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Issue Date: 23 December 2011

OALJ Case No.: 2012-TLC-00008

ETA Case No.: C-11340-30708

In the Matter of:
NORWICH MEADOWS FARM, LLC
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

On December 13, 2011, Norwich Meadows Farm, LLC ("Employer") filed a request for review of the Certifying Officer's ("CO") determination in the above-captioned temporary agricultural labor certification matter. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. On December 16, 2011, the Office of Administrative Law Judges received the Administrative File from the CO. Employer initially requested de novo review, but changed his request to administrative review after discussing the procedural differences between the two and in the interest of a more expeditious resolution with my staff. In administrative review cases, the administrative law judge has five working days after receiving the file to issue a decision on the basis of the written record. 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On December 6, 2011, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor

certification for ten "Farmworkers and Laborers-Crop." AF-29-37.[1] In the "Place of Employment Information" section on the ETA Form 9142 Employer submitted, it listed the worksite address as "4450 NY Rt. 23, Norwich, New York, 13815-3603."[2] It noted that work would be performed in multiple worksites within the area of intended employment and also listed "70 Valley Crest Rd, 1 mile east of NJ Rt 31 in Lebanon, NJ."[3]

On December 9, 2011, the CO issued a Notice of Deficiency ("NOD"), finding that Employer listed two different worksites that were not in the same area of intended employment. Under 20 C.F.R. § 655.103(b), the Area of Intended Employment is defined as "[t]he geographical area within normal commuting distance of the place of the job opportunity for which the certification is sought." The CO noted that Employer indicated the work would be performed at two different worksites, approximately 190 miles apart, which would not be considered the same area of intended employment. The CO required Employer to modify its application by amending the application to limit it to one of the areas of intended employment and filing a separate application for the other. Instead of doing so, Employer exercised its option under the regulations to request an expedited de novo hearing of the NOD before an Administrative Law Judge. 20 C.F.R. § 655.142(c).

DISCUSSION

20 C.F.R. § 655.141(b)(4) requires the NOD to state that the employer has the opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the Notice of Deficiency. "The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action[.]" Where an employer has requested appeal at this stage, the ALJ is limited in his decision to whether or not the CO issued a proper Notice of Deficiency. Because the CO did not make a determination on Employer's application, this is not an appeal of a denial of certification, but of the NOD itself.

20 C.F.R. §655.103(b) provides that "area of intended employment" is defined as:

[1] References to the Appeal File will be denoted by "AF."
[2] AF 32.
[33] *Id.*

> [t]he geographic area within normal commuting distance of the place 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 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.

Employer argues Section 655.103(b) does not establish that the distance between its two farm locations is an "out of the ordinary" commuting distance. "In fact," Employer states in its brief, "the employees will not be commuting from our NY site to our NJ site and vice versa. We have housing at both locations so no commuting will occur."

Employer also notes that it is not feasible to submit two separate applications for certification because the employees working at the New York farm will be rotated to the New Jersey farm and vice versa. Because it is not possible to move the workers between contracts once they are there, having separate H2A contracts is not a viable option. Finally, it noted that last year, after issuing a notice of deficiency on the issue of control over the New Jersey location, the certification was accepted for processing. Employer attached copies of its 2011 certification, but those are legally irrelevant, because I may only consider those documents that were before the CO when he issued his notice of deficiency. 20 C.F.R. § 655.171(a).

The CO's determination that the two work sites that are in different states and 190 miles apart are not within normal commuting distance and therefore not within the same area of intended employment is a reasonable factual determination and a rational application of the regulations, based on the information before him.

It appears that the fundamental problem is that the Employer wants to "rotate" workers between two work sites which are 190 miles apart and not in the same area of intended employment. However, the regulations do not allow it to employ the same workers under separate certifications, so it wants to define the two sites as within one area. The fact that the CO did not issue a notice of deficiency last year on the same basis, does not create any estoppel or

presumptions in employers favor. It may be that the employer's plan would be the most efficient use of his labor, but that raises policy issues best raised elsewhere.

The CO's grounds for deficiency are sustained, the appeal is denied and the file is remanded to the CO for further processing consistent with this decision.

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PATRICK M. ROSENOW
Administrative Law Judge