



Issue Date: 10 May 2016

BALCA Case No.: 2016-TLN-00033
ETA Case No.: H-400-16013-070979

In the Matter of:

BROOK LEDGE, INC.

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Craig McDougal, Esquire
William Velie, Attorney at Law, PLLC
Norman, Oklahoma
For the Employer

Jeffrey L. Nesvet, Assistant Solicitor
Jessica G. Lyn, Senior Attorney
U.S. Department of Labor
Office of the Solicitor of Labor
Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and
Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER REVERSING
DENIAL OF CERTIFICATION

This case arises from Brook Ledge, Inc.'s ("Employer") request for review of the Certifying Officer's ("CO") decision to deny 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 United States

Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor³ using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

BACKGROUND

Employer ships and cares for horses and has a base of operations in Oley, Pennsylvania. (AF 36).⁴ Employer requested temporary labor certification for two peakload horse tractor trailer drivers (Standard Occupational Classification Heavy and Tractor-Trailer Truck Drivers) for the period from April 1, 2016 to November 30, 2016. (AF 70, 72.) The job description listed on the Form 9142 included being licensed to operate a Class 8 truck, being responsible for setting up and breaking down horse stalls in the trailer, loading and unloading horses, and transporting the horses to seventeen states. (AF 72). On the application Employer answered “Yes” to the Question “Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above?” and listed a total of seventeen worksites ranging from California to Maryland. (AF 73, 77).

The CO issued a Notice of Deficiency on March 2, 2016 and cited five denial grounds, one of which was that Employer had listed multiple worksites on the application. Because the worksites were so geographically distant from one another it appeared to the CO that the worksites were not within the same area of intended employment. (AF 63).

Employer responded to the Notice of Deficiency on March 15, 2016. (AF 36). At this stage, Employer explained that all the work originates out of Oley, Pennsylvania. Workers arrive at that location at the beginning of the day and return there at the end of the day. If they cannot come back Employer provides meals and lodging for overnight stays, but “[s]uch situations are rare . . . as workers will travel to various locations and return to the worksite [in Oley] each evening for most work days.” (AF 36). The trucks are kept at the Oley location and workers must go there to pick up the trucks. According to Employer, “[t]here would be no

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015).

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ Citations to the Appeal File are abbreviated as “AF” followed by the page number.

possibility of filing multiple labor certification applications because there is no worksite at any location other than . . . Oley,” Pennsylvania. Employer further explained that because the drivers pass through several locations, and because it wanted to ensure that the highest prevailing wage was offered, it listed multiple locations and wanted to offer the highest wage among these “pass through” locations. Employer also cited to a previous BALCA case in support of his argument. (AF 36-37).

The CO denied the application on March 24, 2016 finding that Employer itself indicated on the Form 9142 that there were multiple worksites at significant distances from each other, and that the job description required travel across seventeen states.⁵ The CO acknowledged the argument made by Employer that the listed worksites are “conceptually distinct from what it considers the area of intended employment” at Oley, Pennsylvania. The CO also acknowledged that Employer claimed that such long travel is “rare and that workers will regularly return to the original worksite.” The CO rejected these arguments, however, because Employer provided no evidence to demonstrate this, nor did Employer outline the frequency of the travel or distance of travel that regularly occurs. Furthermore, the CO rejected the argument that the worksites were simply listed in order to ensure the highest prevailing wage possible because “employer originally submitted a rate of pay for its discussed worksite in Oley, PA and not the higher wage rate issued for its additional locations.” The CO notes, “[t]he employer appears to be minimizing the distance of travel involved by rephrasing worksites as locations passed through.” Finally, the CO stated that Employer has not established “that the truckers will remain in the same geographic area within normal commuting distance.” (AF 23-24).

The Employer appealed the CO’s decision to BALCA. (AF 1-18). The brief on appeal cited nearly identical arguments as the response to the Notice of Deficiency. Again the Employer argued that there is only one worksite in this case. Any other “worksites” listed were a “good faith effort of the employer to pay the highest prevailing wage.” (AF 2).

The matter was docketed by BALCA, and a Notice of Assignment and Expedited Briefing Schedule was issued on April 8, 2016. The CO submitted a brief on appeal arguing that our previous decision in a Heavy and Tractor-Trailer Truck Driver case was wrongly decided and that we had overstepped our authority. *See GT Trans, Inc.*, 2016-TLN-29 (Apr. 15, 2016). Consequently, the CO argues, we should not follow that case here. The Employer did not submit another brief by the deadline of April 27th. We assume it rests upon the previous arguments it put forth in its previously filed “Brief in Support of Appeal.” (AF 2-3).

DISCUSSION

The CO determined that Employer failed to comply with the regulatory obligations of H-2B employers because Employers’ workers would not work within the same area of intended employment. 20 C.F.R. § 655.15(f) 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

⁵ The CO accepted Employer’s arguments regarding the other denial grounds.

