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Issue Date: 14 February 2013

OALJ Case No.: 2013-TLN-00027

ETA Case No.: H-400-12362-129253

In the Matter of:

KLONDIKE AVIATION,
Employer

Certifying Officer: Chicago National Processing Center

Before: **STEPHEN M. REILLY**
Administrative Law Judge

**DECISION AND ORDER VACATING AND REMANDING CERTIFYING OFFICER'S
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 non-agricultural 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); 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).

PROCEDURAL HISTORY

This case involves Klondike Aviation's ("Klondike") December 27, 2012 Application for Temporary Labor Certification. The Employment and Training Administration ("ETA") received Klondike's Application for Prevailing Wage Determination on November 13, 2012. (AF at 52-57).¹ As part of this application, Klondike stated that candidates would be required to

¹ Citations to the 79 page Administrative File are abbreviated as "AF." Because most of the page numbers in the electronic version of the Administrative File provided by ETA were not legible I frequently used the page number generated by computer which does not necessarily match those listed in the index to the Administrative File.

travel in order to perform the listed job duties. Klondike specified that the job would require “travel to airstrips.” (AF at 53). Klondike listed the Place of Employment as Gueydan in Cameron Parish, Louisiana. However, Klondike stated that the work would be performed in multiple worksites. (AF at 54, 56).

After the Application for Prevailing Wage Determination, Klondike advertised the positions. Klondike advertised the positions in the relevant newspaper on December 14, 2012 and December 16, 2012. (AF at 76-77). Klondike also posted the positions through Louisiana’s State Workforce Agency. (AF at 78-79). All postings stated that the positions “may include work in Allen, Cameron, Jefferson Davis, [and] Vermilion Parishes.”

On December 27, 2012, ETA received an Application for Temporary Labor Certification from Klondike. (AF at 64-79). Klondike requested certification for six airplane pilot helpers, Occupational Employment Statistics code 51-9198, from February 25, 2013 to September 30, 2013. (AF at 64). Klondike provided the following description of the job duties to be performed and the experience required:

Employer seeks 6 airline pilot helpers; will assist with preparing loads of seeds, fertilizer, chemicals to be applied to crops of rice and soybean fields by drop [sic] duster pilot; travel with loader trucks to job site to assist with loading and unloading hopper with various seed and agricultural products; general maintenance and cleanup of worksite; disposal and rinsing of containers as necessary; 2 weeks experience in similar occupation required, Random drug screening; overtime varies

(AF at 66).

On January 3, 2013, the CO issued a request for further information (RFI), notifying Klondike that it was unable to render a final determination for the Application because Klondike did not comply with all requirements of the H-2B program. The CO identified three deficiencies in Klondike’s application, two of which Klondike corrected and are not at issue in this appeal. (AF at 58-63).

In response to the RFI, Klondike requested to amend the application to reflect worksites only in Allen Parish and Cameron Parish. (AF at 17). Klondike also submitted a letter from its owner, Randy Broussard. Mr. Broussard stated:

The worksites in Allen and Cameron parish are accepted as normal and acceptable and in the same area of intended employment. From our home base in Cameron Parish to the work done in Allen Parish is approximately 30 miles, In Cameron Parish we work approximately in a 5 mile radius. In Allen Parish we work approximately in a 2 mile radius.

(AF at 18).

The CO issued the Final Determination and denied certification on January 25, 2013. (AF at 39-43). The CO found that Klondike failed to show that there are not sufficient U.S. workers are available for the positions requested. The CO also found that Klondike had not shown that employing foreign workers would not have an adverse effect on the wages and working conditions of similar U.S. workers. The decision described the remaining deficiency in Klondike's application as "multiple areas of intended employment" citing to 20 C.F.R. § 655.20(d) and 20 C.F.R. § 655.4. More specifically, the CO stated that although an H-2B applicant may request certification for more than one position, the positions must be similar and include the same area of intended employment. (AF at 41). The CO cited 20 C.F.R. § 655.4 which defines the intended area of employment and found that Klondike listed worksites on its application that are "significantly distant from one another" including Cameron, Jefferson Davis, Vermillion, and Allen parishes in Louisiana. According to the CO, the worksites are located a significant distance from one another including the furthest worksite in Vermillion County which is 240 miles from Klondike's main worksite. Based upon "the geographic distance between the worksites," the CO did not find that the worksites were in the same area of intended employment. (AF at 41-42).

On January 30, 2013, BALCA received a letter from Klondike requesting review of the CO's decision. (AF at 5-6). In the request, Klondike argues that potential candidates would have been adequately notified as to the job locations specified in the revised application. Although the advertisements to potential candidates listed all four counties despite the fact that Klondike later amended its application to list only Allen Parish and Cameron Parish, Klondike argues that potential candidates were notified that the positions could include work in Allen Parish and Cameron Parish. This is because the advertisements stated that work sites "may include work in Allen, Cameron, Jefferson Davis, and Vermilion Parishes." Klondike further points out and the record reflects that its application in 2012 containing the same list of four parishes was approved the prior year. (AF at 5-6; AF at 31-37).

On February 13, 2013, the CO filed a statement arguing that because of the revised application, that eliminated two parishes, the "job order and advertisements do not contain the correct geographic location of the job opportunity" and as a result, "they do not apprise applicants of the location of the job opportunity." In addition, the CO addressed Klondike's implication that because the previous application was certified this application should also be certified. The CO stated that "the CO's omission of a denial reason in a previous application does not bar the CO from bringing up that denial reason in a future application."

DISCUSSION

The RFI identifies three deficiencies with Klondike's original application. (AF-57 through 59). These are:

1. Failure to comply with recruitment requirements;
2. Multiple areas of intended employment; and,
3. Pre-filing recruitment requirements.

Klondike responded to the CO's request. As stated in the CO's Final Determination, Klondike "corrected two of the three deficiencies identified." The remaining deficiency was: Multiple areas of intended employment. AF-37.

Area of intended employment

The regulations, in relevant part, state that an employer may only apply for Temporary Labor Certification for more than one position in one application if the positions have certain similarities.

Certification of more than one position may be requested on the 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, and during the same period of employment.

20 C.F.R. § 655.20(d). The regulations define the area of intended employment.

Area of intended employment means 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

20 C.F.R. § 655.4. Thus the regulations allow flexibility in determining the area of intended employment based upon the factual situations involved with each application.

I find that the CO improperly determined that the original application contained a deficiency concerning the "area of intended employment." I find that the four parishes identified in the original application meet the requirements in the regulations discussing "same area of intended employment." Because the need to amend the application regarding the areas of intended employment was a superfluous exercise mandated by the CO's error, I need not address the CO's discussion of the amended application as it relates to this issue.

The CO bases his decision regarding the area of intended employment on his finding that "the furthest worksite, Vermillion is approximately 240 miles from the employer's main worksite in Cameron Parish County, Louisiana." (AF at 42). The CO's distances are wrong by a significant amount. I take judicial notice of the Louisiana map at nationalatlas.gov, an online publication of the U.S. Department of the Interior, U.S. Geological Survey. The scale on this map indicates that the greatest distance between any two points in the four parish Intended Area of Employment requested by Klondike is approximately 120 miles, half the distance used by the CO to deny the certification. Considering the nature of the job is to travel in company trucks to the job site to assist with loading the crop dusting aircraft, I find these four counties are a single Intended Area of Employment for this position. Furthermore, reliance on such an erroneous fact renders the CO's decision unsupportable.

This is not the first time Klondike filed an application for H-2B visas for multiple employees. Klondike filed an application for H-2B visas in 2012 for multiple employees at worksites in the same four parishes identified as worksites in this application. The 2012 application was certified. The approval of the 2012 application with the same four parishes as the 2013 application is not precedential, i.e. it does not mandate automatic approval for the 2013 application. However, I find that the CO's determination is arbitrary and capricious, because the CO did not explain why it certified Klondike's prior application from 2012 which listed all four counties, but denied certification in this case. The CO did not explain the reason for adopting a different view. The CO did not indicate there were new regulations nor did the CO show factual differences between the applications. The CO simply denied the application. Absent some reasonable explanation why the CO's position changed or absent a change in facts, denying the 2013 application is arbitrary, capricious, and an abuse of discretion. As such, the CO's decision denying Klondike's 2013 application cannot stand.

CONCLUSION

I find the CO erred in holding that Cameron, Jefferson Davis, Vermillion, and Allen parishes in Louisiana are not in the same area of intended employment for the purposes of these positions. In addition, I find that the CO's failure to explain his change in position regarding whether these four parishes are in the same area of intended employment arbitrary, capricious and an abuse of discretion.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is hereby **VACATED** and **REMANDED** to the Certifying Officer with instructions to **GRANT** Klondike's application.

SO ORDERED.

For the Board:

STEPHEN M. REILLY
Administrative Law Judge