**U.S. Department of Labor**

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**Issue Date: 02 July 2013**

**OALJ Case No: 2013-TLC-00040**

**ETA Case No.: C-13135-543591**

*In the Matter of*:

**LOWRY FARMS, INC.**,

*Employer*

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **DANIEL A. SARNO, JR.**
District Chief dministrative Law Judge

## DECISION AND ORDER

On June 18, 2013, Lowry Farms, Inc. ("Employer") filed a request for review of the Certifying Officer's 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. § 655.115(a) (2009). On June 27, 2013, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer ("the CO"). In administrative review cases, the administrative law judge has five working days after receiving the file to "review the record for legal sufficiency" and issue a decision. § 655.115(a).

## Statement of the Case

On May 7, 2013, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Employer for temporary labor

certification. AF 246-252.[1] In particular, Employer requested certification for 589 "Farm Worker" positions between July 15, 2013 and October 30, 2013. AF 246. Employer noted that the workers were to work at various farms within the southern Louisiana area. AF 246, 254-258.

On May 22, 2013, the CO sent a Notice of Deficiency ("NOD"), which identified two deficiencies. AF 217-222. Employer responded on May 23, 2013. AF 51-215. A second NOD was sent on May 30, 2013, noting three deficiencies. AF 44-50. Employer responded on June 6, 2013, attaching a copy of its surety bond and stating that, as a labor contractor, it did not have a single area of intended employment, but provided labor to several different farms within southern Louisiana. AF 39-43. On June 17, 2013, the CO denied the Employer's application for temporary labor certification on two grounds. AF 23-29. Citing to 20 C.F.R. 655.132(b)(3), the CO found that the Employer had failed to provide a proper original surety bond. AF 26. The CO also determined that Employer had failed to confine its application to a single area of intended employment in violation of 20 CFR 655.103(b). Therefore, the CO denied certification. Employer's appeal followed. Each party submitted appellate briefs in support of its respective position on July 1, 2013.

## Discussion

Federal regulations restrict an H-2A labor contractor's ETA 9142 applications "to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees." 20 CFR 655.132(a). An area of intended employment is "the geographic area within the normal commuting distance of the place of the job opportunity for which the certification is sought." If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multi-state MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of the MSA are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within the normal commuting distance of a location that is inside (e.g., near the border of ) the MSA. 20 CFR 655.103.

As noted above, Employer is not a fixed-site agricultural owner or operator. Employer is an H-2A labor contractor seeking to provide workers to plant sugar cane at various fixed-site farms within the state of Louisiana. The farms are not within one MSA, therefore the geographical area containing the identified farms must be evaluated to determine if they constitute only one area of intended employment, which is the maximum number of areas of intended employment that an H-2ALC can address in an application under the federal regulations restricting H-2ALC employers. 29 CFR §655.132(a).

Nineteen of the sixty farms Employer listed in its request for certification fall within the Baton Rouge MSA. The remaining locations, however, span eleven parishes that fall within four other MSAs. Based on the distance measured from a location central to Employer's list of farms, outlying farms require up to two hours of driving time, clearly exceeding the allowable area of intended employment. Although Employer argues that each of the farms will house its own

[1] Citations to the 401-page Administrative File will be abbreviated "AF" followed by the page number.

workers, eliminating the need for any worker to commute, the Regulations clearly require that an application include no more than one area of intended employment, regardless of whether the workers will actually be required to commute between worksites. Because Employer's application includes more than one area of intended employment, denial was appropriate. Accordingly, the denial of certification is affirmed.[2]

## ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

Digitally signed by Daniel Sarno
DN: CN=Daniel Sarno,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR./JRS/jcb
Newport News, Virginia

[2] Because I have determined that this reason for denial is appropriate, I will not address the remaining deficiency.