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.

20 C.F.R. § 655.5.

Just as was the case in *GT Trans*, the CO’s denial in this case rests upon a definition of the term “worksite,” which subsequently influences the definition of “area of intended employment.” If the Employer is correct in its assertion that Oley, Pennsylvania is the only worksite, then submitting one application is in compliance with the regulations. However, if the CO is correct in asserting that the delivery locations are worksites, then separate applications are needed. As we held in *GT Trans*, truck driver delivery locations are not worksites. The CO’s brief on appeal is largely devoted to the argument that BALCA must defer to the CO’s definition of worksite. We disagree.

According to the CO, BALCA has a limited scope of review in H-2B matters and should defer to the OFLC’s interpretation of a regulation unless it is arbitrary, capricious, an abuse of discretion or not in accordance with law. (CO Brf. 8). The CO asserts that BALCA rejected the “Agency’s longstanding and reasoned interpretation of its regulation” and the “Agency’s longstanding definition of ‘worksite.’” (CO Brf. 14). In *GT Trans*, BALCA looked to the H-1B definition of “place of employment” because it is interchangeable with “worksite.” The definition reflects that “place of employment means the worksite” 20 C.F.R. § 655.715. The CO rejects our use of this definition without explanation and argues that “[a] reviewing body must defer to the program agency where its actions, interpretative or otherwise, are reasonable and consistent with law, even where its choice is not compelled by law or regulation, and its choice may not be the best one among reasonable alternatives.” (CO Brf. 15) (citing *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Furthermore, “[i]n exercising its narrowly defined role, the BALCA is to consider ‘whether the agency acted within its authority, whether the agency provided a reasoned explanation, whether the decision was based on the facts in the record, and whether the relevant factors were considered.’” *Id.* at 16 (quoting *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230 (D.D.C. 2003)). According to the CO, “[t]he Department has issued a regulation through notice and comment rulemaking, has interpreted the regulations, and has provided a rational

basis for its determination to routinely deny employers H-2B certification for multiple positions where they are to be performed across the United States outside the area of intended employment,” and as such, the OFLC is entitled to deference. *Id.* at 17. Also, the CO contends that where there is an ambiguity, OFLC should address the ambiguity, not BALCA. *Id.*

Generally speaking we do not disagree with the CO’s characterization of its role vis a vis OFLC. We have previously acknowledged that BALCA reviews decisions under an arbitrary and capricious standard. *See J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015). We take no issue with the assertion that BALCA should defer to OFLC’s rational and reasonable interpretation of an ambiguous regulatory term. The CO argues that “BALCA must therefore uphold the CO’s determination where the CO ‘has considered the relevant factors and articulated a rational connection between the facts found and the choice made.’” (CO Brf. 8) (quoting *Motor Vehicles Mfrs. Ass’n*, 463 U.S. 29, 43 (1983)). Unfortunately, the CO has not provided the type of “rational connection between the facts” and its determination as described by the Supreme Court and therefore deference is not warranted.

In its original denial the CO provided no clear definition of “worksite.” The CO points to no authority, regulation or sub-regulatory guidance for how it defines that word. Even within its brief, the CO provides no articulated definition. The CO offers no reasoned explanation for its determination and apparently seeks deference based merely on the fact that the decision was issued by OFLC. There is no legal support for such a contention.

The CO inexplicably states that OFLC’s “long-standing” interpretation is that “an employer’s H-2B application would be certified only if the trucking terminal, its delivery locations and the roads between them were either in one area of intended employment, or if the employer obtained certification for every area of intended employment including those locations.” (CO Brf. 14) (quoting *GT Trans, Inc.*). The CO does not explain when or how this interpretation was promulgated. It only cited a single BALCA case.⁶ Perhaps the CO is contending that a worksite is “any and all places where an employee performs job duties,” even though he did not explicitly state so. *Id.* Again, the CO is not articulating a definition or interpretation of worksite—it is simply citing to BALCA’s guess at what the CO’s definition actually is. We choose not to defer to this circular logic. The CO is essentially arguing that his definition of “worksite” is derived from the case law which affirms his own definition—in other words, “worksite” is defined by the CO as he has used it in the past. While it is certainly possible to make reasonable assumptions about what the CO believes “worksite” means based on the language in the denial letters, that approach does not provide the key missing element—a reasoned explanation for the interpretation. Such an explanation is particularly important where there is an obvious alternative interpretation found in the H-1B regulations, another DOL administered temporary worker program, and where the definition the CO appears to be utilizing is contrary to how the word is used elsewhere in the H-2B regulations themselves.⁷ Even if the

⁶ We note that the CO took this quotation from *GT Trans* out of context. The panel in *GT Trans* was describing this apparent “interpretation” as an example of how unreasonable the CO’s decisions actually were.

