



Issue Date: 29 October 2015

**BALCA Case Nos.: 2015-TLN-00060
2015-TLN-00061
2015-TLN-00062**

ETA Case Nos.: H-400-15189-817600
H-400-15189-009030
H-400-15092-949106

In the Matter of:

FOUR QUEENS TRANSPORTATION, LLC,

and

L & R TRUCKING, LLC

and

DESERT RUNNER TRANSPORTATION, INC.

Employers.

**DECISION AND ORDER AFFIRMING
DENIALS OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Four Queens Transportation, LLC’s, L & R Trucking, LLC’s, and Desert Runner Transportation, Inc.’s (collectively “Employers”) requests for review of the Certifying Officer’s (“CO”) final determinations in the above-captioned H-2B temporary labor certification matters.¹ Employers have the same representative and each case alleges a nearly identical appeal. Therefore the cases were consolidated for review and decision on October 1, 2015.²

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). Pursuant to this rule, the Department will “continue to process an *Application for Temporary Employment Certification* submitted prior to April 29, 2015 in accordance with 20 C.F.R. Part 655, Subpart A, revised as of April 1, 2009.” *See id.* at 24109 (to be codified at 20 C.F.R. § 655.4). The Employers filed *Applications for Temporary Employment Certification* on July 8, 2015, with a start date of need of October 1, 2015. Accordingly, the Interim Final Rule, 80 Fed. Reg. 24042 (Apr. 29, 2015), applies to this case.

² References to the record for these consolidated cases are cited from the Appeal File (“AF”) brought by Four Queens Transportation, LLC. The three cases differ somewhat in the particular information presented, such as

The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the U.S. on a one-time, seasonal, peakload, or intermittent basis, as defined by Department of Homeland Security regulations.³ Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”).⁴ A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BACLA.⁵

BACKGROUND

Employers are trucking companies located in Arizona near the U.S. border with Mexico. (AF 52). Employers distribute produce grown in Mexico and the United States to locations determined by “market demands and work orders.” (AF 26). On July 8, 2015, Employers filed H-2B *Applications for Temporary Employment Certification* seeking full-time workers to be employed as Heavy and Tractor-Trailer Truck Drivers for the period of October 1, 2015 to July 1, 2016.⁶ (AF 52-60). The original job description filed provided: “The position will be based in Nogales, Arizona, but will require long travel far from Nogales to make deliveries throughout the United States, including the Northeast.” (AF 61).

In mid-July 2015 the COs issued Notices of Deficiency pursuant to 20 C.F.R. § 655.31 citing five deficiencies in the applications: Employer’s inclusion of multiple areas of intended employment in one application; failure to submit an agent agreement; failure to submit an acceptable job order; failure to submit a disclosure of foreign worker recruitment; and failure to submit a complete and accurate Form 9142. (AF 45-51). In one case, *L&R Trucking LLC*, there was an additional deficiency listed for a failure to include the appropriate assurances and contents in the job order. Later that same July, Employers filed modifications to the applications, including edited job orders. (AF 30). Then in September 2015, despite being past any deadline for modification Employers filed more modifications. (AF 29-29) (*see* 20 C.F.R. § 655.31(b)).

On September 21, 2015 the COs denied the applications citing two remaining deficiencies for each of the cases. (AF 18-25). The first deficiency was that there were multiple areas of intended employment within one application. The COs cited 20 C.F.R. § 655.15(f) and 20 C.F.R. § 655.5 and explained that “only one application may be filed for worksite(s) within one are of intended employment for each job opportunity with an employer for each period of employment” and that because work would be performed at multiple worksites which are “significantly distant from one another” the COs were concerned that the worksites were not within the same area of intended employment. (AF 21-22). Quoting 20 C.F.R. § 655.15(e) the COs asked that Employers submit ETA Form 9142s that complied with the requirement that all

number of workers, exact dates of the letters, etc. but the same issues are raised in the appeals. Any relevant differences will be noted.

³ *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).

⁴ 8 C.F.R. § 214.2(h)(6)(iii).

⁵ 20 C.F.R. § 655.61(a).

⁶ The Application described a “seasonal need for an increase in truck drivers” due to the growing season for produce. (AF 52).

H-2B workers perform the same services or labor in the same area of intended employment. (AF 22). The COs also requested evidence that any additional worksite locations were within normal commuting distance. (AF 22).

I note that in *Four Queens Transportation, LLC* the CO cited the same regulation, but gave a slightly different explanation for denial. The CO explained that the job order detailed that there would be long travel, but that Employer had attested that no work would be performed at multiple worksites on the Form 9142. The CO was therefore unclear as to the “exact geographic location associated with the job opportunity” and “it [did] not appear . . . that the worksites [were] within the same area of intended employment.” (AF 21-22).

The second deficiency for all three cases cited by the COs was a failure to submit an acceptable job order. (AF 23). In the first notice of deficiency the COs explained that the job order did not indicate “how the worker will be provided with or reimbursed for transportation and subsistence” as required by 20 C.F.R § 655.18(b)(12). The COs noted that Employers submitted amended job orders, but then explained that the amended job orders were still missing an accurate description of the job opportunity (the job order did not list a duty that the worker may be required to unload the truck), and that the job orders did not tell the applicants to inquire about the opportunity or send applications to the nearest office of the State Workforce Agency (“SWA”) in the state in which the advertisement appeared. (AF 25). The amended corrections did not contain the information which is required by 20 C.F.R. § 655.18(b)(3) and § 655.18(b)(18) respectively.

In late September 2015, Employers filed their Requests for Administrative Review. Regarding the “multiple areas of intended employment” issue, Employers argued that the trucking business “requires movement” and acknowledged the possibility that “many of the future orders may be outside of Santa Cruz, County.” (AF 3). They contended that there is “absolutely no use for a truck that doesn’t move” and implicitly reasoned that any delivery location is within a normal commuting distance. (AF 3).

Employers addressed the job order deficiency by stating that they did include another paragraph detailing how the workers would be provided with or reimbursed for transportation and subsistence from the place from which the workers come to work. Employers did not address in their argument the issue of the difference in job duties listed on the Form 9142 and the job order, or the issue that the job order did not instruct the applicants to contact the local SWA.

The Office of the Solicitor filed a brief on behalf of the COs on October 19, 2015. The COs argued that Employers have not complied with the H-2B regulatory requirement that the worksites covered by the application be within a single area of intended employment, and cited 20 C.F.R. § 655.15(e) and (f). (CO Brf. at 4). Employers’ supplemental submissions did not allay the concern that workers would be performing work outside the “same area of intended employment.” (CO Brf. at 4). The COs also cited to *Manuel Huerta Trucking, Inc.* which appears to be nearly identical to the case at hand. 2015-TLN-59 (Oct. 16, 2015). That case held that simply stating that truckers will go where market forces take them does not establish that the truckers will remain in the same geographic area. *Id.* at 6. The COs also pointed out that the Employers did not make the necessary revisions to the job orders. (CO Brf. at 5).

Employers filed briefs which made essentially the same arguments as those already submitted in their requests for review.

DISCUSSION

Deficiency 1: Multiple Areas of Intended Employment

The COs determined that Employers failed to comply with the regulatory obligations of H-2B employers because Employers' workers would not work within the same area of intended employment. The regulations at 20 C.F.R. § 656.15(e)-(f) provide:

(e) *Requests for multiple positions.* Certification of more than one position may be requested on the *Application for Temporary Employment Certification* as long as all H-2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(f) *Separate applications.* Except as otherwise permitted by this paragraph (f), only one *Application for Temporary Employment Certification* may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.

The regulations further provide the following definition of “area of intended employment”:

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that 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, or quality of the regional transportation network). 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.

This issue was recently addressed in a similar case where Judge Markley ruled that:

Read together, the regulations permit a single application for multiple positions only where “all H-2B workers will perform the same services or labor” in the same “geographic area” within “normal commuting distance” of the worksite. Conversely, an employer is required to file a separate application for each position where work will be performed outside of the same “area of intended employment.”⁷

⁷ I note that the preamble to section (f) is contradictory to the actual regulation. The preamble states that “[p]aragraph (f) requires that, with one exception discussed below applicable to employers in the seafood industry,

Manuel Huerta Trucking, Inc., *supra* at 6; *see also Southern Refractories, Inc.*, 2012-TLN-20 (March 20, 2012).

Employers have the burden of establishing that they are entitled to the labor certification. *See Cajun Constructors, Inc.*, 2011-TLN-4, slip op. at 7 (Jan. 10, 2011). In this case, Employers argue that truckers, by their very profession, move. Employers admit that “it is possible that many of the future orders may be outside of Santa Cruz, county.” (AF 3). They also admit that it is possible that if a delivery should require long travel, employees could live in the truck. (AF 5). These concessions, rather than prove “normal commuting” actually show that the truckers may travel anywhere, even locations outside an MSA. In fact, they will go “per market demands and work orders of clients.” (AF 2). Employers seem to argue that “commuting” only means a worker’s travel time from home to a worksite and that it is “absurd” to suggest that driving the truck is part of “commuting.” (Emp. Brf. at 5). However, a “commute” also includes regular travel to and from a place. MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/commute> (last visited Oct. 23, 2015) (A definition of commute is “to travel back and forth regularly”). A truck driver commutes regularly in the course of his or her duties.

Therefore, I find Employers did not demonstrate to the COs that the truckers will be performing the same job within the same area of intended employment. I do not hold that a trucker may never be able to show that their route or routes are within one area of intended employment; only that, in this instance, Employers have not met their burden of proof. The drivers on these applications could be miles away from each other at any given time. The original application indicated that the truckers would move “throughout the United States.” (AF 52). Replacing that language with the language about moving where the market demands does not cure the deficiency because it does not establish that the truckers will remain in the same geographic area within a normal commuting distance. For Employers to have all truckers on one application, the application must meet the regulatory requirements of 20 C.F.R. § 655.15(e), which did not happen here. Therefore, the COs did not abuse their discretion in denying what were in fact multiple areas of intended employment submitted on a single application.⁸

employers file separate applications when there are . . . *different* worksites within *an* area of intended employment.” 80 Fed. Reg. 24060 (Apr. 29, 2015) (emphasis added). This would mean that a separate application would be needed for *each* worksite in one area of intended employment. In contrast, the regulation itself says one application may be filed for “worksite(s),” not just a “worksite.” Therefore only *one* application is needed for one position with *more than one worksite* if the job is in the same area of intended employment. If the worksites are in separate areas of intended employment, then separate applications are needed. Where there is an apparent conflict between the preamble and the regulation, the regulation takes precedence. *See Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (holding that language in a preamble of a regulation is not controlling, only persuasive, and furthermore, that just as a preamble is not an operative part of a statute, a preamble is not an operative part of a regulation.)

⁸ Employer submits that a CO previously approved an application under facts similar to this case. (AF 1). This fact, if true, is irrelevant to the instant proceedings at hand. Even if “the CO did not enforce a regulatory requirement in the past, [it] does not prevent the CO from doing so now.” *Southern Refractories, Inc.*, *supra* at 5.

Deficiency 2: Failure to Submit an Acceptable Job Order

The COs also determined that Employers failed to submit acceptable job orders for the applications. (AF 24-25). The regulation at 20 C.F.R. § 655.18(a) provides that “[e]ach job order placed in connection with an *Application for Temporary Employment Certification* must at a minimum include the information contained in paragraph (b) of this section.” Pursuant to 20 C.F.R. § 655.18(b)(3), (12), and (18) Employer must indicate the following:

(3) Describe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity.

...

(12) Detail how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, if the worker completes 50 percent of the period of employment covered by the job order, consistent with § 655.20(j)(1)(i);

...

(18) Instruct applicants to inquire about the job opportunity or send applications, indications of availability, and/or resumes directly to the nearest office of the SWA in the State in which the advertisement appeared and include the SWA contact information.

The job orders submitted by Employers in response to the notices of deficiency in September contained a new paragraph regarding reimbursement. The new job order language provided:

If the worker completed 50% of the work contract period, employer will arrange and pay for transportation and subsistence from the place of recruitment to the place of work. Upon completion of the work contract or where the worker is dismissed earlier, employer will provide or pay for worker’s reasonable costs of return transportation and subsistence back home or to the place the worker originally departed to work, except where the worker will not return due to subsequent employment with another employer. The amount of transportation payment or reimbursement will be equal to the most economical and reasonable common carrier for the distances involved. Daily subsistence will be provided at a rate of \$11.86 per day during travel to a maximum of \$46.00 per day with receipts.

The COs asserted in their brief that Employers still had not “provided the requisite detail about how the employers would provide the employees with or reimburse the employees for transportation and subsistence.” (CO Brf. at 5). The language above, however, details the parameters by which the employees will be repaid and is sufficient to satisfy the requirement at § 655.18(b)(12).

However, the new job orders do not contain instructions regarding how to inquire about the job opportunity at the nearest SWA office, which is a violation of § 655.18(b)(18). (AF 29).

The job descriptions also do not contain the duty that the worker may be required to unload the truck. (AF 29, 54). As such, the job orders do not completely describe the job opportunity, a violation of § 655.18(b)(3). Therefore, the job orders are unacceptable and the COs did not abuse their discretion in denying Employers' applications.

ORDER

It is hereby **ORDERED** that the Certifying Officers' denials of Employers' *Applications for Temporary Employment Certification* are **AFFIRMED**.

For the Board:

Stephen R. Henley
Chief Administrative Law Judge