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**Issue Date: 15 August 2014**

**CASE NO.: 2014-TLC-00096**

**IN THE MATTER OF:**

**CATNIP RIDGE MANURE APPLICATION, INC.,  
Employer**

### **DECISION AND ORDER**

This matter is before me pursuant to the services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655. I have jurisdiction pursuant to 20 C.F.R. Sections 655.141(c) and 655.171(b)(2).

### **PROCEDURAL HISTORY**

Catnip Ridge Manure Application, Inc. (“Employer”) submitted its application for temporary employment certification on 27 Jun 14. On 3 Jul 14, the Certifying Officer (CO) of the Employment and Training Administration (ETA) issued a Notice of Deficiency (NOD), outlining three reasons why Employer’s application could not be certified.<sup>1</sup> One of these reasons was that the application was not limited to a single area of intended employment. The CO explained that as an H-2A labor contractor (H-2ALC), Employer’s application must be limited to a single area of intended employment in which the fixed-site employer(s) to whom it would be furnishing employees would be using them. According to the CO, the regulations require that the “area of intended employment” be within “normal commuting distance” of the place of the job opportunity, Conesville, Iowa. The CO also noted that Employer had identified multiple worksites, none of which fell within a Metropolitan Statistical Area (MSA), and that the commutes from the first worksite to the other sites were “abnormal,” because they required lengthier travel than the longest commute within the nearest MSAs.

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<sup>1</sup> Appeal File at 6-13 (also submitted by the CO as his Exhibit 1, hereinafter “AF”). Although the CO briefed arguments on the other deficiencies, Employer attested to my satisfaction that it was correcting them, and I do not address them in this opinion.

Instead of attempting to correct the stated deficiency, Employer opted to exercise its right to a de novo hearing. The parties decided that the case could be decided on the record and submitted the following evidence:

CO's Exhibits (CX) 1-7

Employer's Exhibits (EX) 1-4<sup>2</sup>

## **LAW AND POSITIONS OF THE PARTIES**

### **Standard of Review**

It is the employer's burden to establish eligibility for temporary labor certification.<sup>3</sup> Whether an employer requests administrative review or a de novo hearing, the ALJ must either affirm, reverse, modify the CO's decision, or remand for further action.<sup>4</sup> In a de novo hearing, however, since new evidence that was not before the CO may be submitted, the ALJ must independently determine if the employer established eligibility for temporary labor certification. Therefore, the standard of review in a de novo case cannot be for abuse of discretion on the part of the CO, because the ALJ may receive evidence not available to the CO when his decision was rendered. Based on the issues before me and the evidence received, I make my determination based on whether or not Employer carried its burden to establish by a preponderance that its labor certification application is sufficient.

### **Area of Intended Employment**

An H-2A labor contractor (H-2ALC) is any individual or legal entity that is not a fixed-site employer or employee, or an agricultural association or employee, who recruits, solicits, hires, employs, furnishes, houses, or transports H-2A workers.<sup>5</sup> Federal regulations restrict an H-2ALC's application "to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees."<sup>6</sup> An area of intended employment is the geographic area within the normal commuting distance of the place of the job opportunity for which the certification is sought. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within that MSA is considered to be within "normal commuting distance" of the place of intended employment. A location outside an MSA

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<sup>2</sup> I considered EX-2-4 over the CO's objections. While the CO was not able to depose the letter writers, he had an adequate opportunity to read and respond to them via CX-7.

<sup>3</sup> 20 C.F.R. § 655.161(a).

<sup>4</sup> 20 C.F.R. § 655.171.

<sup>5</sup> 20 C.F.R. § 655.103.

<sup>6</sup> 20 C.F.R. § 655.132(a).

may still be within the normal commuting distance of a location inside the MSA, but “normal commuting distance” is not defined by the regulations.

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).<sup>7</sup>

For H2-ALCs seeking to provide labor at multiple worksites, if those sites are not within a single MSA, the geographical area identified must constitute only one “area of intended employment.”<sup>8</sup> The practical effect of this regulation is that an H2-ALC must submit applications for each area of intended employment. If worksites are outside “normal commuting distance,” an application must be filed for each.

In *T. Bell Detasseling LLC*, the ALJ reversed the CO’s denial of an H-2ALC’s application where the CO had applied a 60-minute commute cutoff to applications in which the place of intended employment was not located within the bounds of an MSA.<sup>9</sup> The ALJ found this method contravened the regulatory text that stated “there is no rigid measure of distance that constitutes a normal commuting distance,” and further stated that “the CO relies on the false premise that, because only 3.7% of Iowans commute more than 60 minutes, anything beyond a sixty minute commute is ‘long’ and a long commute is not a normal commute.”<sup>10</sup> The ALJ found this cutoff was contrary to the Department of Labor’s regulations, and arbitrary and capricious. Further, he stated that “[w]hether 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[.]”<sup>11</sup> He reversed and remanded the case to the CO with instruction to accept the employer’s application.

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<sup>7</sup> 20 C.F.R. § 655.103 (emphasis added).

<sup>8</sup> 20 C.F.R. § 655.132(a).

<sup>9</sup> 2014-TLC-00087 (ALJ May 29, 2014).

<sup>10</sup> *Id.*, slip op. at p. 5-6.

<sup>11</sup> *Id.* at p. 5.

More aptly, in the preceding case with the same Employer, *Catnip Ridge Manure Application Inc.*,<sup>12</sup> the ALJ also rejected the CO's imposition of a 60-minute commuting cutoff. There, the CO referred to the same report issued by the U.S. Census Bureau that found only 3.7% of workers in Iowa commute 60 minutes or longer.<sup>13</sup> The CO determined that any worksite located outside of the 60-minute threshold (if not within the boundaries of a MSA) warranted a separate application, or Employer could submit documentation establishing that the proposed commutes were "normal."<sup>14</sup> This ALJ also ruled that the imposition of a threshold of distance or time was "in direct conflict with the regulatory text."<sup>15</sup> He criticized the reliance on a Census Bureau report, which included responses from only two people in Conesville, Iowa, and the disregard of testimony from four agricultural employers who agreed with Employer's assertion that it was normal to commute three or more hours for such work. The ALJ concluded that the CO failed to provide a rational explanation for the inconsistency between imposing a 60-minute threshold on commutes outside an MSA, where a much-longer commute within a MSA could be acceptable. He found this was an abuse of discretion, reversed the deficiency findings, and remanded to the CO for further processing.

### **Contentions of the Parties**

Employer notes that 20 C.F.R. Section 655.122(b) defines the process of determining whether or not a particular requirement of an H-2A job opportunity is "normal," and states that each requirement must be consistent with the "normal and accepted qualifications" required by employers that do not use H-2A workers in the same or comparable occupation. Employer cited an Agency FAQ document that states the CO will consult with the applicable State Workforce Agency (SWA) to determine what constitutes the "maximum normal commuting distance," and noted that the CO acknowledged not contacting the SWA for information. Instead, the CO relied upon a draft document entitled "Standard of Review – Area of Intended Employment,"<sup>16</sup> and Employer argues that the document improperly imposes substantive obligations without having undergone notice and comment rulemaking. Further, Employer criticizes the methods of calculation included in the draft document and objects to the CO's reliance on it. Employer also takes issue with the CO's specific time calculations. In sum, Employer spends the majority of its brief arguing against the CO's methods of analysis and the validity of the documents on which he relied, rather than on behalf of its application.

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<sup>12</sup> 2014-TLC-00078 (ALJ May 28, 2014) (*Catnip Ridge I*).

<sup>13</sup> *Id.* at slip op. 4.

<sup>14</sup> As here, the first worksite listed was in Conesville, Iowa.

<sup>15</sup> *Id.* at slip op. 5.

<sup>16</sup> CX-2. Incidentally, the draft document also recommends the CO consult the SWA.

Employer argues that its inclusion of three letters from individuals within the fertilizer application industry supports its position that long travel times between sites is a normal feature of the job.

CO's position is that the worksites contained within the application were not within one area of intended employment, in violation of 20 C.F.R. Sections 655.103(b) and 655.132(a). In his view, "the regulations are clear and specific that such area of intended employment must be based on the geographic area within normal commuting distance of the place of the job opportunity," and Employer did not submit any information to the CO to help him determine normal commuting distance in the area.<sup>17</sup> Moreover, the CO made his own determination as to what was reasonable commuting distance by using U.S. Census data and information from adjoining MSAs. The CO concluded that the first worksite in the application was located in Conesville, Iowa, which is located in Muscatine County. The CO found that based on Census data, the mean commuting distance for workers in Muscatine County was 17.5 minutes. He also stated that based on statewide data, less than fifteen percent of rural workers in Iowa travel more than one half hour to work. The CO went on to analyze neighboring MSAs to discern the maximum commuting distance that would be normal within those, and found that in the neighboring Rock Island, Iowa/Illinois MSA, the Keithsburg-to-Yorktown, Illinois commute was the longest, at one hour and 37 minutes.<sup>18</sup> Accordingly, "the CO used his discretion to set a normal commuting range consistent with the longest commute in an adjoining MSA[,] which was one hour and 37 minutes[.]"<sup>19</sup> The CO also opined that a "worksite which requires an overnight stay is not a site within a normal commuting distance," because that does not comport with the Merriam-Webster dictionary definition of a commute, which the CO paraphrased as "regular, daily, travel from home to work."<sup>20</sup> The CO also referred to a Department of Labor Wage and Hour fact sheet that states indicated travel away from the home community that requires an overnight stay is not considered "commuting."<sup>21</sup>

Though Employer did not submit letters from other members of the manure-application industry with his application, the CO considered the same in preparation for the hearing and concluded that they did not change his determination.<sup>22</sup> This was because he did not think they reflected knowledge of normal commutes required of workers in the place of intended employment, and because they discussed the distance between multiple work sites and not normal commuting distance.

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<sup>17</sup> CO's brief at p. 4 (internal quotation omitted).

<sup>18</sup> CX-5.

<sup>19</sup> *Id.* at p. 6.

<sup>20</sup> *Id.* at p. 6-7.

<sup>21</sup> *Id.* at p. 7.

<sup>22</sup> CX-7.

In his reply brief, the CO argued that Employer had made an incorrect legal assertion when it stated that the process for determining whether or not a particular requirement of an H-2A job opportunity is ‘normal’ is defined by 20 C.F.R. Section 655.122(b). Section 655.122(b) states that “[e]ach job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the documentation to substantiate the appropriateness of any job qualification specified in the job offer.”<sup>23</sup> The CO contends that what constitutes a normal commuting distance in the area of intended employment is governed by different regulations and is not relevant to determining what is a normal commute within an area of intended employment. In support of this interpretation, the CO quotes a 2011 case where the ALJ stated that “job qualification” and “requirements” are “characteristics of the person applying, not a term or condition of the job that must be accepted by the applicant.”<sup>24</sup> Alternatively, the CO argues, even if I applied the “normal and accepted” standard to commuting distance, Employer’s requirements are too great for one area of intended employment.

In its sur-reply brief, Employer cites two cases in opposition to the CO’s legal conclusion. In *Head Brothers* and *Moss Farms*, the CO denied the employer’s application because it included an arbitration and grievance clause in the job order, which the CO found was not a normal and accepted job requirement.<sup>25</sup> The ALJ affirmed the CO, finding that the clause was a condition precedent that an applicant must accept before being hired, and was therefore a job requirement governed by 655.122(b). In doing so, he rejected the employer’s argument that “job qualifications and requirements refer solely to the requisite set of skills needed to perform the specific job being offered” and concluded “[t]his assertion has no merit.”<sup>26</sup>

Conversely, in this case, Employer argues that the occasional trip to outlying job sites *is* a job requirement governed by Section 655.122(b), which would encourage me to review other employers in the same field to see if such long commutes were standard. As evidence in support of this, Employer relies on the letters it submitted from Mr. Neese, Mr. Puck, and Dr. Wittry, all averring that two-to-three hour travel times are normal within the industry.

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<sup>23</sup> 20 C.F.R. § 655.122(b).

<sup>24</sup> *Russelburg Farm*, 2011-TLC-00408 at p. 4-5 (June 10, 2011).

<sup>25</sup> 2011-TLC000394 and 2011-TLC-00395 (May 18, 2011).

<sup>26</sup> *Head Brothers* at p. 6.

## DISCUSSION

I agree with the CO that Sections 655.132(a) and 655.103 govern the questions in this case, as they deal specifically with the determination of what constitutes a “normal” commuting distance for these positions and set forth, albeit very generally, the means by which a CO can determine what is normal. Employer wishes to insert a legal requirement that the CO consider common industry practices, as it presented strong evidence that long commutes are standard in the type of work for which it seeks certification. The regulations do not provide a safety valve, however, for Employers who wish to hire foreign workers and treat them to circumstances that, while they are normal for the industry, are contrary to the regulations. Employer bears the burden of proving its application satisfies those regulations.

To remedy the situation Judge Colwell described in *T. Bell Detasseling* and *Catnip Ridge I*, where a two-and-a-half hour commute inside an MSA might be acceptable but a 61-minute commute outside an MSA would not, the CO took a different approach to Employer’s present application. He relied upon the guidance document that set new standards for determining a normal commute.

He stated that since Employer listed several worksites within its application, he reviewed them to determine if they were in one area of intended employment. He relied on a draft copy of the “Standard of Review—Area of Intended Employment”<sup>27</sup> for protocols on determining normal commuting distance. That document states the CO should estimate maximum commutes within each MSA in the state, contact the State Workforce Agency (SWA) for information about barriers, tolls, labor flow patterns, and more to assess their impact on normal commutes within the areas and “solicit any commute-related information the SWA has or access to related to [sic] normal commutes in MSAs and/or non-MSAs within its jurisdiction.”<sup>28</sup> The next task is to map the distance and time of the commutes and identify MSAs applicable to the worksites. If no sites are within any MSAs, then the CO should look at MSAs adjacent to the worksites and the maximum commute distances/times within those. The maximum commute distance/time in the MSAs assessed will become the threshold against which the listed worksites will be evaluated, and if multiple MSAs are involved, then the longest estimated commute distance/time of all will be the threshold.

The draft document thus sets forth more sophisticated methods for determining a “normal commute,” to avoid the rigidity the regulations caution against and which resulted in a remand in the previous case. I find the methods described in the draft document to be reasonable, as they take many factors and data into account. As a rule of

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<sup>27</sup> CX-2.

<sup>28</sup> *Id.*

thumb, the longest commute within an adjacent MSA will be the standard by which other commutes outside the MSA will be judged. In this case, however, the CO did not follow the other guidance in the document, which stated that he should contact the SWA for information about “local factors” that would influence the commute in the areas.<sup>29</sup> The guidance document also recommends “performing basic local area research to confirm...the position that one or more worksites are outside normal commuting distances[,]”<sup>30</sup> considering the employer’s application from the prior year, and other employer applications for the same occupation. The CO does not appear to have undertaken any of these steps. I find that imposing a rule that a “normal” commute may only be as long as the longest commute within a neighboring MSA violates the regulations, when it is not considered in the context of the other information such as that the draft document suggests. While there may be plenty of support for a cut-off of an hour and 37 minutes, the only evidence that that is the outer limit of a normal commute is the fact that it is the longest distance within the neighboring MSA in Illinois.

Employer explained in brief that “the occasion may arise where it would be more efficient to stay in public housing or a hotel rather than return to the employer’s housing at the end of the day.”<sup>31</sup> One of the letters Employer submitted states that “[m]any of our clients have large jobs that require multiple days, and because they are located a great distance from the home base of the service we hire, the employees from that service routinely stay in local motels near the job site rather than returning home each evening.”<sup>32</sup> The other letters stated that two-to-three hour drives to work sites were normal within the industry.

The fundamental question, however, is not how far or long the workers will have to travel from the primary location to the various employers’ worksites. The record clearly establishes the relevant facts, which are the times and distances involved and the fact that on infrequent occasion, those workers will spend the night away from the primary location. The record also establishes that such an arrangement is common within that industry in that area, even for non-alien employees.

The central question is whether those facts fall within the definition of a “normal commute” as that term is used in defining an area of intended employment. It is clear that no bright line rule related to distance or time may be used to make that determination. I believe that the common practice in the industry and area in question should be in the totality of the circumstances considered.<sup>33</sup> The CO’s argument is cogent and his decision below rational. Were the standard of review one of an abuse of discretion, I would affirm

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<sup>29</sup> See CX-7 at 3.

<sup>30</sup> CX-2 at “B. Tier 2 Local Area Analysis.”

<sup>31</sup> Employer’s brief at p. 9.

<sup>32</sup> EX-4.

<sup>33</sup> I note that this is a separate question from whether the commute is a normal condition of employment.

it. However, I view the evidence in a different light and weight more heavily the evidence of common practice and in the area and industry. Thus, I find that given the totality of the circumstances, the record does establish that even with the extended distances and occasional overnight stay, the application does fall within a normal commute and single area of employment.

For this reason, the CO's decision is **REVERSED** and **REMANDED** for further processing consistent with this decision.

**So ORDERED.**

PATRICK M. ROSENOW  
Administrative Law Judge