



Issue Date: 06 May 2019

BALCA Case No.: **2019-TLN-00042**
ETA Case No.: **H-400-19004-482015**

In the Matter of:
EAGLE CONSTRUCTION CO. LLC,
Employer.

Before: **Larry S. Merck**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” *Id.* § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor, Employment, and Training Administration. 8 C.F.R. § 214.2(h)(6)(iii). For the reasons set forth below, the Certifying Officer’s (“CO”) denial of temporary labor certification is affirmed.

BACKGROUND

On January 3, 2019, Eagle Construction Company, LLC (“Employer” or “Appellant”) submitted a temporary labor certification application (“Application”) for fifteen (15) “Helpers—Carpenters,” Standard Occupational Classification Code 47-3012, to perform “various tasks on outdoor concrete construction job sites” from April 1, 2019 through December 10, 2019. (AF 99).² Employer annexed several documents to its application, which includes a Job Order, a Self-Recruiting Attestation, and a letter in support of the Employer’s request supported by an additional five exhibits. (AF 108–115). The five additional exhibits included information about Employer, a document entitled “Cold Weather Concreting” that outlines the difficulties

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security 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”). The 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. In the present case, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

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

associated with concrete installation during the winter, wages paid to and hours worked by the Employer's employees in 2016 and 2017, and invoices for 2018. (AF 116–154).

On January 10, 2019, the CO issued a Notice of Deficiency (“NOD”), identifying three deficiencies with Employer's Application. (AF 92–98). First, the CO found that Employer failed to establish that the job opportunity was temporary pursuant to 20 C.F.R. § 655.6(a)–(b) (“Deficiency 1”), stating that:

The [E]mployer's statement of need and 2018 invoices do not support the employer's requested dates of need. The submitted invoice summaries cover a period from June through October; thus, representing only a partial year of the employer's operations. Therefore, the documents do not support a peakload need during the employer's requested dates of need, April 1 through December 10.

Additionally, the employer submitted a Manual of Concrete Practice article; however, the application's job duties do not involve concrete work. The employer did not provide an explanation of how its Manual of Concrete Practice article supports its expected peakload need for Helpers—Carpenters.

(AF 96). Second, the CO found that Employer's application failed to establish a temporary need for the fifteen workers requested pursuant to 20 C.F.R. § 655.11(c)(3)–(4) (“Deficiency 2”), stating that the Employer did not state “how it determined that it needs 15 Helpers—Carpenters during the requested period of need.” (AF 97). And third, the CO found that Employer's application failed to establish that Employer's worksites were located within “a single area of intended employment” pursuant to 20 C.F.R. §§ 655.15(e), 655.5 (“Deficiency 3”). (AF 98). Specifically, the CO found that:

[I]n Section F.c., the employer listed 1150 County Line Road, Des Moines (Warren County) IA as its primary worksite location and marked “Yes” in Section F.c., Item 7., that work will be performed at multiple worksites within the area of intended employment. The employer indicated that work will be performed in the following BLS Areas: Des Moines-West Des Moines, IA MSA; Ames, IA MSA; Southeast Iowa Nonmetropolitan Area; and Southwest Iowa Nonmetropolitan Area.

The employer has indicated multiple worksite areas within the state that do not appear to be in a single area of intended employment.

Id.

The CO directed Employer to provide additional evidence and documentation to cure the three cited deficiencies. (AF 96–98). The CO requested that Employer provide the following regarding Deficiency 1:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;

2. A detailed explanation as to the duties performed by the employer's permanent workers in this same occupation during the stated non-peak period;
3. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Helpers--Carpenters*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF 96–97) (emphases in original).

The CO further directed Employer to provide the following regarding Deficiency 2:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting 15 Helpers--Carpenters for Des Moines, IA during the dates of need requested;
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF 97). Finally, the CO directed Employer to provide “evidence that all worksite locations are within normal commuting distance[s] and are in the same area of intended employment.” (AF 98) (emphasis in original).

Employer timely responded to the NOD on January 18, 2019, providing explanatory and supplemental statement of need letters, maps and driving directions, monthly payroll reports for

the years 2017 and 2018, employee hours and wage charts, and invoices from contracts performed by Employer. (AF 35–90).

