



Issue Date: 20 December 2011

BALCA Case No.: 2012-TLN-00010

ETA Case No.: C-11292-55644

In the Matter of:

DOMINGUEZ RACING STABLES,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Henry Dominguez
El Paso, Texas
For the Employer

Gary M. Buff, Associate Solicitor
Matthew Bernt, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER
AFFIRMING 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, as

defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO’s denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a). The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On October 9, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary seasonal labor certification from Dominguez Racing Stables (“the Employer”). AF 73-87.¹ The Employer requested certification for 15 stable attendants from December 1, 2011 to September 30, 2012. AF 74. The Employer stated that the place of employment was in Sunland Park (Dona Ana County), New Mexico, and that the additional worksites include SunRay Park (San Juan County), Ruidoso Downs (Lincoln County), and Downs at Albuquerque (Bernalillo County), New Mexico. AF 77, 83-84

On October 26, 2011, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer did not comply with all requirements of the H-2B program. AF 65-72. The CO found six deficiencies with the Employer’s application, only three of which remain on appeal. Among the deficiencies, the CO found that the Employer’s four worksites are located a significant distance from one another. AF 67-68. The CO noted that the closest of the worksites are San Juan County and Lincoln County, which are 153 miles apart, and the furthest of the worksites are Dona Ana County and San Juan County, which are 434 miles apart. *Id.* The CO found that the worksites require between three to seven hours of travel between them, and determined that the worksites are not within the same area of intended employment. *Id.* The CO reminded the Employer that the H-2B regulations do not permit an employer to

¹ Citations to the 87-page appeal file will be abbreviated “AF” followed by the page number.

submit one application for multiple worksites that are not within the same area of intended employment. *Id.* The CO required the Employer to either submit an amended application that complies with the requirement that all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment, or alternatively, provide evidence demonstrating that the worksites are within normal commuting distance and are in the same area of intended employment. *Id.*

The Employer responded to the RFI on November 2, 2011, contending that the worksites are within normal commuting distance for employers in the racing stable industry. AF 22-64. The Employer did not provide any additional evidence or documentation related to whether the distances between the worksites are within normal commuting distance.

On November 21, 2011, the CO denied the Employer's application. AF 12-21. The CO found that the Employer's assertion that the commuting distances, which ranged from 153 miles to 434 miles each way, constitute "normal commuting distance," was not supported by any evidence. AF 16. The CO determined that the worksite locations are not within normal commuting distance from one another, and therefore, are in different areas of intended employment. *Id.*

On December 1, 2011, the Employer requested BALCA review, arguing that the regulatory requirement that all worksite locations fall within a single area of intended employment is overly restrictive. The Board received the appeal file on December 12, 2011, and the CO filed a brief on December 19, 2011, arguing that the Employer failed to comply with Section 655.20(d) because the job opportunity involves multiple worksites not within the same area of intended employment.

DISCUSSION

The H-2B regulations permit an employer to file an application for more than one position, "as long as all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended

employment, and during the same period of employment.” 20 C.F.R. § 655.20(d). The H-2B regulations provide the following definition of “area of intended employment.”

Area of Intended Employment means that the geographic area within normal commuting distance of the place (worksite address) 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 (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). 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. § 655.4. The Employer put forth no evidence to demonstrate that these worksites are within the same area of intended employment. Official notice is taken of the distance between the Employer’s northern-most worksite, in SunRay Park (San Juan County) and the closest worksite to it, Downs at Albuquerque (Bernalillo County), which is 178 miles and more than three hours away.² 29 C.F.R. § 18.45. The shortest distance between any two worksites is 144 miles between Ruidoso Downs (Lincoln County) and Sunland Park (Dona Ana County), and the longest distance between any two worksites is 436 miles between SunRay Park (San Juan County) and Sunland Park (Dona Ana County). Although there is no precise limit on the number of miles that constitutes a “normal commuting distance,” here, where all of the worksites are at least 144 miles from each other, under no circumstances can such a distance be considered within the normal commuting distance.

Based on the foregoing, I find that the CO’s denial of temporary labor certification was proper.

² <http://maps.google.com> (last visited December 19, 2011).

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge