

**U.S. Department of Labor**

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**Issue Date: 20 December 2018**

Case No.: 2019-TLC-00008  
ETA Case No.: H-300-18325-573449

*In the Matter of:*

**ALTMAN SPECIALTY PLANTS, INC.,**  
*Employer.*

Certifying Officer: John Rotterman  
Chicago National Processing Center

Appearance: Thomas P. Bortnyk, Esq.  
MAS Labor H2A, LLC  
Lovingson, VA  
*For the Employer*

Before: Jason A. Golden  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING NOTICE OF DEFICIENCY**

This proceeding arises from Altman Specialty Plants, Inc.'s (Employer) request for expedited administrative review of Certifying Officer John Rotterman's (CO) Notice of Deficiency (NOD) in response to Employer's H-2A temporary labor certification application. 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 at 20 C.F.R. Part 655, subpart B pertain to this proceeding.<sup>1</sup>

When an employer timely seeks administrative review of a certifying officer's decision on an H-2A temporary labor certification application, the administrative law judge may affirm, reverse, or modify the certifying officer's decision, or remand the case to the certifying officer

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<sup>1</sup> The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A). A certifying officer in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA) reviews applications for temporary labor certification. If the certifying officer denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges (OALJ). 20 C.F.R. § 655.171.

for further action. The judge's decision must be based on the written record and "any written submissions (which may not include new evidence) from the parties involved or amici curiae."<sup>2</sup>

## **BACKGROUND**

On November 21, 2018, the Employer filed an H-2A application in which it requested certification to hire 16 drivers to support its nursery operations at 14095 Peyton Hwy., Peyton, Colorado, from February 1, 2019 through June 30, 2019. The Employer intends for the drivers to transport the Employer's nursery products to market in the surrounding states. (AF 3, 27-28, 30, 40.)<sup>3</sup> On November 28, 2018, the CO issued a NOD in response to Employer's application. On December 3, 2018, the Employer timely filed this appeal with the OALJ. (AF 1-2, 16.) On December 7, 2018, the case was assigned to me and I issued a Notice of Docketing and Order Setting Briefing Schedule on December 7, 2018. I received the Administrative File from the ETA on December 17, 2018.<sup>4</sup> The parties timely submitted briefs.

### **A. Notice of Deficiency**

In the NOD, the CO cited three deficiencies that the Employer needed to address with a modification of its application before approval could be granted. First, in accordance with *In re Red Diamond Enterprises*,<sup>5</sup> fixed site growers must limit their worksites to those within two contiguous states, but Employer's worksites span four contiguous states: Colorado, Texas, New Mexico, and Arizona (Deficiency No. 1). To resolve this deficiency, the Employer must limit the geographic scope of its application to two contiguous states. (AF 18-20.)

Second, "[i]n Section F.a. Item 3 of the ETA Form 9142 and Item 11 of the ETA Form 790 the employer indicates the work days will range from five to seven hours. Also, in Item 3 the employer lists the housing as apartments in Colorado Springs, [Colorado] as the place of residency for the workers. However, several of the employer's worksites have round trip travel times that would exceed the required work schedule." (AF 18-19.) For example, the round-trip travel time from Employer's Payton, Colorado worksite to 1800 W. Valencia Rd., Tucson, Arizona 85746 is 24 hours, 14 minutes (Deficiency No. 2). To resolve this deficiency, the Employer must amend the daily work hours or provide an explanation as to how the daily work schedule accurately reflects the workers' expected hours. (AF 19.)

Third, the Employer "indicated one worksite on its ETA Form 9142, and indicated 'no' in item F.c.7 of the ETA Form 9142 regarding additional worksite locations. However, the employer submitted an attachment of anticipated delivery locations with its ETA Form 790. Moreover, the employer did not submit the attachment to indicate additional locations with its ETA Form 9142 [(Deficiency No. 3)]." (AF 19.) To resolve this deficiency, the Employer "must clarify whether or not there are multiple worksites and amend item F.c.7 of the ETA Form 9142

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<sup>2</sup> 20 C.F.R. § 655.171(a).

<sup>3</sup> References to the appeal file in this Decision and Order are abbreviated with an "AF" followed by the page number or PDF number.

<sup>4</sup> The electronic docket indicates that the Administrative File was received or downloaded by OALJ on December 14, 2018. However, I first received notice of this on December 17, 2018, via email.

<sup>5</sup> 2013-TLC-00046 (Aug. 14, 2013).

accordingly. If applicable, the employer must submit an attachment of its anticipated delivery locations as an attachment for its ETA Form 9142 so that the worksite locations are consistent throughout its application.” (*Id.*)

## **B. Employer’s Arguments**

In its application, the Employer identified one worksite at 14095 N. Peyton Highway, Peyton, Colorado 80831. (AF 30, 40.) The application also includes lists of addresses in Colorado, Texas, New Mexico, and Arizona. (AF, PDF at 72-74.) Employer provided housing is located in Colorado Springs, Colorado. (AF 40.)

In its appeal, the Employer explains that its location in Peyton is where the drivers would report to work each workday, clock in, and obtain their delivery routes for the day. The Employer has delivery points, where the agricultural products it produces are brought to market, in four states: Colorado, Texas, New Mexico, and Arizona. Each workday, the drivers will report to work at the Peyton worksite and proceed to make deliveries at one or more of the delivery points listed on the documents submitted with its application. At the end of each workday, the drivers will return to the Peyton worksite to drop off their trucks, clock out, and return to the employer-provided housing. (AF 3; *see* AF 30, 35-36, 40, PDF at 52.)

With respect to Deficiency No. 1, the Employer argues that the CO misinterpreted the *Red Diamond* decision. “Nothing in the Red Diamond case establishes . . . that fixed-site growers are limited to worksites in two contiguous states.” (AF 5.) Further, the Employer argues that *Red Diamond* is distinguishable from the present case because it concerned a fixed-site grower with two worksite locations in two separate areas of intended employment, and the present case concerns a fixed-site grower with one worksite location in Peyton seeking to employ drivers to transport Employer’s agricultural commodities to market. (AF 6-7.)

Likewise, the Employer argues that 20 C.F.R. § 655.131(b) does not require that the Employer’s application contain areas of intended employment in no more than two contiguous states because: (1) Section 655.103(b)’s definition of “area of intended employment” does not contain any reference to “two contiguous states;” (2) Section 655.131(b) applies to associations of fixed site employers, not individual fixed-site employers such as Altman Specialty Plants; and (3) the two contiguous states rule pertains to where the employer is located, not its customers. The Employer is located in Peyton, Colorado. Its customers are located in Colorado, Texas, New Mexico, and Arizona. (AF 5-6.)

Lastly, the Employer argues that the two contiguous states rule is arbitrary and capricious as applied to individual fixed-site employers; the policy consideration behind the two contiguous states rule for associations of fixed-site employers is not applicable to individual fixed-site employers; taken to its logical conclusion, application of the rule to individual fixed-site employers would have bizarre and untenable results; and application of the rule in this case would violate the Administrative Procedure Act. (AF 8-9.)

With respect to Deficiency Nos. 2 and 3, the Employer characterizes these deficiencies as “stemm[ing] directly from the issue of worksites raised in the CO’s first deficiency.” (Emp. Brf.

at 3.) The Employer argues that its delivery locations are not worksites, and thus, Deficiency No. 3 is erroneous. But, it “concedes that the travel times may not comport with U.S. Department of Transportation (DOT) trucking guidelines. Therefore, the employer is willing to address the issue of travel time on long haul delivery routes by adding the following footnote to the phrase ‘standard work schedule’ in its job order and H-2A Application:

Workers on the long-haul delivery routes will be required to work 12 or more hours per day, depending on delivery point distance. Long-haul routes will comply with DOT hours of service guidelines. No overnight stays required.”

(Emp. Brf. at 7.)

### C. CO’s Arguments

In his brief, the CO withdraws Deficiency No. 1 because that “Deficiency relies on an administrative decision that, in the Department’s view, fails to apply the correct regulatory standard.” (CO Brf. at 4.)

The CO stands on Deficiency Nos. 2 and 3 stating that:

The CO correctly determined that the Employer’s alleged standard work schedule and Employer-provided housing were incompatible with the workers’ delivery routes, as the travel times to all of the delivery locations outside of Colorado could not be reached within the hours of work and housing parameters represented on the Application and Job Order. In addition, the Notice of Deficiency correctly found that the Application was incomplete, erroneous, or inaccurate because it did not reflect that workers would be required to deliver goods to the anticipated delivery points.

(*Id.*) The CO elaborates that the application states there is only one worksite, but indicates that the drivers will be required to perform work at multiple worksite’s, i.e., delivery locations. The work at the delivery locations includes “work with sales representatives and/or merchandizer at the stores to assist in handling product including but not limited to unloading product.” (CO Brf. at 11, quoting AF 50.) The CO asserts that review of his decision by the Board of Alien Labor Certification Appeals (BALCA) is subject to the arbitrary and capricious standard. (*Id.* at 4-6.)<sup>6</sup>

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<sup>6</sup> 29 C.F.R. § 655.171 does not require appeals of certifying officer’s decisions on H-2A temporary labor certification applications to be decided by the BALCA. Section 655.171 merely states: “The Chief ALJ will immediately assign an ALJ (which may be a panel of such persons designated by the Chief ALJ from the Board of Alien Labor Certification Appeals (BALCA)).” The Chief Administrative Law Judge has not assigned this appeal to a panel, but to an individual administrative law judge. However, this distinction makes little difference here as the undersigned does sit as a member of the BALCA when assigned a case for decision over which only the BALCA has jurisdiction.

Because the Employer does not suggest a different standard of review and my decision would not differ were I to use a different standard of review, I will use the arbitrary and capricious standard in this case. Under the arbitrary and capricious standard, if there is any rational basis for the CO’s determination, it must be sustained. *See Dellew Corp. v. United States*, 108 Fed. Cl. 357, 368 (Fed. Cl. 2012); *Erinys Iraq Ltd. v. United States*, 78 Fed. Cl. 518, 525

He argues that based on the information available to him at the time, he correctly determined that the Employer failed to demonstrate that it was entitled to certification (*Id.* at 12.)

### DISCUSSION

Deficiency No. 2 raises the questions of whether there is an inconsistency in Employer's application regarding the number of hours the requested drivers will work and, if so, whether such inconsistency is fatal to Employer's application for temporary labor certification. The answer to both questions is "yes."

In its ETA Form 9142, the Employer stated that the drivers will work 40 hours per week, from 6:00 a.m. to 2:00 p.m. (AF 29.) In its ETA Form 790, the Employer indicated that the drivers are expected to work seven hours per day Monday through Friday, and five hours per day on Saturdays. More importantly, when considering the distances between the Employer's area of intended employment/worksite at 14095 Peyton Hwy., Peyton, Colorado and its delivery locations throughout Colorado, Texas, New Mexico, and Arizona, it is abundantly clear that the application is inconsistent and inaccurate regarding the number of hours the requested drivers will work. From Peyton, Colorado, one or more of the delivery locations would take more than 11 hours to reach by truck, and twice as long for round-trip travel.

The Employer concedes that there is an inconsistency in its application regarding the number of hours the requested drivers will work. This concession is evidenced by Employer's willingness to modify its application to change the expected working hours to 12 or more hours per day. The Employer proposes modifying its application to add the following:

Workers on the long-haul delivery routes will be required to work 12 or more hours per day, depending on delivery point distance. Long-haul routes will comply with DOT hours of service guidelines. No overnight stays required."

(*See* Emp. Brf. at 7.) Unfortunately for the Employer, even if I were able to consider new evidence in this appeal, its proposed modification does not cure the inconsistency and inaccuracy in its application.

49 C.F.R. § 395.3(a) provides:

(1) *Start of work shift.* A driver may not drive without first taking 10 consecutive hours off duty;

(2) *14-hour period.* A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.

(3) *Driving time and rest breaks.* (i) *Driving time.* A driver may drive a total of 11 hours during the 14-hour period specified in paragraph (a)(2) of this section.

(ii) *Rest breaks.* Except for drivers who qualify for either of the short-haul exceptions in §395.1(e)(1) or (2), driving is not permitted if more than 8 hours

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(Fed. Cl. 2007); *see also* *Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 669, n.11 (9th Cir. 1980).

have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.

According to this Federal Motor Carrier Safety Regulation, a driver operating a property-carrying commercial motor vehicle cannot drive more than 11 hours in a 14-hour duty period, and must take 10 consecutive hours off duty before he can start a new 11-hour driving period. This means that any of Employer's drivers who drive to any delivery location more than approximately 5 ½ hours from Peyton, Colorado will have to stay somewhere overnight other than Employer's provided housing, whether it be a hotel, sleeper berth in the truck-cab, or elsewhere. This legal requirement illuminates the fallacy of Employer's assertion that "[n]o overnight stays [are] required." (Emp. Brf. at 7.) Based on Deficiency No. 2, the CO's decision was reasonable and not arbitrary and capricious. The Employer failed to demonstrate by its application that it is entitled to temporary labor certification.

The merit or lack of merit of Deficiency No. 1 need not be addressed because it was withdrawn by the CO. Deficiency No. 3 also need not be addressed because my finding with respect to Deficiency No. 2 controls the disposition of this appeal.

### **ORDER**

Based on the foregoing, it is ORDERED that the Certifying Officer's issuance of the Notice of Deficiency is AFFIRMED.

Jason A. Golden  
Administrative Law Judge