



Issue Date: 28 November 2017

BALCA CASE NO.: 2018-TLN-00007

ETA CASE NO.: H-400-17248-594078

In the Matter of:

SANDS DRYWALL, INC.,
Employer.

DECISION AND ORDER

This matter is before the Board of Alien Labor Certification Appeals on Employer Sands Drywall, Inc.'s application for a certification under the H-2B nonimmigrant alien worker program.¹ The Department of Labor's Employment and Training Administration's Certifying Officer denied Employer's application on October 30, 2017. Employer timely requested BALCA review.

This Decision and Order is based on a written record, which consists of the Appeals File and Employer's request for review. 20 C.F.R. § 655.61(e). The Administrator elected not to file a brief. I will affirm the Certifying Officer's denial of the labor certification.

Findings of Fact

Employer installs drywall and ceiling tile. AF at 68.² It applied for the H-2B Temporary Employment Certification on September 5, 2017. It requested certification to hire nine installers to work from November 19, 2017 through June 18, 2018. *Id.*

On September 14, 2017, the Certifying Officer found Employer's application deficient in that it failed to state that the nine installers would all be working "in the same area of intended employment." (Notice of Deficiency, AF at 66.) A statement verifying this is a requirement when, as here, an employer seeks to certify multiple positions on a single application.³ Employer

¹ See Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and certain of its implementing regulations at 20 C.F.R. Part 655, Subpart A.

² "AF" refers to the Appeals File.

³ The regulation provides: "(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." 20 C.F.R. § 655.15(e).

stated in the application only that the employees would work in the “East South Dakota Nonmetropolitan area.” AF at 66. The Certifying Officer found this too vague to comply with the regulation.

The regulations define an “area of intended employment” as:

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 which 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, quality of the regional transportation network, etc.). 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.

Employer responded with a list of fourteen South Dakota counties in which the employees would work. They are: Brown, Faulk, Marshall, Roberts, Beadle, Clark, Day, Grant, Jerauld, McPherson, Clay, Spink, Codington, and Edmunds.

On October 4, 2017, the Certifying Officer found Employer’s supplement deficient. AF at 66. Employer had identified the primary worksite as 47030 Phillip Street, Sioux Falls, South Dakota, which is in Lincoln County. The Certifying Officer found that many of the 14 counties that Employer listed as worksites would require the workers to commute more than two hours from the primary worksite in Sioux Falls; that this appeared to be outside normal commuting distance; and that it implied that the installers would be working at multiple worksites, not all “in the same area of intended employment.” The Certifying Officer required that:

The employer must provide supporting documentation and evidence that the additional worksite locations, indicated above, are within normal commuting distance and are in the same area of intended employment, as defined by 20 CFR sec. 655.5.

OR

In order to be in compliant with 20 CFR sec. 655.5, the employer must:

1. Amend [the application] by removing all worksites not located within a single area of intended employment from the primary worksite location identified in [the application]; and

2. Submit an amended job order that has all worksites not located within a single area of intended employment from the primary worksite location identified in [the application] removed.

AF at 66-67.

On October 5, 2017, Employer again supplemented its application. It did not amend the application to remove any worksites. Instead, Employer elected the Certifying Officer's first option – to provide supporting documentation that the worksite locations are within normal commuting distance and in the same area of intended employment.

Employer submitted the following: census data for the population of South Dakota; driving directions from Bon Homme County to Brown County showing a minimum driving time of three hours and 44 minutes; a list of the South Dakota nonmetropolitan areas and Metropolitan Statistical Areas and their included counties; a map of South Dakota to which had been added a hand-drawn “boundary” noted as the “EAST SD MSA”; a list of South Dakota Cities by population; and a map of major highways in South Dakota.

Employer stated that, with a population of 864,454, South Dakota is one of the nation's least populated states. Employer argued: (1) that the sparse population led to metropolitan statistical areas that are very large (geographically), and (2) that it was normal to commute over 200 miles to work in South Dakota because people live in small towns connected by two major highways with speed limits up to 80 miles per hour and no traffic issues. AF at 50. But, beyond this conclusory statement, Employer offered no *evidence* of how many people commute these distances.

The Certifying Officer issued a Denial of the application on October 30, 2017. She concluded that Employer had failed to establish that its worksite locations are within normal commuting distance or otherwise in the same area of intended employment as required in 20 C.F.R. § 655.5. AF at 38. She again stated that some of the commute times were over three hours and that this is not a normal commuting distance. AF at 11.