On January 28, 2019, the CO issued a Final Determination, finding that Employer’s response did not cure the deficiencies listed in the NOD, and denied Employer’s temporary labor certification application for the same reasons set forth above. (AF 26–34).

On February 8, 2019, Employer filed a Notice of Appeal (“Appeal”) pursuant to 20 C.F.R. § 655.61, requesting administrative review with the Board of Alien Labor Certification Appeals (“BALCA”). (AF 1–25). On March 7, 2019, the undersigned issued a *Notice of Assignment and Expedited Briefing Schedule*, allowing the parties to file briefs within seven business days of receiving the appeal file. Neither party filed a brief on appeal, however.

DISCUSSION

The CO denied Employer’s temporary labor certification application on the grounds that Employer failed to establish that the job opportunity or need for 15 workers was temporary or that the employer’s worksites were located within “a single area of intended employment.”³ (AF 92, 96–98).

The standard of review in H-2B is limited. When an employer requests review under Section 655.61(a), BALCA 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 was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed *de novo*, and BALCA must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). While neither the Act nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review, BALCA “has fairly consistently applied an arbitrary and capricious standard” in reviewing the CO’s determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). The decision must be affirmed if the CO considered the relevant factors and did not make a clear error of judgment. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing the requirements to satisfy the “arbitrary and capricious” standard of review).

An employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy & Ed. Inc.*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Indus. Prof’l Servs.*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant an Employer’s application to admit H-2B workers for temporary non-agricultural employment if the employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

³ The CO cites the following regulations in support of denying the Employer’s temporary labor certification application: 20 C.F.R. § 655.6(a)–(b) for Deficiency 1; 20 C.F.R. § 655.11(c)(3)–(4) for Deficiency 2, and 20 C.F.R. §§ 655.15(e), 655.5 for Deficiency 3.

An employer also bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *see also Alter and Son Gen. Eng'g*, 2013-TLN-3, slip op. at 4 (ALJ Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show that its need for workers is temporary and that the request is a one time occurrence, seasonal, peakload, or intermittent need. As relevant here, an employer establishes a “peakload need” if it shows it “regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff . . . on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).⁴

The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

Furthermore, the regulations also state 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.” 20 C.F.R. § 655.15. The regulation next defines exceptions to this general rule, which apply only to employers in the seafood industry, and are not relevant in this case. *See* 20 C.F.R. §655.15(f)(1)–(2). The phrase “area of intended employment” is defined as:

⁴ *See also Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peak load, temporary need); *Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (affirming denial where the employer’s documentation revealed that the employer’s alleged “peak load” need spanned at least a 19-month period); *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer’s payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need); *Paul Johnson Drywall*, 2013-TLN-00061 (Sep. 30, 2013); *Kiewit Offshore Services*, 2012-TLN-00031, -32, -33 (May 14, 2012); *Tarrasco Steel Company*, 2012-TLN-00025 (Apr. 2, 2012); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *DialogueDirect, Inc.*, 2011-TLN-00038, -39 (Sep. 26, 2011); *Top Flight Entertainment, Ltd.*, 2011-TLN-00037 (Sep. 22, 2011); *Workplace Solutions LLC*, 2009-TLN-00049 (Apr. 22, 2009) (finding that the employer’s payroll documentation supported a claim for peak load need because, notwithstanding a calculation error, it was evident that the employer had a permanent staff that is supplemented by temporary workers); *Hutco, Inc.*, 2009-TLN-0070 (Jul. 2, 2009); *Jim Connelly Masonry, Inc.*, 2009-TLN-00052 (Apr. 23, 2009) (finding that the Employer’s submission of agreement letters, which were not legally binding, did not provide adequate evidence of the Employer’s need to supplement its permanent workforce with temporary workers during the stated time period); *Deober Brothers Landscaping, Inc.*, 2009-TLN-00018 (Apr. 3, 2009) (suggesting peak load need can recur if it lasts no longer than 10 months each year); *Magnum Builders*, 2016-TLN-00020 (March 29, 2016); *Erickson Framing Az*, 2016-TLN-00016 (Jan. 15, 2016) (remands to permit the CO to determine if a partial certification should be granted for a reduced period of peak load need); *accord, Rowley Plastering*, 2016-TLN-00017 (Jan. 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (Jun. 4, 2015) (remanding to permit certification for a shorter period of need); *BMC West*, 2016-TLN-00043 (May 16, 2016) (evidence of industry peak season need did not match employer’s need); *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016) (“An employer cannot just toss hundreds of puzzle pieces—or hundreds of pages of document—on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers.”); *Chippewa Retreat Spa*, 2016-TLN-00063 (Sep. 12, 2016); *Los Altos Mexican Restaurant*, 2016-TLN-00073 (Oct. 28, 2016) (payroll records do support alleged period of need).

[T]he 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.

After reviewing the record in this matter, I find that Employer submitted insufficient evidence to establish that its worksites are within one area of intended employment.

Temporary, Peakload Need (Deficiency 1)

Employer avers that it does indeed employ “carpenter helpers year-round to perform limited concrete work However, there is not enough of this type of work to warrant a year-round, full time staff of the size needed during the regular construction season from April through December.” (AF 44). Employer supports this assertion by providing graphs outlining wages paid to its employees and payroll reports, which Employer claims shows “an increase in total wages during . . . the months of April through December . . . [and] a dramatic increase in hours worked and salaries paid in April of each year and continuing throughout the season of need.” *Id.* The CO found that the evidence Employer submitted did not overcome the deficiencies set forth in the NOD. Specifically, the CO found the following:

[Employer’s] payroll for 2017 shows more hours were worked in January and March than during the months of April, June and July, which are included in the employer’s indicated peakload period. Additionally, the number of hours worked in June and July 2017 were fewer than full-time hours (35 hours per week). The payroll for 2018 shows the fewest hours were worked in June, July and August, which are included in the employer’s indicated peakload period. Finally, the payroll shows the number of hours worked in June and August 2018 were fewer than full-time hours (35 hours per week)

The employer explained the supporting graphs reflect higher numbers for the warmer months. However, the supporting graphs submitted demonstrate the same information reflected in the 2017-2018 payroll reports and do not support the indicated peakload need.

Furthermore, the additional invoices submitted for 2018 show an increase in work performed during January, February and March, which are outside of the requested dates of need.

(AF 20).

Employer's contentions are well-taken regarding Employer's 2017 payroll. The regulations require an employer to show a temporary need for workers in one of four ways, which includes a showing of a "peakload need," as Employer asserts in its Application. *See* 20 C.F.R. § 655.6(a)–(b); AF 113–14; *see also* *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need); *Baranko Brothers, Inc.*, 2009-TLN-00051 (Apr. 16, 2009); *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient). An employer demonstrates a peakload need if it "regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff . . . on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Here, employer asserts that its peakload need for temporary workers begins on April 1 and extends through December 10; however, Employer's 2017 payroll summaries show more hours worked in January and March than in April, June, and July. (AF 47, 99). Aside from February 2017 (341.3 full-time hours worked by five employees), the fewest hours worked in 2017 occurred in June (346.5 hours worked by five employees). (AF 47). Employer also employed more full-time employees in January 2017 than it did during any other month in 2017. *See id.* (documenting that Employer employed six full-time employees in January 2017 and five full-time employees from February 2017 to December 2017). Employer's 2017 itemized payroll reports bear similar results, and the reports for each employee are similarly inconsistent.⁵ (*See* AF 48–53).

Despite the inconsistencies found in Employer's 2017 payroll data, Employer has demonstrated a temporary, peakload need from April 1 through December 10 based on its 2018 payroll. *See* 20 C.F.R. § 655.6(a)–(b). Employer's 2018 payroll data show that its employees worked significantly more hours from April to December compared to the same time frame in 2017. (AF 54). The CO found, in part, that this evidence did not overcome Deficiency 1 because it "shows the fewest hours were worked in June, July and August, which are included in the employer's indicated peakload period." (AF 20). The CO erred on this point. The 2018 payroll clearly demonstrates that the fewest hours were worked in January, February, and March. (*See* AF 54). Although Employer's employees worked fewer hours in June, July, and August of 2018 than in April, May, September, October, November, and December, the "slowest" month during this timeframe, June, demonstrates that employees worked 199 more hours than in January, 431 more hours than in February, and 132.5 more hours than in March. *See id.* Furthermore, the number of hours worked in July 2018 was significantly greater than in February 2018 or March 2018 despite employing one fewer worker. *Id.* Employer supports a temporary, peakload need by stating the following in its Appeal:

[Employer] employs carpenter helpers year-round to perform the same concrete construction tasks that the temporary carpenter helpers will perform. The

⁵ BALCA has consistently affirmed denials of certification applications where an employer's own records belie its claimed peak load periods of need. *See, e.g., Erickson Construction*, 2016-TLN-0050 (Jun. 20, 2016); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Stadium Club, LLC*, 2012-TLN-00002 (Nov. 21, 2011).

Appellant further clarifies that year-round carpenter helpers perform limited concrete work during the off-season, but are still employed full-time doing other types of work NOT included in the job description for the temporary carpenter helpers who ONLY engage in outdoor concrete work. This explanation sheds light on the number of hours worked in the off-season. While there were high numbers of hours worked during *one* off-season month in the past 2 years, the majority of those hours do not relate to outdoor concrete work but rather the other job duties performed by full-time carpenter helpers in the off-season. In the off-season during the cold winter months of the year the Appellant's year-round worker provide snow removal services which are completely different from the carpenter helper activities performed during the peakload season from April to December. The Appellant must provide some type of work to year-round employees in the off-season in order to keep the number of full-time, year-round staff necessary to continue operations. The Appellant does not pay his carpenter helpers two separate salaries in order to show how many hours were worked in the performance of the same job duties offered to the temporary workers as opposed to the different off-season job duties. Therefore, a high number of hours worked during one off-season month does not equate to a high number of hours available for the same job duties offered to the temporary workers.

(AF 2–3).

The CO's determination that "the fewest hours were worked in June, July and August" is, therefore, only correct between April and December, Employer's requested dates of need. (AF 20). An employer's workload may ebb and flow within a specific timeframe and still demonstrate a peakload need without violating the Act. Employer has, therefore, demonstrated temporary, peakload need during the requested dates of need based on its 2018 payroll data. *See* 20 C.F.R. § 655.6(a)–(b); 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Number of Workers Requested (Deficiency 2)

Employer has likewise submitted ample evidence demonstrating the need for 15 Helpers—Carpenters from April 1, 2019 to December 10, 2019. As discussed in the previous section, Employer has demonstrated a substantial increase in workload based on its 2017 and 2018 invoices. Employer's employees worked a total of 1,580.5 full-time hours between January 2017 and March 2017 and 5,666.5 full-time hours between April 2017 and December 2017. (AF 47). In contrast, Employer's employees worked a total of 1,430.5 full-time hours between January 2018⁶ and March 2018, a decrease of 150 full-time hours during the same 2017 time frame, and 7,801 full-time hours between April 2018 and December 2018, an increase of more than 2,100 full-time hours from the same alleged peakload 2017 time frame while employing roughly the same number of employees. (AF 54). As Employer explains in its response to the CO's NOD and on Appeal:

Eagle Construction experiences a similar increase in workload (as shown by payroll records) each season as compared to previous

⁶ Employer employed 5 full-time employees in January 2018 and July 2018 and 6 full-time employees for the remainder of the year. (AF 54).

seasons, and uses this professional experience to determine the amount of work expected in 2019 and therefore the number of workers needed to fill our peakload need. During the 2018 concrete construction season Eagle Construction had so much work that it had to sub-contract with other concrete construction providers in order to complete all projects during the peakload season. Based on the regular increases in business that Eagle Construction has experienced each year, we fully expect to have more work during the 2019 season than our current full-time workforce can handle. Therefore, Eagle Construction has a peakload need for fifteen (15) carpenter helpers for the 2019 concrete construction season. . . .

This updated explanation demonstrates that the Appellant used its experience during both the 2017 and 2018 peakload seasons, along with the need to sub-contract work, to determine exactly how many temporary carpenter helpers would be needed to fill the 2019 peakload need. Further, invoices were provided to demonstrate bona fide job opportunities available to the temporary carpenter helpers. . . .

The Appellant has no incentive to apply for more carpenter helpers than are necessary to fill its need as more workers add more expense and more time necessary to train. It is arbitrary and capricious to disregard the Appellant's explanation for how the number of necessary carpenter helpers was determined.

