



Issue Date: 02 October 2019

BALCA Case No.: **2019-TLN-00149**  
ETA Case No.: **H-400-19203-025738**

*In the Matter of:*  
**ATP AGRI-SERVICES, INC.,**  
*Employer.*

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

**DECISION AND ORDER DIRECTING GRANT 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.<sup>1</sup> 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 Employer’s temporary labor certification is reversed.

**BACKGROUND**

On July 22, 2019, ATP Agri-Services, Inc. (“Employer”) submitted an *Application for Temporary Employment Certification* (“Application”) for twenty (20) “Heavy and Tractor-Trailer Truck Drivers,” Standard Occupational Classification Code 53-3032, to “navigate to a field where they will pick up a load of . . . crop[,] . . . drive the truck to the assigned drop off location for that load[,] . . . and then move on to their subsequent load” from October 5, 2019 to

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<sup>1</sup> On April 29, 2015, the Department of Labor 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*, 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.” 20 C.F.R. § 655.4(e). In the above-captioned matter, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Accordingly, all citations to 20 C.F.R. Part 655 in this Decision and Order refer to the IFR.

June 30, 2020. AF 58, 63, 69.<sup>2</sup> Employer annexed several documents to its Application, including an Addendum, Job Order, a H-2B Detailed Statement of Temporary Need, and an Agency & Indemnity Agreement with Mas Labor H2B, LLC, a “professional services [entity that] . . . assist[s] employers in obtaining temporary, seasonal workers through the H-2B non-immigrant visa program,” and ETA Form 9141, Application for Prevailing Wage Determination. *Id.* at 69–84.

On July 30, 2019, the CO issued a Notice of Deficiency (“NOD”), identifying four deficiencies with Employer’s Application. *Id.* at 49–57. 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 while Employer detailed which produce is in season during the requested dates of need, . . . [E]mployer did not explain nor document how that translates to . . . a seasonal need.” *Id.* at 53. The CO further noted that the study from the United States Department of Agriculture relied upon by Employer was outdated.<sup>3</sup> *Id.* Second, the CO found that Employer failed to establish a temporary need for the 20 drivers requested pursuant to 20 C.F.R. § 655.11(c)(3)–(4) (“Deficiency 2”), stating that Employer did not state “how it determined that it needs 20 Commercial Drivers during the requested period of need.” *Id.* at 54. Third, the CO found that Employer’s Application “appeared” to include additional worksites “outside of a single area of intended employment” (“Deficiency 3”). *Id.* at 55. And fourth, the CO found that Employer failed to submit an acceptable job order pursuant to 20 C.F.R. § 655.16, 18 (“Deficiency 4”), stating that the job order “did not indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor.” *Id.* at 56. The CO directed Employer to provide additional evidence and documentation to cure the four cited deficiencies. *Id.* at 53–57.

Employer timely responded to the NOD on August 6, 2019, providing the following documentation: a copy of a Department of Agriculture report on the Florida citrus harvesting season, which, Employer explained, spans from mid-September until the end of June; a chart reflecting monthly truck loads for 2018 and 2019 year-to-date; and monthly payroll reports from 2017 to 2019 year-to-date. *Id.* at 19–20, 24–40. Employer, however, contested Deficiencies 3 and 4, stating that it “rejects the CO’s premise that work is performed at multiple worksites.” *Id.* at 21. Specifically, Employer argues that “BALCA has affirmed on numerous occasions that neither trucking pick-up points nor delivery points qualify as ‘worksites’ for purposes of the area of intended employment analysis.” *Id.* at 21. Specifically, Employer cites *GT Trans, Inc.*, 2016-TLN-00029 (Apr. 15, 2016), *Olson’s Greenhouses of Colorado, LLC*, 2019-TLC-00012 (Jan. 2, 2019), and *Brook Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016) as controlling, stating, in pertinent part:

The only “worksite” under the accepted definition of the term, as repeatedly adopted by BALCA, is the location in which the workers pick up the trucks to begin the workday. The pickup and delivery locations are locations to which the worker travels during the course of the workday, and are therefore not locations to

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

<sup>3</sup> The CO was also unable to open the included hyperlink to evaluate how the cited Department of Agriculture study supported Employer’s requested dates of need. AF 53.

which a worker "commutes" under the plain meaning of the term. As the ALJ noted in *Brook Ledge, Inc.*, area of intended employment is principally concerned with "commute time," i.e., the non-compensable time between the worker's home and the place where work begins (portal-to-portal).

The employer respectfully asserts that the CO's interpretation of "worksites" is incorrect according to BALCA precedent. On this basis, the employer declines to modify the application as instructed in your NOD. Doing so would be contrary to the regulatory requirements and would introduce the odd results and issues identified by the ALJ in *GT Trans, Inc.*

*Id.* at 21–22. Employer further provided a list of 20 counties that it expects its drivers to “haul[] citrus to and from.” *Id.* at 22. Employer “stresse[d] that the[ listed counties] are NOT ‘worksites’ within the meaning contemplated by the regulations govern[ing] area of intended employment, but rather, locations to which workers will make pickups and deliveries before returning to the starting point (the worksite disclosed in the application) at the end of the workday (consistent with the standards set forth in *Olson’s Greenhouses of Colorado, LLC*.)” *Id.* (emphasis in original).

On August 22, 2019, the CO issued a Final Determination, finding that Employer’s response did not cure Deficiencies 3 and 4, and denied Employer’s Application for largely the same reasons set forth above. *Id.* at 15–16. The CO further noted, however, that the “additional worksite locations” provided in its response are not within a normal commuting distance and the same area of intended employment, stating that “the worksite in Collier is three hours from the employer’s main worksite location; Lee is four hours and 8 minutes from the employer’s main worksite location; Martin is two hours and 36 minutes from the employer’s main worksite location; and Orange is two hours and 17 minutes from the employer’s main worksite location.” *Id.* at 16.

On August 22, 2019, Employer filed a Notice of Appeal pursuant to 20 C.F.R. § 655.61, requesting administrative review with the Board of Alien Labor Certification Appeals (“BALCA”). *Id.* at 1–7. Employer argues that “it is entirely reasonable to view the issue through the lens of the more comprehensive H-1B definitions for insight and guidance, just as BALCA did in the *GT Trans, Inc.* case” because “there is no clear definition of what constitutes a ‘worksites’ in the H-2B regulations and OFLC has consistently failed to provide a reasonable and articulable standard.” *Id.* at 5. Employer cites 20 C.F.R. § 655.715(1)(ii), (2), the H-1B regulation defining “worksites,” in support of its position. *Id.* at 5–6. Employer concludes:

BALCA has been decisive on this issue with identical fact patterns, and ATP has complied with all BALCA precedent. There is only one worksite in this case, 1906 Mel Bryan Rd., Zolfo Springs, FL 33890. There is only one area of intended employment in this case, the area within reasonable commuting distance of the Zolfo Springs worksite. The pickup and delivery locations that a trucker travels to during the course of the workday are not worksites, and therefore have no bearing on the area of intended employment analysis. The CO's conclusion is entirely incorrect and unsupported by statute, regulation, sub-regulatory guidance, or any

applicable caselaw. The CO has absolutely no basis for its determination. Further, it is apparent by the CO's refusal to acknowledge the applicable BALCA caselaw that the CO is acting in bad faith, effectively "forum shopping" in search of a sympathetic ALJ. This determination cannot stand.

*Id.* at 6–7.

On August 26, 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. On September 10, 2019, the CO timely filed the *Certifying Officer's Brief*, arguing that the CO's denial should be affirmed because the Office of Foreign Labor Certification ("OFLC") issued deferential guidance on the application of the term "worksite" in the H-2B context, which "committed to written form the agency's longstanding position that 'a 'worksite' is any location where the worker performs one or more duties of the job opportunity.'" *Certifying Officer's Brief* at 10–11. The CO argues that, in light of OFLC's interpretation, the job opportunity sought by Employer requires work to be performed at multiple worksites that are not within a normal commuting distance and the same area of intended employment. *Id.* at 12–13; *see also* AF 16. Employer did not file a brief on appeal.

#### DISCUSSION

The standard of review in H-2B temporary labor certifications 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. *Id.* § 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. *Id.* § 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.*, slip op. at 5. 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 the following: (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).

The regulations 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.” *Id.* § 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 id.* § 655.15(f). The phrase “area of intended employment” is defined as:

[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.

*Id.* § 655.5.

The H-2B regulations do not define the term “worksite.” In *GT Trans, Inc.*, however, BALCA looked to the Department of Labor’s other immigration-related regulations for guidance on defining “worksite” for the purposes of H-2B applications. *GT Trans, Inc.*, slip op. at 5. The court looked to the H-1B definition of “place of employment” because it is interchangeable with “worksite.” *Id.* The court found that, under the H-1B definition, “truckers’ delivery and pickup locations would not qualify as ‘worksites’” because “[t]he job functions of a truck driver necessitate frequent changes of location with little time spent at any one location and the nature of the occupation mandates [a] short-term presence.” *Id.* at 6. BALCA emphasized that its decision in *GT Trans, Inc.* was limited to “the facts of Heavy and Tractor-Trailer Truck Driver cases,” the same occupation involved here. *Id.* at 7; AF 58.

Approximately one month later, in *Brook Ledge, Inc.*, BALCA again addressed the definition of the term “worksite” and its influence on the definition of “area of intended employment” in H-2B cases involving applications for Heavy and Tractor-Trailer Truck Drivers. *Brook Ledge, Inc.*, slip op. at 2, 4. The CO argued that BALCA must defer to OFLC’s interpretation of a regulation unless it is arbitrary, capricious, an abuse of discretion, or not in accordance with law, and that a reasonable interpretation consistent with law, even if not among the best reasonable alternatives, must be accorded deference. *Id.* Although BALCA agreed it “should defer to OFLC’s rational and reasonable interpretation of an ambiguous regulatory term,” BALCA found that “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.” *Id.* at 5. BALCA stated that if OFLC explained its “longstanding” definition of worksite or issue guidance, it “will review such policy under the abuse of discretion standard,”

and that it was “incumbent upon OFLC to provide clarity to the trucking community,” and accordingly found for the employer. *Id.* at 6–7.

The facts and parties’ arguments in this matter are remarkably similar to those in *Brook Ledge, Inc.*; however, one important distinction is noteworthy.<sup>4</sup> On October 4, 2016, OFLC issued an FAQ to elucidate the meaning of “worksite” and “area of intended employment” for the purposes of the H-2B program. See *2015 H-2B Interim Final Rule FAQs, Round 17: “Worksite” and “Area of Intended Employment” in the H-2B Program* (Oct. 4, 2016) (available at [https://www.foreignlaborcert.doleta.gov/pdf/Round-17\\_FAQs\\_Worksites-AIE.pdf](https://www.foreignlaborcert.doleta.gov/pdf/Round-17_FAQs_Worksites-AIE.pdf)) (“FAQ”). The FAQ reads, in pertinent part:

*For purposes of the H-2B program, a “worksite” is any location where the worker performs one or more duties of the job opportunity. For example, a landscaping crew may meet each morning at the employer’s place of business to gather and prepare equipment, load trucks, and then travel to various other locations to provide landscaping services. The employer’s place of business where the crew gathers and prepares the employer’s equipment or other tools is a worksite, as is each other location where the crew provides landscaping services. This is because the workers engage in one or more job duties at each of these locations.*

*Other occupations that often perform duties at multiple worksites include itinerant guides and truck drivers. Itinerant tour guides routinely work at multiple worksites in the performance of their job duties, including the location where they pick up their assigned group and then at each location they visit on the tour. Likewise, truck drivers are generally engaged in one or more job duties at multiple worksites, including the location where they pick up their assigned truck, the trucking route while driving, and each location where the drivers perform other job-related activities, including the loading and unloading of the truck or supervision thereof, and the maintenance of the truck. If, while awaiting the return trip from the destination, the drivers are required to maintain the employer’s property, the drivers are also engaged in performing one or more duties under the job opportunity while waiting.*

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[A]n application for a job opportunity requiring work to be performed regularly in multiple locations across more than one area of intended employment will generally be denied H-2B certification. For example, an H-2B application for itinerant tour guides to lead trips throughout the Western coast of the United States will be denied because the tour guides would be required to perform their assigned duties in different cities across the region that extend beyond a single area of intended employment. Tour guides must perform their job duties when they initially pick up their tour group and then as the group moves from city to city until the trip ends. Thus, the job duties are performed in a series of locations.

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<sup>4</sup> Here, unlike *GT Trans, Inc.* and *Brook Ledge, Inc.*, OFLC, rather than the CO, issued guidance.

In this particular scenario, each of the locations where the tour guides perform work is a worksite. Because the worksites fall outside one area of intended employment and instead extend throughout the Western coast of the United States, the job opportunity would not be eligible for certification. Similarly, *if an employer seeks to employ tractor trailer truck drivers to pick up and deliver cargo through routes across the United States, the job duties generally are not performed in one location. Rather, the job duties are performed in a number of locations across the United States and thus outside of a single area of intended employment. Accordingly, the job opportunity would not be eligible for H-2B certification.*

*Id.* at 1, 4 (emphases added). The *FAQ* makes clear its disagreement with *GT Trans, Inc.* and *Brooks Ledge, Inc.*:

With this authoritative interpretation of “worksite” as it is defined for purposes of the H-2B regulations, which reflects the Department’s long-standing and consistently held approach, we expressly reject the application to H-2B cases of the definition of “worksite” under the H-1B regulations, as suggested in *GT Trans, Inc.* . . . and *Brook Ledge, Inc.* . . . .

*Id.* at 1 n.1.

The CO argues that each pickup and delivery location listed in Employer’s NOD response are “worksites” that are not within the “same area of intended employment” pursuant to the *FAQ*. *Certifying Officer’s Brief* at 9–12. The CO states that OFLC’s interpretation of worksite, “an ambiguous regulatory term in H-2B cases, is rational and reasonable, and correspondingly entitled to deference.” *Certifying Officer’s Brief* at 11, 13–16. I disagree.

The Supreme Court has consistently held in a number of contexts that, in order to accord an agency discretion in interpreting its own regulation, the “agency must cogently explain why it has exercised its discretion in a given manner.” *Motor Vehicles Mrfs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983); *see also Atchison, T & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438, 443 (1965). It must also “explain the evidence which is available, and . . . offer a ‘rational connection between the facts found and the choice made.’” *Id.* at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Furthermore, I note that the *FAQs* do not carry the force and effect of law and regulation. *See Solar Turbines*, 2016-PER-00025, slip op. at 2 n.4 (June 2, 2017) (citing *Perez v. Mortgage Bankers’ Ass’n*, 135 S. Ct. 1199, 1203–04 (Mar. 9, 2015)) (noting that the language in the *FAQs* are precatory rather than mandatory and that no evidence of record that the *FAQs* were “properly promulgated as either an Instruction pertaining to the Form 9089 or as a legislative rule, which would be necessary if it were to have the force and effect of law”). However, BALCA has held that while guidance published as an *FAQ* is not binding, it may serve as persuasive interpretative authority depending 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 the power to persuade.” *HealthAmerica*, 2006-PER-00001, slip op. at 14 (July 18, 2006); *see also Syracuse University*, 2016-PER-00045, slip op. at 4 n.3 (Aug. 17, 2016).

OFLC’s guidance and the CO’s brief cites the *FAQ* as the “authoritative interpretation of the term ‘worksite’ as it is defined for purposes of the H-2B regulations, which reflects the Department’s long-standing and consistently held approach.” *FAQ* at 1 n.1; *Certifying Officer’s Brief* at 4. Neither the CO nor the OFLC, however, explain how or when this interpretation was promulgated, and they cite no BALCA precedent in support of their positions. The only explanation was the *FAQ* itself, which merely refers to the “substantial differences between the nature and scope of the work in H-1B and H-2B[] and the agency’s statutory and regulatory obligations in each program” as justification for according each regulation a different interpretation of the word “worksite.” *FAQ* at 1–2 n.1.

I find that OFLC’s explanation of its “long-standing and consistently held approach” is a conclusory assertion unsupported by evidence or reasons for its decision. OFLC did not explain the differences between the two programs and why these differences justify conflicting definitions of the term “worksite” in each program. The CO offered no explanation beyond that offered by OFLC; it “seeks deference based merely on the fact that the decision was issued by OFLC. There is no legal support for such a contention.” *Brooks Ledge*, slip op. at 5.

