



Issue Date: 20 March 2012

BALCA Case No.: 2012-TLN-00020

ETA Case No.: C-12010-57135

In the Matter of:

SOUTHERN REFRACTORIES, INC.,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Robert Wingfield, Jr.
Amigos Labor Solutions
Dallas, Texas
For the Employer

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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 January 10, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary peakload labor certification from Southern Refractories, Inc. ("the Employer"). AF 105-122.¹ The Employer requested certification for 38 refractory workers from April 2, 2012 to January 31, 2013. AF 105. The Employer stated that the place of employment was in Southlake, Texas, and that the additional places of employment include 10 other counties in Texas, as well as worksites in Alabama, Illinois, Oklahoma, California, Utah, and Colorado. AF 108.

On January 17, 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 did not comply with all requirements of the H-2B program. AF 100-104. The CO noted the Employer has worksites in multiple Metropolitan Statistical Areas (MSAs) in violation of 20 C.F.R. § 655.20(d).² AF 102. The CO reminded the Employer that the H-2B regulations do not permit an employer to 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

¹ Citations to the 122-page appeal file will be abbreviated "AF" followed by the page number.

² The CO also found one other deficiency, which is not at issue on appeal.

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 January 20, 2012 and submitted a modified application with the statement “[a]ll 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.” AF 91. The Employer’s application stated that the work would be performed in the same 21 counties in seven states that the Employer indicated in its initial application. AF 92.

On February 21, 2012, the CO denied the Employer’s application. AF 72-78. The CO found that despite the Employer’s statement on its application that all H-2B workers would perform labor within the same area of intended employment, it was clear that the H-2B workers would move from one area of intended employment to others outside the MSA during the course of employment. AF 78. The CO noted that there is no special procedure or Training and Employment Guidance Letter (TEGL) permitting a variance from the regulatory requirements for the occupation of Refractory Materials Repairers. *Id.*

On February 29, 2012, the Employer requested BALCA review, arguing that the regulations contemplate H-2B workers performing work in more than one MSA and that it should be entitled to special procedures processing under 20 C.F.R. § 655.3. The Employer also noted that it received certification last year for H-2B workers to perform work in different MSAs. The Board received the appeal file on March 8, 2012, and the CO filed a brief on March 15, 2012, 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. As the Employer’s application identifies 21 counties in seven states where the work will be performed, it is clear that the worksites are not within normal commuting distance, and therefore not in the same area of intended employment. The only exception to the requirement that work be performed in one area of intended employment is if an application qualifies for processing under Section 655.3. 20 C.F.R. § 655.20(e).

The Employer contends that its application should have been processed under the special procedures provided for under Section 655.3. Section 655.3 provides, in relevant part:

(b) *Establishment of special procedures.* The Office of Foreign Labor Certification (OFLC) Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for the processing of certain H-2B applications when employers can demonstrate, upon written application to the OFLC Administrator, that special procedures are necessary. These include special procedures currently in effect for the handling of applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers. Prior to making determinations under this paragraph (b), the OFLC Administrator may consult with employer and worker representatives.

The special procedures regulation does not identify “Refractory Materials Repairers,” the occupation that is the subject of this application, as an occupation for

which there are currently any special procedures in effect. Additionally, there is no indication that the Employer has even applied for processing under Section 655.3, as the Employer did not even mention the special procedures process until after its application had been denied. Moreover, Section 655.3 leaves it to the discretion of the OFLC Administrator to determine whether a variance is appropriate for a particular occupation or application.

Finally, that the Employer received certification for the same application last year is not a basis to reverse the denial. That the CO did not enforce a regulatory requirement in the past does not prevent the CO from doing so now. Based on the foregoing, I find that the CO's denial of temporary labor certification was proper because the Employer's application does not comply with 20 C.F.R. § 655.20(d).

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge