

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 24 May 2016**

**BALCA Case No.: 2016-TLN-00035**  
ETA Case No.: H-400-15288-473124

*In the Matter of:*

**TRACKIM, INC.,**  
*Employer,*

Certifying Officer: Chicago National Processing Center

Appearances: Samantha Lloyd, Esquire  
RC Immigration, LLC  
Chicago, Illinois  
*For the Employer*

Jeffrey L. Nesvet, Assistant Solicitor  
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U.S. Department of Labor  
Office of the Solicitor of Labor  
Employment and Training Legal Services  
Washington, District of Columbia  
*For the Certifying Officer*

Before: Stephen R. Henley  
Chief Administrative Law Judge

**DECISION AND ORDER**  
**REVERSING DENIAL OF CERTIFICATION**

This case arises from Trackim, 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers seeking to utilize this program must apply for and receive labor certification from the U.S. Department of Labor<sup>3</sup> using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). 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 the 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 is a small freight shipping company specializing in steel hauling operating out of Portage, Indiana. (AF 115; 183).<sup>4</sup> On January 15, 2016, Employer filed a Form 9142 seeking ten full-time peakload truck drivers (the standard occupational classification title for which is “Heavy and Tractor-Trailer Truck Drivers”) for the period of April 1, 2016 to July 1, 2016. (AF 182-190). In Section F.c of the Form 9142, entitled “Place of Employment Information,” Employer identified “Worksite address 1” as “1201 Mainview Street” and “Address 2” as “And other US locations, as needed.” (AF 185). Employer then checked “No” in response 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?” *Id.*

On April 8, 2016, the CO issued a Non-Acceptance Denial because “it appears that the employer may have additional worksites which are outside of a single area of intended employment,” which violates 20 C.F.R. § 655.5 and § 655.15(e). (AF 95-101). On April 14, 2016, Employer requested administrative review pursuant to 20 C.F.R. § 655.61, submitting that the CO’s ground for denial “essentially means that the H-2B is not available to truck drivers, which is not what Congress intended.” (AF 27-94). In its request, the Employer argued that while truck drivers must drive to various locations to pick up and deliver cargo, these are standard duties for a truck driver, and those other pickup and delivery locations are not “worksites.” (AF 2-5).

A Notice of Docketing and Expedited Briefing Schedule was issued on April 20, 2016. Both the CO and the Employer timely submitted appellate briefs.

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<sup>1</sup> *See* 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).

<sup>2</sup> 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.

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

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

On appeal, the CO argues that a previous decision addressing a similar issue involving Heavy and Tractor-Trailer Truck Drivers was wrongly decided and the panel in that case overstepped its authority.<sup>5</sup> See *GT Trans, Inc.*, 2016-TLN-29 (Apr. 15, 2016). Consequently, the CO argues the Board should not follow the rationale set forth in that case while the Employer argues we should.

## DISCUSSION

Here, the CO denied certification because Employer could not file a single application for multiple positions as, in the CO's view, Employer's truck drivers would not be working within the "same area of intended employment," which would violate 20 C.F.R. § 655.15(e).

The issue in this case presents substantially the same issue as that presented in *GT Trans, Inc.*, *supra* and *Brook Ledge, Inc.*, 2016-TLN-33 (May 10, 2016), in which BALCA interpreted the term "worksite" as used in the definition of "area of intended employment" found in 20 C.F.R. § 655.5.<sup>6</sup> As determined in both cases, client pickup and delivery locations for Heavy and Tractor-Trailer Truck Drivers are not "worksites" within the meaning of § 655.5's definition of "area of intended employment."

Here, as in *Brook Ledge*, the CO argues that BALCA's interpretation of the term "worksite" in *GT Trans, Inc.* exceeded the Board's authority because the panel must defer to the CO's definition of "worksite." In *Brook Ledge*, the panel addressed the issue of deference and ruled that deference was not warranted because the CO failed to provide the type of reasoned explanation required. *Id.* at 5. The panel found that the CO had not provided its own clear definition of "worksite," nor "authority, regulation, or sub-regulatory guidance for how it defines that word." *Id.* The panel declined to defer to the CO where the only basis for doing so was the fact that the agency issued a decision on the labor certification application. *Id.*

On appeal in this case, the CO again avers the Board is compelled to defer to the CO's interpretation of "worksite" as it relates to Heavy and Tractor-Trailer Truck Drivers. That argument was considered and found unpersuasive in *Brook Ledge* and the Board does so here.<sup>7</sup>

On the record and arguments presented, the Board finds that the Employer in this matter was eligible to file a single H-2B application for multiple positions based on its terminal as the sole worksite.

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<sup>5</sup> The CO submitted its brief containing a statement of facts for Trackim and an abbreviated argument and attached its brief submitted in *Brook Ledge, Inc.*, 2016-TLN-33.

<sup>6</sup> Section 655.5 provides, in part: "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."

<sup>7</sup> To reiterate, the Board is not required to afford *Chevron*-style deference to an interpretation of a regulation made only in a Non-Acceptance Denial letter where that interpretation is arbitrary and unexplained. See *HealthAmerica*, 2006-PER-1, slip op. at 12-14 (July 18, 2006) (en banc) (whether an FAQ is entitled to deference as persuasive authority depends on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade).

**ORDER**

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

For the Board:

Stephen R. Henley  
Chief Administrative Law Judge