(AF 4–5).

The invoices that Employer provided in response to the NOD also show an increase in workload that justifies the need for additional employees during the requested dates. (*See* AF 64–90). Employer has, therefore, demonstrated a bona fide need for 15 Helpers—Carpenters from April 1, 2019 to December 10, 2019. *See* 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012).

One Area of Intended Employment (Deficiency 3)

The CO's Final Determination found that Employer also did not cure Deficiency 3, stating that “[t]he commuting distance from the employer’s primary worksite location to the furthest counties Fremont and Monona in Southwest Iowa Nonmetropolitan Area and Clinton and Lee counties in Southeast Iowa Nonmetropolitan Area are over 150 miles. Thus, the commuting distance exceeds the two hour traveling distance from the employer’s primary worksites.” (AF 34). Employer’s Appeal states that *all* worksites are located within 39.1 miles of Employer’s primary worksite location, which Employer stated was a normal commuting distance, and are, therefore, within the same area of intended employment, but later states that “the vast majority” of the remaining worksite locations are within a one hour drive from Employer’s primary worksite location.” (AF 5–6). Employer’s Appeal also restated its position from its NOD response that:

No work will be performed by H-2B workers at job sites located outside the area of intended employment as defined by a normal commuting distance. Therefore, all worksite locations are within normal commuting distance and are in the same area of intended employment. The Appellant is always bidding on new projects and therefore could not provide a complete and accurate list of all intended worksites at the time of NOD response. However, to date there are no job sites anticipated in the 4 furthest BLS counties and the Appellant is aware that temporary workers cannot be employed on job sites outside of normal commuting distance or outside of the area of intended employment.

Id. Employer, therefore, concludes that the CO's "rigid '2-hour-drive-time to the farthest reaches of the BLS area' standard to the evaluation of 'normal commuting distance'" was arbitrary and capricious. *Id.*

Under 20 C.F.R. § 655.5, 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. *Id.* If work locations 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." *Id.* 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. *Id.*

Employer's evidence submitted in response to the CO's NOD calculated the driving distance, 39.1 miles, from Employer's primary worksite location to Ames, Iowa. (AF 38–41). In its application, however, Employer listed the following areas as anticipated worksites: "Des Moines-West Des Moines, IA MSA; Ames, IA MSA; Southeast Iowa Nonmetropolitan Area; and Southwest Iowa Nonmetropolitan Area." (AF 102). Indeed, several counties encompassed within Employer's anticipated worksites are well over a 150 mile one-way commute from Employer's primary worksite location in Des Moines, Iowa. While the regulations further state that "no rigid measure of distance . . . constitutes a normal commuting distance or normal commuting area [due to] widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network)," the CO did not err in denying certification on this point because a 300-plus mile daily round trip commute clearly does not fall within a single "area of intended employment." *See* 20 C.F.R. § 655.5.

Employer's argument on appeal that it does not anticipate worksites "in the 4 furthest BLS counties" and its awareness "that temporary workers cannot be employed on job sites outside of normal commuting distance or outside of the area of intended employment" does not overcome Deficiency 3. (AF 6). Employer was directed to list the anticipated places of employment "with as much specificity as possible" on the Application. (AF 102). Therefore, the CO's conclusion that Employer's worksites would include contracts to be performed in those counties was reasonable and not arbitrary and capricious. *See The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5

(May 10, 2016);⁷ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Employer must, therefore, submit separate applications pursuant to 20 C.F.R. § 655.15(f).

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

LARRY S. MERCK
Administrative Law Judge

⁷ *Brook Ledge, Inc.* is distinguishable from the facts of this case. Although BALCA reversed the CO's denial of certification in *Brooks Ledge*, the decision rested, in part, on the proposition that delivery locations are not worksites for the purpose of influencing the definition of "area of intended employment," and that "[a] Heavy and Tractor Trailer Truck Driver's worksite is the location where the job opportunity is, and where the drivers report to work." *Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 4, 7; see also 20 C.F.R. §§ 655.15, 655.5. Here, by contrast, Employer admits that it anticipates worksites that are great distances from Employer's primary worksite location. See AF 102; 20 C.F.R. § 655.5; *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").