Discussion

The regulations are silent about the deference the Board of Alien Labor Certification Appeals should accord the Certifying Officer's determination. Where the Certifying Officer's determination turns on the Employment and Training Administration's long-established policy-based interpretation of a regulation, it would appear that considerable deference is owed ETA. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). A Certifying Officer's policy-based determination likely should not be overturned unless it is arbitrary, capricious, or inconsistent with the established policy interpretation. But, absent an established policy-based interpretation of the regulations, it would appear that BALCA should review the Certifying Officer's denial *de novo*.⁴

⁴⁴ When an employer requests a review by the Board of Alien Labor Certification Appeals (“the Board”) under 20 C.F.R. § 655.61(a), the Board may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which

On the present record, however, I need not decide the deference owed the Certifying Officer: I would affirm her decision even were I to accord it no deference (*i.e.*, apply *de novo* review).

Regardless of the “boundaries” Employer sketched on a map to outline “East South Dakota,” that area is not a Metropolitan Statistical Area. Employer’s list of South Dakota nonmetropolitan areas and Metropolitan Statistical Areas shows East South Dakota as a *nonmetropolitan* area, not as a Metropolitan Statistical Area. AF at 58. Similarly, in its initial application, Employer referred to the East South Dakota area as a “nonmetropolitan” area. The difference is significant because the regulation deems locations within a single MSA to be within normal commuting distance; this does not apply to a “nonmetropolitan area.” As East South Dakota is not a Metropolitan Statistical Area, application of the regulation does not lead to its being deemed an area of normal commuting distance.

I reject as unsupported and irrelevant Employer’s contention that a two-hour (each way) commute in South Dakota is normal. First, Employer’s only evidence to support this is its conclusory statement; I give that statement no weight. Employer could have offered academic research, an expert opinion, or more simply even newspaper articles reporting on normal commuting time or distances in local South Dakota areas. At the least, Employer could have offered anecdotal declarations from its employees about how far they commute each day (though this would have been less persuasive). Employer did none of this, offered nothing else, and thus failed to submit evidentiary support for this contention.

Second, Employer’s submission shows that some of the requested workers would have to commute far longer than two hours. For example, McPherson County is one of the 14 counties that Employer identified as a place where some of these employees would work. McPherson County is located in north central South Dakota, immediately south of the North Dakota line. Employer’s central worksite in Sioux Falls is in the southeast corner of the state, a half-hour’s drive from locations in Minnesota and Iowa. Sioux Falls is about 250 miles and more than a 3 1/2-hour one-way drive to the county seat of McPherson County. Employer’s argument that a two-hour commute is normal therefore is irrelevant because some of the nine workers would have a much longer commute. I also reject any argument that the more than three-hour commute from McPherson County to Sioux Falls, SD is a normal commuting distance.

Others of the 14 counties Employer identified as having worksites probably are within a normal commute of Employer’s location in Sioux Falls. But that does not refute the Certifying Officer’s point; on the contrary, it makes her point. It shows that a worker in McPherson County (3 1/2 hours northwest of Sioux Falls) would not be working in the same area of intended employment as, for example, a worker in Clay County, which is about an hour south of Sioux Falls. (Clay County was another of the 14 counties Employer listed.)

Finally, I find unavailing Employer’s arguments that it rarely has jobs at the farthest distances and that some employees avoid long commutes by not coming to the Sioux Falls location.

was actually submitted to the Certifying Officer prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5).

Employer identified the 14 counties where these workers would be assigned to work; it cannot evade its disclosure by arguing that not all of the workers would travel that far. Employer was offered an opportunity to amend its application to narrow the geographical area where the workers would work; Employer chose not to do that. The point is that *some* of the workers would have to travel to the farthest distances encompassed within the 14 counties Employer identified: that is why Employer identified those counties in its supplemental filing. To comply with the regulations, *all nine* of the requested workers would have to perform the work “in the same area of intended employment.” 20 C.F.R. § 655.15(e). If *any* of the nine employees would be assigned to work in other areas, the application must be denied.

Accordingly, I conclude that the Certifying Officer’s conclusions are correct in law and fact.

Order

The Certifying Officer’s denial of Employer’s application is AFFIRMED.

STEVEN B. BERLIN
Administrative Law Judge