

**U.S. Department of Labor**

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**Issue Date: 07 April 2016**

BACLA CASE NO.: 2016-TLN-00028

*In the Matter of:*

**JCS CAROLINA CHIPPING SERVICES,  
LLC,**  
*Employer.*

Certifying Officer: Charlene G. Giles  
Chicago National Processing Center

Before: Christopher Larsen  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF TEMPORARY LABOR CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) on the Employer’s request for review of the Certifying Officer’s denial in this H-2B temporary labor certification matter. Under the H-2B program, employers may hire foreign workers to perform temporary nonagricultural work within the United States, either *ad hoc*, seasonally, or intermittently (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*” (emphasis added). 8 C.F.R. §214.2(h)(1)(ii)(D); *see also* 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(ii)(B); 20 C.F.R. §655.1(a). Employers wishing 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 Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 C.F.R. §655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. §655.53.

## STATEMENT OF THE CASE

In this case, the Employer, JCS Carolina Chipping Service, LLC, filed an H-2B Application for Temporary Employment Certification (ETA Form 9142B) on or about January 2, 2016, for 12 construction laborers to be employed full-time from April 1, 2016, to December 1, 2016 (AF<sup>1</sup> p. 118). The job, which involves removing hardened concrete from Ready-Mix trucks using jackhammers, is classified under ONET Code 47-2061 (AF p. 118). It was to be performed in twelve identified locations within the states of Virginia, North Carolina, South Carolina, and Georgia (AF pp. 121, 124).

On February 2, 2016, the CO issued a “Notice of Deficiency” (AF pp. 112-117). As relevant here, the CO advised Employer, AF p. 116:

In accordance with Departmental regulations at 20 C.F.R. 655.15(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.

In accordance with Departmental regulations at 20 CFR 655.5, an area of intended employment is defined as “the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which certification is sought.”

The employer indicated that work will be performed at multiple worksites in Section F.c. of the ETA Form 9142 which are significantly distant from one another.<sup>2</sup>

Specifically, the employer indicated that work will be performed in the various counties among the states of Virginia, North Carolina, South Carolina, and Georgia. . . .

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. None of the above named work sites are within two hours of one another. The employer may not submit one application for multiple worksites which are not within the same area of intended employment.

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<sup>1</sup> “AF” refers to the Appeal File.

<sup>2</sup> In the paragraph following, it becomes clear that the CO did not actually believe the Employer intended to jackhammer concrete at multiple worksites on the ETA Form 9142.

The CO invited the Employer to “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 CFR 655.5” (emphasis in original) (AF p. 117).

On February 9, 2016, the Employer submitted its response to the Notice of Deficiency (AF pp. 108-111). Employer reported its “day-to-day operations” occurred near its headquarters in the metropolitan Richmond, VA, area, servicing over 1,000 cement trucks there. But, additionally, Employer serviced “a smaller number of trucks” in the other locations reported to the CO “on a circuit (or route) basis as needed” and “as we are able to fill our schedule for the trip in these areas. These other areas are not our main area of business, but are serviced as we are able to make a trip worthwhile” (AF p. 109). Typically, Employer runs three crews to service the trucks in the Richmond area. Approximately once in every three months, each crew in turn travels a “circuit” of the more remote locations, remaining on the road about three or four weeks at a time (AF p. 110). Employer emphasizes that its traveling workers are not “commuting,” in the usual sense of the term; Employer provides accommodations for them while they are on the road. Employer asserts “[t]his is the normal way of operating in the concrete chipping business” (AF, pp. 110-111).

On March 4, 2016, the CO sent Employer a Non Acceptance Denial letter (AF pp. 99-104) denying Employer’s Application for Temporary Employment Certification. According to the CO (AF p. 104)

The employer did not provide evidence that additional worksite locations were within normal commuting distance and were in the same area of intended employment, as defined by 20 CFR 655.5.  
... Therefore, the employer did not overcome the deficiency.

This appeal followed (AF pp. 1-97).

## DISCUSSION

On appeal to BALCA, I may consider only those documents upon which the CO bases his or her determination (that is, the AF), the request for BALCA review (which may not include new evidence), and the arguments submitted by the parties. 20 C.F.R. §655.61(e). The Solicitor filed a brief on behalf of the CO on April 5, 2016. In a telephone conference with all counsel on March 31, 2016, I extended to Employer an opportunity to file additional argument on or before April 4, 2016, but Employer has not done so. Accordingly, I consider the arguments Employer set forth with its request for administrative review (*see* AF pp. 1-4; *see also* AF pp. 108-111).

The question on which the CO and the Employer part company in this case is whether the Application covers more than one “area of intended employment for

each job opportunity.” The CO relies on the language of 20 C.F.R. §655.15, subsection (f), which establishes a general rule that

. . . 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 regulation then defines exceptions to this general rule, which apply only to employers in the seafood industry, and are not relevant in this case. 20 C.F.R. §655.15, subsections (f)(1) and (f)(2). The phrase “area of intended employment,” under 20 C.F.R. §655.5,

. . . 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.

Under 20 C.F.R. §655.5, then, multiple work locations within the same Metropolitan Statistical Area as the worksite address are, by definition, within a single “area of intended employment.” When work locations are *not* within the same MSA, they nevertheless lie within a single “area of intended employment” so long as they are “within normal commuting distance” of the worksite address. If they are not within the same MSA, and are not within “normal commuting distance” of the worksite address, they are not within a single “area of intended employment.” The regulation also instructs that “normal commuting distance” varies, depending upon factors such as average commuting times, barriers to reaching the worksite, or quality of a regional transportation network.

In this case, nobody contends that the twelve identified locations in Virginia, North Carolina, South Carolina, and Georgia lie within the same MSA as the worksite address, and Employer implicitly admits they do not (AF, p. 109). What is more, the court is strongly inclined to doubt that any substantial number of people normally commute between Manakin Sabot, VA, and Charlotte, NC, or Columbia,

SC, or Atlanta, GA. And, more importantly, there is no evidence in the record to suggest they do. The CO's position, accordingly, is consistent with the regulations, and reasonable.

Employer compares its circumstances to those of the Employer in the matter of *Preferred Landscape & Lighting, LLC*, 2013-TLN-00001 (ALJ October 26, 2012), in which Associate Chief Administrative Law Judge William S. Colwell allowed the employer to file a single Application for Temporary Employment Certification covering worksites in Bexar, Dallas, Travis, and Harris counties in Texas (AF pp. 79-84). The workers in that case installed holiday décor (AF, p. 80), working 75% of their time at the Employer's office in Bexar County and 25% of their time at more remote locations (AF, p. 81). But Judge Colwell specifically limited his holding in that case to the facts before him, observing the decision "should thus hold little future precedential value" (AF, p. 83, fn. 4), and in two important respects, the facts of the case before this court are different. First, as the CO points out, the worksites in this case are considerably more widespread than were the worksites in *Preferred Landscape* (Certifying Officer's Brief, pp. 5-6), and it appears that the workers in this case would spend considerably more time traveling than the *Preferred Landscape* workers did (Certifying Officer's Brief, p. 6). Second, and most importantly, in *Preferred Landscape*, the Employer had submitted evidence that non H-2B employers in the same occupation and area of intended employment likewise occasionally sent employees to similar remote locations. To be sure, in his letter of February 9, 2016, Mr. McMann, President of Employer in this case, alleges that sending teams of employees on the road "is the normal way of operating in the concrete chipping business" (AF, p. 111), but there are no specific facts in the record before me to support the conclusion that the jobs Employer describes in its application are consistent with the normal and accepted qualifications and requirements imposed by non H-2B employers in the same occupation and area of intended employment.<sup>3</sup>

Employer points out that its identical Application was certified last year (AF, p. 1), but the CO in response cites authority that a certifying officer's decision to grant certification is not binding on later applications. While the court acknowledges, as indeed the CO should, that inconsistency may wreak havoc on an operating business, the cited authority controls. *Quod licet Iovi, non licet bovi*.

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<sup>3</sup> Even the CO suggests that the result in this case might be different if Employer had shown that its competitors regularly send employees to work in equally-remote locations (Certifying Officer's Brief, pp. 4-5). Alas, on the record before me, this is an argument for another day.

**ORDER**

For the reasons set forth above, the court affirms the Certifying Officer's decision denying certification.

SO ORDERED.

For the Board:

CHRISTOPHER LARSEN  
Administrative Law Judge