An explanation of the term “worksite . . . is particularly important where there is an obvious alternative explanation found in the H-1B regulations, another DOL administered temporary worker program, and where the definition . . . is contrary to how the word is used elsewhere in the H-2B regulations themselves,” which contradicts the *FAQ*’s broad definition of worksite.<sup>5</sup> *Id.* at 5; *FAQ* at 1.

Under the H-1B regulations, “place of employment” and “worksite” are interchangeable, which the regulation defines, in pertinent part, as:

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<sup>5</sup> OFLC defines worksite as:

[A]ny location where the worker performs one or more duties of the job opportunity[, including] the loading and unloading of the truck or supervision thereof, and the maintenance of the truck. If, while awaiting the return trip from the destination, the drivers are required to maintain the employer’s property, the drivers are engaged in performing one or more duties under the job opportunity while waiting.

*FAQ* at 1. I find this definition particularly unsuited for the trucking industry for the same reasons articulated in *GT Trans, Inc.*:

The very nature of trucking requires movement from one place to another and stopping at multiple locations along a route. Under . . . [OFLC’s] definition of “worksite,” an employer’s H-2B application would be certified only if the trucking terminal, its delivery [and pickup] 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. These requirements would be manifestly unreasonable [for trucking employers].

*GT Trans, Inc.*, slip op. at 5.

*Place of employment* means the worksite or physical location where the work actually is performed by the H-1B, H-1B1, or E-3 nonimmigrant.

(1) The term does not include any location where either of the following criteria—paragraph (1)(i) or (ii)—is satisfied:

.....

(ii) *Particular worker's job functions.* The nature and duration of an H-1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a "place of employment" or "worksite" if the following three requirements (*i.e.*, paragraphs (1)(ii)(A) through (C)) are all met—

(A) The nature and duration of the H-1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(1) The H-1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; or

(2) The H-1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

(B) The H-1B worker's presence at the locations to which he/she travels from the "home" worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.*, not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H-1B nonimmigrant is not at the location as a "strikebreaker" (*i.e.*, the H-1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

20 C.F.R. § 655.715. Therefore, under the H-1B definition, Heavy and Tractor-Trailer Truck Drivers' pickup and delivery locations are not worksites. *See GT Trans, Inc.*, slip op. at 6. Indeed, "the job functions of a truck driver necessitate frequent changes of location with little time spent at any one location and the nature of the occupation mandates this short-term presence. The H-1B regulations provide a reasonable definition of 'place of employment,' and one which is derived under immigration provisions relating to the DOL's enforcement of H visa programs." *Id.*

Similarly, a narrower definition of “worksite” is also consistent with “job opportunity,” as that phrase is used in describing an “area of intended employment,” which the H-2B regulations define as “the geographic area within normal commuting distance of the place (*worksite* address) of the job opportunity for which the certification is sought.” 20 C.F.R. § 655.5 (emphasis added); *GT Trans, Inc.*, slip op. at 7. A “job opportunity” is defined as “one or more openings for full-time employment for which the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.” *Id.* The H-2B regulations require employers to “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.” 20 C.F.R. § 655.45. The Preamble to the H-2B regulations provide that “the posting of the notice at the employer’s worksite . . . is intended to provide that all of the employer’s U.S. workers are afforded the same access to the job opportunities for which the employer intends to hire H-2B workers.” 80 Fed. Reg. 24,024, 24,077 (Apr. 29, 2015). The job opportunity is, therefore, the worksite address. *GT Trans, Inc.*, slip op. at 7. *GT Trans, Inc.* is instructive on how “job opportunity” influences the term “worksite” for the purpose of H-2B applications:

In the case of trucking, there is only one job opportunity for one trucker. There is only one opening for full-time employment and it is where the trucking terminal is located. There is no “job opportunity” or opening for employment at the delivery location or on the road between the terminal and that location. Therefore, in the case of a Heavy and Tractor-Trailer trucker, the trucking terminal is the only worksite address within the meaning of the regulations, and the area of intended employment encompasses the geographic area within normal commuting distance of that location.

*Id.*

Neither the CO nor OFLC has explained its derivation from reasonable definitions and interpretations of the term “worksite” in the H-1B and H-2B regulations.

To adopt the *FAQ*’s definition of “worksite” would require Employer, as part of the application process, to post a notice at each delivery and pickup location, even on private property not owned by Employer. *Cf. Brook Ledge, Inc.*, slip op. at 5 n.7. “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.” *Id.* Furthermore, given the nature of commercial trucking industry contracts, an employer may not know of the precise delivery and pickup locations prior to filing an H-2B application. The *FAQ*, therefore, functionally prevents the commercial trucking industry from participating in the H-2B program. *See id.* at 6–7.

The drafters of the regulation could have singled out certain types of employers, but they chose not to do so here. *See* 20 C.F.R. § 655.19 (outlining the filing requirements for job

contractors); *GT Trans, Inc.*, slip op. at 7. Likewise, Congress<sup>6</sup> could have carved out provisions only applicable to the commercial trucking industry, as they did with the seafood industry, but chose not to do so. *See* 20 C.F.R. § 655.15(f) (outlining filing requirements applicable only to the seafood industry); *GT Trans, Inc.*, slip op. at 7 n.8.

For the foregoing reasons, the *FAQ* definition of the term “worksite” for the purposes of the H-2B program is not a reasonable interpretation consistent with law and regulation.<sup>7</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (June 26, 2019) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)) (stating that deference to an agency’s interpretation of its own regulations is unwarranted when the “interpretation does not reflect an agency’s authoritative, expert-based, ‘fair[ or] considered judgment.’”); *see also HealthAmerica*, slip op. at 14 (establishing criteria for evaluating the deference accorded to *FAQs*).

### CONCLUSION

Here, Employer listed 20 counties that it anticipates it workers to “haul[] citrus to and from.” AF 22. A Heavy and Tractor-Trailer Truck Driver’s worksite is the “location where the job opportunity is, and where the driver[] reports to work.” *Brook Ledge, Inc.*, slip op. at 7. I agree with Employer that the only worksite is located in Zolfo Springs, Florida, where drivers pick up their trucks. *See* AF 81. Therefore, there is only one area of intended employment that is within a normal commuting distance of Zolfo Springs, Florida. 20 C.F.R. § 655.5; *see also Preferred Landscaping & Lighting, LLC*, 2013-TLN-00001 (Oct. 26, 2012) (noting that “the definition of ‘area of intended employment’ . . . focuses almost exclusively on commuting distance”). Employer, therefore, complied with the regulations by submitting one application. Accordingly, the CO’s denial of Employer’s certification is reversed.

### ORDER

**IT IS HEREBY ORDERED** that the CO’s **DENIAL** of Employer’s *Application for Temporary Employment Certification* in the above-captioned matter is **VACATED** and this matter is **REMANDED** for grant of certification.

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<sup>6</sup> The drafters of the IFR described the carve-out for the seafood industry as the “implementation of the Congressional mandate . . . to permit employers in the seafood industry flexibility with respect to the entry into the U.S. by their H-2B nonimmigrant workers.” 80 Fed. Reg. at 24049.

<sup>7</sup> Although not dispositive to the outcome of this matter, I find that even if BALCA accorded OFLC’s interpretation deference, I would still direct the CO to grant certification. While Employer stated that the counties listed in its NOD response are anticipated “locations to which workers will make pickup and deliveries,” Employer made clear that “workers are not handling the crop, they are only driving it from the pickup point to the drop off point” before returning to the worksite disclosed in its application at the end of each workday. AF 22, 63 (emphasis omitted). Employer never stated that its workers would be “supervis[ing the unloading] thereof.” *See FAQ* at 1. Nor did Employer state that its workers, after making a delivery or pickup, would be stopped for an extended period of time “[w]aiting the return trip from the destination” or that its workers were “required to maintain . . . [E]mployer’s property.” *See id.* Employer’s workers are therefore, not performing “one or more duties of the job opportunity” under OFLC’s definition of the term “worksite.” *See FAQ* at 1.

**LARRY S. MERCK**  
Administrative Law Judge