



Issue Date: 26 February 2010

BALCA Case No.: 2010-TLN-00032

ETA Case No.: C-09352-47716

In the Matter of:

STONEHENGE FRAMING, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009).

Statement of the Case

On December 15, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Stonehenge Framing, LLC, ("the

Employer”) requesting certification for 39 “Construction Laborers” from February 1, 2010, until December 1, 2010. AF 89-216.¹ The application indicated that the Employer’s need was a peakload standard and wrote:

[The Employer] has a marked increase in the amount of construction contracts to be performed during February to December. During this temporary peak load, our company has a need for FORTY (40) Laborers. . . . Once we address the end of our peak load need, we should return to our regular levels of business, and the aliens will return to their country of nationality. . . .In order for our company to meet the increase in our clients’ request for construction services it is necessary that we have the adequate number of temporary workers for the ten months of our peak load need. . . .In the Austin area, we have experienced a tremendous growth in the construction industry causing a high demand for our company’s services. [The Employer’s] peak load period corresponds with the height of residential construction. . . .Our need for these workers is temporary in nature and has a foreseeable end.

AF 103-104.

On December 22, 2009, the CO issued a Request for Further Information (“RFI”). AF 82-88. Citing to 20 C.F.R. § 655.6, the CO found that the Employer had failed to establish that the nature of the its need was temporary. AF 84. Specifically, the CO wrote:

The employer’s requested dates of need in the current application create overlapping dates of need with the employer’s previous application history, which does not justify a temporary need. . . . Upon review of the employer’s application history, it was found that the employer previously applied for and received certification (C-09212-46011) for forty Construction Laborers in the same area of intended employment for the dates of October 1, 2009, to July 1, 2010. The employer’s current application, when taken together with the employer’s previous application history, demonstrates an overlapping need covering more than 426 calendar days. . . .The aggregate period of need is fourteen (14) months for which the employer has applied for temporary labor certification.

AF 84. The CO also included the following chart:

Case #	Workers Requested	Occupation Title	Start Date of Need	End Date of Need	Status
C-09212-46011	40	Construction Laborer	October 1, 2009	July 1, 2010	Certified

¹ Citations to the 216-page Administrative File will be abbreviated “AF” followed by the page number.

C-09352-47716	39	Construction Laborer	February 1, 2010	December 2, 2010	Pending
---------------	----	-------------------------	---------------------	---------------------	---------

The Employer was required to submit, *inter alia*, an “explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need.” AF 85.

On December 29, 2009, the Employer submitted its response to the RFI. AF 29-82. Regarding the CO’s request for an additional statement of temporary need, the Employer explained that it has two distinct work areas: one in Austin, Texas, and one in Marble Falls, Texas. AF 39-40. According to the Employer, the two areas have different peak load needs, and in the past, the Department of Labor has treated the two applications separately. *Id.* The Employer goes on to explain that in the past, the Employer attempted to have permanent workers move from one area to the other during the distinct peak loads, but this move proved to be not economically sound for the workers who make less than \$9.00 per hour to commute great distances for work. *Id.* The work areas are “over 60 miles apart.” *Id.* The Employer’s total work area encompasses around 200 miles. *Id.* As a result, the Employer has “distinct workforces for every region in which we work.” *Id.*

On January 22, 2010, the CO denied certification. AF 23-28. Citing to 20 C.F.R. § 655.21(a)(1), the CO found that the Employer failed to establish a temporary need. AF 25. The CO noted that in both the previous application and the current application, the Employer stated that its workers would be “employed at new and commercial homes in and around Marble Falls, TX” and “employed at new and commercial homes in and around Austin, TX.” AF 27. Moreover, the CO found that the distance between the two locations was 37 miles, using www.geobytes.com/CityDistanceTool. *Id.* The CO went on to state:

The Employer placed an advertisement, in connection with both applications, in the same newspaper, the *Austin American Statesman*. The nature of the employer’s business as a framing sub-contractor requires it to rely on retaining contracts with construction companies in the area in which it services. In both applications, that area is Austin, TX Metropolitan Statistical Area (MSA). The employer requires the services of construction laborers in not only the Austin, Texas area, but an additional 200 miles to the east and west of Austin. By its own statement, the employer has acknowledged that its area of need, which is the Austin MSA, extends well beyond Marble Falls, Texas and Austin,

Texas. Therefore, the employer has filed two applications with overlapping dates of need.

AF 27. Because the Employer failed to evidence a temporary need, the CO denied certification. The Employer's appeal followed.

In its Request for Review, the Employer argued that it had two distinct work areas. According to the Employer, the CO relied on "as the crow flies" distances, rather than actual driving distances between the two worksites. AF 8. The Employer asserted that the actual distance according to driving maps is 61 miles and is 1.5 hours away by car. AF 9. The Employer further argued that the U.S. Census Bureau does not include Marble Falls, Texas, and Austin, Texas, in the same MSA. AF 10. Finally, as further evidence of the distinctions between the two areas, the Employer noted that it received separate prevailing wage determinations for each area: \$ 8.45 per hour in Marble Falls, Texas, and \$ 8.17 per hour in Austin, Texas. AF 9. The Employer goes on to assert that "while the company provides transportation to and from work, it does so only within each distinct working division." AF 11.

Discussion

The question before the board is whether Marble Hills, Texas, and Austin, Texas, are in the same "area of intended employment" as defined by the H-2B regulations, and thus, whether the Employer has overlapping dates of need or whether the Employer has two separate temporary needs. Accordingly, the regulations define an area of intended employment as:

Area of Intended Employment means the geographic area within normal commuting distance of the place of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas.

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 the MSA.

20 C.F.R. § 655.4.

According to the record, the CO's only basis for denial was that the two applications, when viewed together, evidenced that the Employer had a permanent need. However, if the two applications are not viewed together, nothing in the record suggests that the Employer did not adequately demonstrate a temporary peak load need. Therefore, the question of whether the CO properly denied certification turns on whether the two geographic locations are within the same area of intended employment and should be viewed as multiple requests from a single employer.

Marble Falls and Austin are not within the same MSA. The regulations, therefore, would define these two locations as the same area of intended employment only if the areas are within normal commuting distance of each other. While the CO and the Employer disagree about the distance between the two locations, a quick query into the driving distance between them reveals that the commute, without factoring in traffic congestion or other commuting issues, would be approximately one hour.² Given the nature of the temporary work, a commute of at least one hour is unreasonable and furthers the Employer's argument that these two locations are two distinct areas of intended employment and should be treated separately. Moreover, the prevailing wage determinations issued for both areas require the Employer to pay different minimum wages for the same type of work, which smacks of the notion that these are separate areas with enough distance between them to require different pay scales.

While the CO argued that the Employer's use of the same newspaper for its recruitment efforts demonstrated that the two cities were within the same area of intended employment, the argument lacks force. Newspapers are wide reaching, and often serve a broad audience. However, it would not be feasible to commute from one the farthest reaches of the newspaper's readership to the opposite end. Therefore, CO improperly viewed the two applications together, since Marble Hills, Texas, and Austin, Texas are not in the same area of intended employment. As a result, the Employer does not have a permanent need, and the CO incorrectly denied certification.

Order

² Despite the CO's assertion that the actual driving distance between the two points was not before the CO and therefore not properly before the me, it is within my parameters to take judicial notice of a map showing the driving distance between Austin, Texas, and Marble Falls, Texas. According to www.mapquest.com, the approximate driving distance between the center points of both places is approximately one hour.

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **REVERSED**.

For the Board:

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge