, but explicitly rejected the commenter's concern as "misplaced."

In the end, the CO failed to rationally explain why a 61 minute commute is automatically presumed to be unacceptable if the job opportunity is located outside of an MSA, when a commute of up to two-and-a-half hours may be acceptable if the job opportunity is located within an MSA. (Tr. 79-80.)⁵ The data upon which the CO relies to impose the 60-minute threshold applies equally to locations within MSAs and to locations outside of MSAs. Nevertheless, the CO inexplicitly relies on this data to impose a 60-minute threshold as "normal" when a position is outside of an MSA, yet not when it is within an MSA (which would be in clear violation of the regulation). Why would the Department draft a regulation that favors longer commuting distances within an MSA, where there is presumably more traffic, than outside of an MSA, where there is presumably less traffic?⁶ The CO's failure to provide a rational explanation to justify this inconsistency constitutes an abuse of discretion, and the undersigned therefore reverses the deficiency findings he made on this basis.

Subsistence Amount

The second deficiency challenged by the Employer involves the rate of subsistence pay. The regulations require an employer participating in the H-2A program to pay its workers for reasonable costs incurred due to transportation and daily subsistence from the place from which the workers come to work for the employer. 20 C.F.R. § 655.122(h). This daily subsistence payment must be at least as much as the employer would charge the worker for providing three meals a day during employment (if applicable), but in no event less than the amount permitted under 20 C.F.R. § 655.173(a). *Id.* The Employer's job order listed a subsistence reimbursement rate of \$11.42 per day, the current rate at the time the Employer submitted its job order. (ALJX-4 at 58.) While the Employer's application was pending before the CO, the Department published a new minimum subsistence reimbursement rate of \$11.58 per day in the Federal Register. In the NOD, the CO found the Employer was in violation of 20 C.F.R. § 655.122(h), and directed the Employer to provide permission to amend the job order to reflect the new subsistence reimbursement rate of \$11.58 per day. (ALJX-4 at 13-14.) The CO does not dispute that the subsistence amounts listed in the employer's job order were correct as of the date the Employer's application was filed.

The Employer cites *Bryant Brothers Farm*, 2011-TLC-332, to argue that it is not required to update the subsistence rate published in its job order because it was correct as of the date the application was filed. In this case, the administrative law judge found the following:

⁵ The undersigned notes that some MSAs span distances well in excess of 100 miles. For instance, the Washington, DC MSA includes the District of Columbia, five counties in Maryland, nine counties in Virginia, and one county in West Virginia, spanning from Spotsylvania County, Virginia in the south to Fredrick County, Maryland in the north, a distance of over 130 miles.

⁶ The CO relies on the distance between worksites to calculate commute times; he did not specify whether this calculation takes into account traffic. (ALJX-4 at 9.)

The Employer was required to pay the subsistence rates currently in effect, regardless of the rates listed in their application, even if the Employer had not included language restating that requirement in their application. The Employer acted appropriately in including that language to make clear its understanding of its responsibility with regard to subsistence reimbursement. The fact that the prescribed dollar amount changed while the application was under review was not an appropriate basis for finding a deficiency. In a conference call shortly after receiving the Appeal File, counsel for the Department acknowledged that this finding of a deficiency was in error.

Id., slip op. at 1-2. The undersigned agrees with the administrative law judge in *Bryant Brothers Farm* that the fact that the prescribed dollar amount changed while the application was under review is not, on its own, an appropriate basis for finding a deficiency. Had this been the sole-cited basis for deficiency, the undersigned would agree that it would be inappropriate to delay processing of the Employer's application on this basis alone. But because there is no doubt that the Employer is obligated to pay the subsistence rate currently in effect, and the Employer has agreed that it will make many other modifications as required by the CO in the NOD, the undersigned sees no harm in requiring the Employer to make this additional change as well.

ORDER

In light of the foregoing discussion, the undersigned REMANDS this matter to the Certifying Officer for further processing consistent with this decision.

SO ORDERED.

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge