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Issue Date: 14 August 2013

BALCA Case No.: 2013-TLC-00046
ETA Case No.: H-300-13196-351927

In the Matter of:

RED DIAMOND ENTERPRISES,

Employer

Certifying Officer: Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

Red Diamond Enterprises, Inc. (Employer) seeks administrative review of the Certifying Officer's Notice of Deficiency in the above-captioned H-2A temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and the associated regulations promulgated by the United States Department of Labor (DOL or the Department) at 20 C.F.R. Part 655.¹ For the reasons set forth below, this matter is REMANDED to the Certifying Officer (CO) for processing.

BACKGROUND

The Employer seeks temporary labor certification for 125 H-2A workers to harvest tomatoes, cantaloupe, and bell peppers at two worksites in Florida. One worksite is located in Loxahatchee (Palm Beach County) and the other is located in Sarasota (Sarasota County); they are about 176 miles apart. On July 13, 2013, the Employer filed an electronic *Application for Temporary Employment Certification* (ETA Form 9142) with the Employment and Training Administration. AF at 31-45. In Section F-c (entitled "Place of Employment Information"), the Employer listed its worksites in Loxahatchee and Sarasota. AF 34.

¹ The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire H-2A nonimmigrant workers must first apply for and receive a "temporary labor certification" from DOL's Employment and Training Administration (ETA). 8 U.S.C. 1188(a)(1).

The CO issued a Notice of Deficiency (NOD) on July 22, 2013. AF 13-18. The NOD identified multiple reasons why the Employer's application did not meet the Department's criteria for acceptance, but only one, the "area of intended employment," is relevant to the instant appeal. With respect to this deficiency, the CO stated:

In accordance with Departmental regulations at 20 CFR 655.103(b), Area of Intended Employer id [sic] defined as "[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 the 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."

Furthermore, according to a study released in February 2013 by the U.S. Department of Commerce titled *Out-of-State and Long Commutes: 2011*, only 6.4% of Floridians had a commute to work of over 1 hour. As such, commutes of over 1 hour are not normal in Florida.

In its application, the employer indicates its first worksite is located at 17601 Southern Blvd in Loxahatchee, Florida with corresponding housing at 200 S. Main St in Bella Glade, Florida. However the additional worksite listed at 1311 Fruitville Rd in Sarasota, Florida with corresponding housing at 1016 Sawgrass Parkway in Ruskin Florida [sic] appears to be 176 miles away (three hours) from the first worksite and housing locations.

Although each worksite has corresponding housing within an hour commute, the employ [sic] cannot submit a job order covering multiple areas of intended employment.

AF 16. The CO directed the Employer to limit its application to a single area of intended employment and suggested contacting the Florida State Workforce Agency (SWA) to determine the correct area of intended employment.

On July 26, 2013, the Employer responded to the NOD and asked the CO to "kindly reconsider the requested modification." The Employer maintained that the regulatory provision that limits the worksites covered in an application to a single area of intended employment, 20 CFR 655.132(a), only applies to H-2A Labor Contractors (H-2ALC's), and does not limit applications filed by fixed-site agricultural employers such as itself. AF 10.

The CO declined to reconsider and issued a second NOD on July 30, 2013. AF 8-9. In this second NOD, the CO explained:

While true that 20 CFR 655.132(a) applies only to H-2ALCs, this does not mean that fixed-site grower applications can encompass more than one area of intended employment. 20 CFR 655.103(b) provides the definition of area of intended employment because all applications must be limited to one area of intended employment unless granted a variance by a special procedure.

AF 8. The Employer disagreed and filed a request for expedited administrative review before the Office of Administrative Law Judges (OALJ) pursuant to 20 C.F.R. § 655.141. AF 4. The undersigned Administrative Law Judge (ALJ) issued a Notice of Docketing on August 6, 2013, setting forth an expedited briefing schedule. Both parties timely filed briefs.

DISCUSSION

The sole issue on appeal is whether the CO erred in concluding that “all applications must be limited to one area of intended employment unless granted a variance by a special procedure.” See AF 8.² The Employer argues that the CO’s interpretation is unreasonable because the regulations do not prohibit a fixed-site employer from filing one application that covers worksites in multiple areas of intended employment. The CO acknowledges that the regulations do not explicitly prohibit a fixed-site employer from filing a single application for worksites in multiple areas of intended employment, but argues that this prohibition is “implicit in the overall regulatory scheme” and “clearly set forth in the Department’s Frequently Asked Questions (FAQs).” CO’s Brief at 2. Specifically, the CO asserts:

[T]he regulations themselves necessitate that an application may contain only one area of intended employment. The term area of intended employment is “used primarily for recruitment purposes to ensure that the designated SWAs receive the job order so that U.S. workers have the opportunity to apply for the job.” 75 Fed. Reg. 6884, 68885 (Feb. 12, 2010). In fact, almost all of the regulatory requirements for recruitment rely on the application being restricted to one area of intended employment and nowhere in the regulations are there references to ‘areas of intended employment,’ except in the provisions addressing association master application filing requirements where the inclusion of multiple areas of intended employment is expressly authorized.

CO’s Brief at 3, *citing* 20 CFR §§ 655.103(a), 121, 122, 130(a), 134(b), 135(g), 141(a), 143(a), 150(a), 151(a), 152(b), 154(b). The CO also cites the following FAQs:

8. Can I file one H-2A application for work that will take place in multiple work locations?

Yes. An employer's application may cover multiple work locations within an area

² The CO does not dispute that the Employer is a “fixed-site employer.”

of intended employment so long as they are within reasonable commuting distance from a place of the job opportunity for which the employer is seeking certification. If an employer belongs to an association, under the 2010 Final Rule the association may file a master application on behalf of the employer and its other members. A master application may cover multiple areas of intended employment and multiple work locations so long as: all workers covered by the application belong to the same occupation or will perform comparable work for the employer-members; the application reflects a single date of need for all workers; and all employer-members covered by the application are located in at most two contiguous states. Master Applications can only be filed by Associations acting as joint employers with their members. Finally, if the employer is an H-2A Labor Contractor (H-2ALC), the employer may file a single application covering multiple work locations within one area of intended employment.

14. Can a farm that has operations in two States with the same crop and period of need submit one Application for Temporary Employment Certification including both worksite locations?

An Application for Temporary Employment Certification is limited to a single area of intended employment, unless the job opportunity is covered by an approved special procedure that permits work in multiple areas of intended employment. The H-2A regulation defines an area of intended employment as the geographic area within normal commuting distance of where the job opportunity is located. An employer may include multiple worksite locations, including worksites on different sides of State lines, on a single Application for Temporary Employment Certification as long as each worksite is within a single area of intended employment (i.e., within normal commuting distance). If the worksites are beyond a reasonable commuting distance, then a separate application must be filed for those worksites.

There is no specific distance that constitutes a maximum normal commuting distance because various factors specific to the worksite area determine what length of commute is normal. For example, the quality of the public transportation network impacts the length of commute considered normal. To provide an employer with some measure of normal commuting distance, the Department has determined that any place within a Metropolitan Statistical Area (MSA) (including a multistate MSA) is within normal commuting distance. The borders of an MSA are not controlling, however, for identifying normal commuting distance; a location outside of an MSA may be within normal commuting distance of a location inside the MSA (e.g., close to the border of the MSA).

The Chicago National Processing Center (NPC) will consult with the applicable State Workforce Agency in determining what constitutes the maximum normal commuting distance for a given geographic area.

CO's Brief at 2-3, *citing* H-2A FAQs, "Filing" FAQ Questions 8 and 14, <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2afile6>. Ordinarily, I would defer to a program agency's interpretation of its own regulations, but in this case, neither the CO nor the agency has provided a reasoned explanation to support their interpretation of the regulations.

In the second NOD, the CO maintained that "all applications must be limited to one area of intended employment unless granted a variance by a special procedure." This statement is contradicted by the plain language of the regulations. 20 C.F.R. § 655.131(b) explicitly permits an association of fixed-site employers to file a single, master application covering multiple areas of intended employment, so long as the association's employer-members are located in no more than two contiguous states. 20 C.F.R. § 655.131(a). The CO never explained why this exception does not apply to a single, fixed-site agricultural employer, given that it applies to groups of fixed-site employers. In fact, the plain language of 20 C.F.R. § 655.131(a) assumes that this exception also applies to fixed-site employers. 20 C.F.R. § 655.131(b) provides, in relevant part: "An association may submit a master application covering the same occupation or comparable work available with a number of its employer-members in multiple areas of intended employment, just as though all of the covered employers were in fact a single employer, as long as a single date of need is provided for all workers requested by the *Application for Temporary Employment Certification* and all employer-members are located in no more than two contiguous States." (emphasis added). Consequently, the CO cannot reasonably require a fixed-site employer to limit its application to a single area of intended employment if all of the worksites in the employer's application are located within two contiguous states. Here, both worksites listed in the Employer's application are located in Florida. Accordingly, I find that the deficiency cited by the CO in the second NOD is not legally sufficient.

ORDER

In light of the foregoing, it is hereby ORDERED that this matter is REMANDED to the Certifying Officer for further processing consistent with this Decision

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge