

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 16 October 2015**

**BALCA Case No.: 2015-TLN-00059**

ETA Case No.: H-400-15187-405429

*In the Matter of:*

**MANUEL HUERTA TRUCKING, INC.,**

*Employer.*

Certifying Officer: Office of Foreign Labor Certification Certifying Officer,  
Chicago National Processing Center

Before: **MONICA MARKLEY**  
Administrative Law Judge

**DECISION AND ORDER**

This case is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to the Employer's request for review of the Certifying Officer's (CO) denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one-time occurrence or on a seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, "if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor." 8 C.F.R. § 214.2(h)(1)(ii)(D).

Employers who seek to hire foreign workers under this program must apply for and receive a "labor certification" from the U.S. Department of Labor (DOL). 8 C.F.R. § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration (ETA) pursuant to the procedures and standards codified at 20 C.F.R. Part 655, Subpart A.<sup>1</sup> If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.61.

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<sup>1</sup> The regulations at this subpart have been the subject of federal court orders and have undergone numerous revisions within the last 10 years, some of which were never implemented. On April 29, 2015, the DOL and the DHS jointly published an *Interim Final Rule* to replace the regulations at 20 C.F.R. Part 655, Subpart A. See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) ("2015 IFR"). These rules are effective immediately and govern this case.

BALCA “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” § 655.61(e).

### **BACKGROUND**

The Employer is a trucking company located in Arizona near the U.S. border with Mexico. The Employer distributes produce grown in Mexico and the United States to locations throughout the United States. (AF 54.)<sup>2</sup> On July 8, 2015, the Employer filed an H-2B application with the ETA seeking 25 full-time workers to be employed as Heavy and Tractor-Trailer Truck Drivers for the period from October 1, 2015, through July 1, 2016.<sup>3</sup> (AF 54.) The job description filed in support of the application provided:

The position will be based in Rio Rico, Arizona, but will require long travel far from Rio Rico to make deliveries throughout the United States, including the Northeast.

(AF 63.)

On July 16, 2015, the CO issued a *Notice of Deficiency* (NOD) citing four deficiencies in the Employer’s application: the Employer’s inclusion of multiple areas of intended employment in one application; failure to submit an acceptable job order; failure to submit an agent agreement; and failure to submit a disclosure of foreign worker recruitment. (AF 47-53). The CO requested additional information for each deficiency. With regard to the “area of intended employment deficiency,” the NOD provided:

#### **Additional Information Requested:**

The employer must submit an amended ETA form 9142 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.

#### **AND**

The employer must provide evidence that any additional worksite locations are within normal commuting distance and are in the same area of intended employment, as defined by 20 C.F.R. § 655.5.

(AF 49 (emphasis in original).)

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<sup>2</sup> Citations to the Appeal File are abbreviated as “AF” followed by the page number.

<sup>3</sup> The Application described a “seasonal need for an increase in truck drivers,” from October to the beginning of July, due to the growing seasons of marketable produce. (AF 54.)

On July 21, 2015, in response to the NOD, the Employer submitted an employer attestation; its legal services agreement with its attorney; and a revised job description.<sup>4</sup> (AF 39-45). The revised job description provided, in relevant part:

The Company's headquarters at 21 Kipper Street, in Rio Rico, Arizona ("The Headquarters") is easily accessible by car. The Truck Drivers will report in and out for duty at the Headquarters. They will obtain their assignments at The Headquarters where they will obtain the Company Truck that they will be driving, and where they will park the company truck after finishing their assignment. The destination(s) of where the Company Truck will be sent to, in order to deliver produce, will be decided by market forces and planned as orders come in.

(AF 43.)

On September 9, 2015, the CO denied certification. (AF 31.) The CO found the Employer's response to the NOD did not correct two deficiencies: the Employer did not show that all workers will work in the same area of intended employment (the "area of intended employment deficiency"); and the job order did not provide a detailed description of how the workers will be provided with or reimbursed for transportation and subsistence from their present location to the place of employment (the "job order deficiency"). (AF 35, 37.) Regarding the "area of intended employment" deficiency, the CO stated:

The employer indicated that work will be performed in multiple states across the United States. Specifically, the employer's job order indicates, "[t]he 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."

Based on the geographic distance between the worksites, it does not appear to the Department that the worksites are within the same area of intended employment. The employer may not submit one application for multiple worksites which are not within the same area of intended employment.

(AF 34-35.)

The ETA received a supplemental response to the NOD on September 9, 2015. A notation in the Index to the Appeal File explains:

The Department received a supplemental Notice of Deficiency (NOD) response from the Employer on September 9, 2015, which was considered untimely pursuant to 20 C.F.R. 655.31(b)(2). The Department had not yet processed and did not consider these documents in making its Final Determination and they are not included in this Appeal File. This is the submission to which the Applicant refers in its appeal filing. However, a review of the untimely submission shows that while the employer overcame the job order deficiency, the application was still deniable due to the Area of Intended Employment deficiency.

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<sup>4</sup> The attestation established that the Employer does not use a recruiter or agent. The legal services agreement is the agreement between the Employer and its attorney. Neither of those documents bears on this appeal.

(AF Index).<sup>5</sup>

On September 16, 2015, the Employer filed a Request for Administrative Review. (AF 1.) The Employer attached its September 9, 2015 supplemental response to its appeal.<sup>6</sup> (AF 22-28.) Regarding the “area of intended employment” deficiency, the Employer noted that the CO quoted from the first job order, which was modified. (AF 3.) The Employer argues: “[T]hese two subsequent job orders said nothing of where any H2B Truck Drivers would deliver produce.” (AF 3.) It asserts: “The Applicant will send any new employed truckers, including truckers that may be employed under the H2B program, ‘as per market demands and work orders of clients,’ which at present are unknown.” (AF 4.) The Employer explains that the trucking business “requires movement” and acknowledges the possibility that “many of the future orders may be outside of Santa Cruz, County in Southern Arizona.” (AF 4) It argues:

Despite the delivery location of its produce, the truckers working for Manuel Huerta Trucking, Inc. report to duty in Rio Rico, Arizona where they pick up the company truck, and report back to Rio Rico, Arizona after their assignment. Their assignment may be in Rio Rico, Arizona itself, or it may be beyond, depending on the purchase orders. However, their place of employment is Rio Rico, Arizona.

(AF 5)

On September 25, 2015, the Appeal File was transmitted to BALCA, in accordance with § 655.61. The Office of the Solicitor submitted a brief on behalf of the CO on October 6, 2015.

In its brief, the Solicitor agrees that the Employer’s untimely supplemental response resolved the job order deficiency, and it does not argue that ground. The Solicitor asserts that the CO’s denial of certification should be affirmed based on the “area of intended employment” deficiency. The Solicitor argues that the Employer did not comply with 20 C.F.R. § 655.15(e)-(f) because it did not show the H-2B workers would be performing their services or labor in the “same area of intended employment.” It further argues:

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<sup>5</sup> Under 20 C.F.R. § 655.31(b), the Notice of Deficiency must “[o]ffer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 10 business days from the date of the Notice of Deficiency.” The Notice of Deficiency issued on July 16, 2015, and advised the Employer that it could “submit a modified application within ten business days from the date you receive this Notice of Deficiency letter.” The Employer’s July 21, 2015 submissions were timely, but its September 9, 2015 submission was not. The Employer argues that “delays in the Department’s Bureaucracy” caused the late submission to be excluded from consideration in the CO’s determination, but Exhibit B to the Employer’s appeal shows that the document was sent after business hours on September 8, 2015—several weeks after the ten-day period for submission of a modification had expired and just hours before the CO’s final determination issued at 7:31 a.m. on September 9, 2015. (AF 22, 26, 27-28).

<sup>6</sup> It is noted that the revised Job Order contains the same paragraph (set forth above) describing the work locations that was submitted in the Employer’s July 21 response. (*Compare* AF 25 with AF 43.) The only other requested change relevant to the “area of intended employment” deficiency is the Employer’s request to change its “Statement of Temporary Need” in the Application to replace, “The produce is distributed throughout the United States,” with, “The produce is distributed as per market demands and work orders of clients.” (AF 22.)

[T]he employer's untimely submission did not allay the CO's concern that H-2B workers would be performing their services or labor beyond the bounds of the "same area of intended employment." In the absence of information reassuring her that the employer's worksites would be within normal commuting distance for the H-2B workers, the CO could not conclude that the interests of U.S. workers were adequately protected. 20 C.F.R. § 655.1(a)(2). Therefore, the CO could not accept the employer's application.

(CO's Brief at 4).

### DISCUSSION

The CO determined that the Employer failed to comply with the regulatory obligations of H-2B employers because the Employer's workers would not work within the same area of intended employment. The regulation at 20 C.F.R. § 656.15(e) provides:

*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.<sup>7</sup>

The regulations 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.

20 C.F.R. § 655.5.

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<sup>7</sup> Subsection (f) likewise provides:

*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.

20 C.F.R. § 656.15(f).

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.” Here, the Employer sought approval for 25 truck drivers on one application.

The Employer’s truckers will not be performing the same services or labor in the same geographic area within the normal commuting distance of the worksite. Although, as the Employer contends, all drivers will begin and end their assignments at the company Headquarters in Rio Rico, Arizona, they will not remain there. As the Employer concedes, the business of trucking requires movement. The trucks will be dispatched to different locations, along different routes, to serve different “market forces” and satisfy different orders. As Employer also concedes, many of those routes and orders will take the truckers beyond southern Arizona. Simply omitting the “throughout the United States” language and replacing it with “market forces” language does not cure the deficiency, because it does not establish that the truckers will be remaining in the same geographic area within the commuting distance of Rio Rico, Arizona, to perform the same services or labor.<sup>8</sup> (Nor could it do so, as the nature of the job itself requires travel to deliver the produce, as the Employer acknowledged in admitting that many orders may be for locations beyond southern Arizona.)

Therefore, the modification did not allay concerns that the drivers would be working outside of the same “area of intended employment.”<sup>9</sup> The requested H-2B drivers could be thousands of miles away from each other, and from Rio Rico, Arizona, at any given time. The Employer’s application and subsequent modification are insufficient to show that all 25 truck drivers would work in the same area of intended employment, as defined by the regulations. Consequently, certification of more than one position could not be requested on a single application. 20 C.F.R. § 655.15(e).

Based upon the foregoing, I find that the CO properly denied temporary labor certification because the Employer’s application does not comply with § 655.15(e).

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<sup>8</sup>Moreover, the H-2B Application requires an employer to “define the area of intended employment with as much geographic specificity as possible” and to indicate “[i]f work will be performed in location(s) other than the address” indicated as the worksite address. H-2B Application for Temporary Employment Certification Form ETA-9142B – General Instructions U.S. Department of Labor.

[http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142B\\_General\\_Instructions.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142B_General_Instructions.pdf)

<sup>9</sup> On its Application, the Employer indicated drivers would transport produce throughout the United States for distribution and “[m]ay be required to unload truck.” (AF 54, 56.) These responses show the Employer requests H-2B truck drivers to perform work beyond the Rio Rico, Arizona, geographic region. The late-requested change from a specific description of deliveries “throughout the United States,” to the more general description of deliveries “as per market demands and work orders of clients,” fails to show that the truckers would remain in the same geographic area and thus fails to cure the deficiency.

**ORDER**

It is hereby **ORDERED** that the Certifying Officer's **DENIAL** of the Employer's *Application for Temporary Employment Certification* is **AFFIRMED**.

For the Board:

**MONICA MARKLEY**  
Administrative Law Judge