⁷As we stated in *GT Trans*, at 6:

Furthermore, even within the H-2B regulations, the word “worksite” is used in such a manner that would contradict the CO’s broad definition of *any* place where work is conducted. For example,

CO had provided a reasoned definition in his brief, “[a] reviewing authority owes little deference to agency interpretations announced for the first time in a litigation brief.” *Albert Einstein Medical Center*, 2009-PER-379 (Nov. 21, 2011) (*en banc*) (citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988)).

The CO argues that we should not use the H-1B definition to influence the definition of worksite in the H-2B program but gives no explanation as to why. “[G]enerally, [t]he normal rule of statutory construction assumes that ‘identical words used in different parts of the same act are intended to have the same meaning.’ . . . This rule applies equally to regulations.” *U.S. v. Lachman*, 287 F.3d 42, 55-56 (1st Cir. 2004) (internal citations omitted). The CO has not explained why the Board should not use an analogous temporary labor certification program definition of “worksite” or “place of employment” where the H-2B program’s regulations contain no definition of the term. Ignoring the H-1B definition, without explanation, was arbitrary.

The CO’s argument that BALCA failed to quote a part of the H-1B definition of “place of employment” is irrelevant. The CO submits that *GT Trans* stripped the CO of any power to apply the term “worksite,” and that we have taken away the ability of the CO to question whether a situation could be contrived or abusive. We did not state, nor do we now, that the CO may not “look carefully at situations which appear to be contrived or abusive . . .” or that the CO may not “seriously question any situation” where the purported place of employment is a location other than where most of the employment is performed. *See* 20 C.F.R. § 655.715. The CO has the authority to question the underlying facts of any individual case.

The CO also claims we are making an accommodation for a specific industry and violating case law by doing so. We do not agree. We are not creating a new substantive policy or procedure. Rather, we are simply reading existing regulations and guidance in such a way as to *not* create a special accommodation or penalty for any specific industry, without prior notice.

Should the OFLC explain its “longstanding” definition, or issue guidance, BALCA will review such a policy under the abuse of discretion standard, and will “defer to the program agency where its actions, interpretative or otherwise, are reasonable and consistent with law, even where its choice is not compelled by law or regulation, and its choice may not be the best one among reasonable alternatives.” (CO Brf. 15) (citing *Chevron USA, Inc.*, 467 U.S. at 842-43). As it currently stands, BALCA cannot defer to a nonexistent explanation. We find it would be arbitrary and capricious to enforce an unarticulated definition of worksite on an employer

pursuant to 20 C.F.R. § 655.45, “the employer must post the availability of the job opportunity in at least 2 conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers.” The preamble explains this provision and states that “the posting of the notice *at the employer’s worksite*, . . . is intended to provide . . . notice to the employer’s U.S. workers of the job. 80 Fed. Reg. 24,042, 24,077 (emphasis added). To hold that each delivery location where a truck driver may offload goods is a “worksite” would require the odd result of having to post a notice at each delivery and pickup location, even if that location is on a customer’s premises. Because the truck driver at that one delivery or pickup location is the only employee there, no notice would actually be provided to a U.S. worker employed by Employer.

such that an entire industry is precluded from participating in the H-2B program when no notice or explanation was given. As we decided in *GT Trans*, a trucker's delivery locations are not necessarily worksites.

In this particular case, the CO cited 20 C.F.R. §§ 655.5 and 655.15(f) for the proposition that Employer needed to file multiple applications because there were multiple worksites across multiple areas of employment. Employer listed a total of seventeen worksites on its application but later explained that there was only one actual worksite—Oley, Pennsylvania. A Heavy and Tractor Trailer Truck Driver's worksite is the location where the job opportunity is, and where the drivers report to work. The truckers only commute to Oley to pick up their trucks. We accept the Employer's assertion that there is only one worksite. There is therefore only one area of intended employment which consists of the normal commuting distance around Oley. *See* 20 C.F.R. § 655.5; *see also Preferred Landscape & Lighting, LLC*, 2013-TLN-1 (Oct. 26, 2012) (noting that "the definition of 'area of intended employment' . . . focuses almost exclusively on commuting distance"). Because there is no guidance as to how a trucking company is supposed to fill out the Form 9142 or how it is supposed to indicate travel, it would be fundamentally unfair to penalize the Employer for trying to disclose as much as possible on the application. It is incumbent upon OFLC to provide clarity to the trucking community. In this particular case, by submitting only one application for one worksite in one area of intended employment, Employer complied with the regulations. We therefore reverse the CO's denial of certification.

ORDER

It is hereby **ORDERED** that the Certifying Officer's denial of Employer's *Application for Temporary Employment Certification* is **REVERSED** and that this matter is **REMANDED** for certification.

Entered at the Direction of the Panel:

TODD R. SMYTH
Secretary to the Board of Alien Labor
Certification Appeals