



**Issue Date: 11 April 2012**

**BALCA Case No.: 2012-TLN-00028**

ETA Case No.: C-12039-58072

*In the Matter of:*

**SALAZAR CONTRACTING, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Kemal Ian Benouis, Esquire  
Benouis Law Office  
Manchaca, Texas  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Clarette H. Yen, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **PAUL C. JOHNSON, JR.**  
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).

## **BACKGROUND**

On February 8, 2012, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary peakload labor certification from Salazar Contracting, LLC (“the Employer”) for 20 landscaping and groundskeeping workers from April 2, 2012 to December 31, 2012. AF 64-76.<sup>1</sup> The Employer indicated that work would be performed in Tellico Plains, Tennessee, plus worksites in Davidson County and Dickson County, Tennessee, and Tuscaloosa County, Jefferson County, Greene County, and Sumter County, Alabama. AF 67. The Employer stated the rate of pay as \$8.66 per hour. AF 68.

On February 14, 2012, 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 failed to satisfy all the requirements of the H-2B program. AF 56-63. The CO explained to the Employer that under the H-2B regulations, an employer is permitted to request certification for more than one worker on an application 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.<sup>2</sup> AF 60. The CO determined that the multiple work locations listed on the Employer’s application were not in the same area of intended employment, as required by 20 C.F.R. § 655.20(d). *Id.* The CO explained that Section 655.4 of the H-2B regulations

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<sup>1</sup> Citations to the 76-page appeal file will be abbreviated “AF” followed by the page number.

<sup>2</sup> The CO also identified four other deficiencies, which are not at issue on appeal.

defines “area of intended employment” as “the geographic area with normal commuting distance of the place (worksites address) of intended employment of the job opportunity for which certification is sought.” *Id.* The CO required the Employer to provide a written explanation as to how each location where work will be performed falls within the regulatory definition of area of intended employment.

The Employer responded to the RFI on February 17, 2012. AF 35-55. The Employer explained that its attorney inadvertently reused its application from the previous year and neglected to delete worksites in Davidson County and Dickson County, Tennessee. AF 51. The Employer amended its application and removed the Davidson County and Dickson County worksites, but retained its worksites in Tuscaloosa County, Jefferson County, Greene County, and Sumter County, Alabama. AF 45-46, 51.

On March 14, 2012, the CO denied the Employer’s application. AF 30-34. The CO determined that the Employer failed to cure the deficiency identified in the RFI because the worksites on the Employer’s itinerary were not all in the same area of intended employer, as required by 20 C.F.R. § 655.20(d). AF 33. The CO found that the distance between the Employer’s place of business in Tellico Plains, Tennessee and a worksite in Greene County, Alabama is more than 300 miles, and the distance between Tellico Plains, Tennessee and Sumter County, Alabama is more than 340 miles. AF 34. The Employer appealed the CO’s determination on March 22, 2012, contending that the H-2B workers will initially meet at the Employer’s place of business in Tellico Plains, Tennessee, but that the job opportunity is in Alabama, and that the workers will not be transported back to Tennessee until after the mowing season is completed in December 2012.

## **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. Rather, the Employer seems to suggest that the H-2B workers will not be working at the Employer's place of business in Tellico Plains, Tennessee, but instead will just meet there and then be transported to each job site in Alabama. However, there is no indication that work will only be performed in Alabama, rather than in both Tennessee and Alabama. I note that all of the Employer's domestic recruitment efforts were conducted in Tennessee, not Alabama. AF 68. As the regulations require employers to place newspaper advertisements and State Workforce Agency job orders within the area of intended employment, it would appear that work will be performed in Tellico Plains, Tennessee. *See* 20 C.F.R. §§ 655.15(e)-(f). Official notice is taken that the distance between the Employer's worksite in Tellico Plains, Tennessee, and Jefferson County, the northernmost and closest worksite in Alabama, is 235 miles.<sup>3</sup> 29 C.F.R. § 18.45. This distance is certainly not within the same area of intended employment, as defined by 20 C.F.R. § 655.4.

Moreover, even if all of the worksites were in Alabama and no work was going to be performed in Tennessee, the worksites still would not be within the same area of intended employment. The distance between the northernmost worksite, in Jefferson County, Alabama, and the southernmost worksite, in Sumter County, Alabama, is 118 miles and more than two hours away. The Employer has not offered any evidence that

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<sup>3</sup> <http://maps.google.com> (last visited Apr. 6, 2012).

these counties are within the same MSA, and I find that the 118-mile distance between these two counties is not within a “normal commuting distance.”

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

**ORDER**

Accordingly, it is hereby **ORDERED** that the Certifying Officer’s determination is **AFFIRMED**.

For the Board:

**A**

**PAUL C. JOHNSON, JR.**  
Associate Chief Administrative Law Judge