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Issue Date: 23 July 2004

Case No.: 2004-TLC-00009

In the Matter of:

CARLSON ORCHARDS, INC.,
Petitioner,

and

UNITED STATES DEPARTMENT OF LABOR
Respondent

Appearances:

Natalie K. Brouwer (McGuiness, Norris & Williams),
Washington, D.C., for the Petitioner

R. Peter Nessen (Charles D. Raymond, Associate Solicitor
For Employment Training Legal Services; Harry L. Sheinfeld,
Counsel for Litigation), Washington, D.C. for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

FINAL DECISION AND ORDER

I. Statement of the Case

This matter arises under the temporary agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (the "INA"), and its implementing regulations, found at 20 C.F.R. Part 655 ("the Regulations"), based upon a request filed on June 25, 2004 by Carlson Orchards, Inc. ("Carlson") pursuant to section 218(e) of the INA, 8 U.S.C. § 1188(e), and section 655.112(b) of the INA's implementing regulations, 20 C.F.R. § 655.112(b), for a *de novo* hearing by the Office of Administrative Law Judges ("OALJ") regarding the decision of the Employment and Training Administration ("ETA") of the United States Department of Labor ("DOL") to deny Carlson's application for a temporary alien labor certification. The matter is subject to expedited hearing and decision rules. 20 C.F.R. § 655.112.

A telephone conference was conducted with the attorneys representing Carlson and DOL on July 1, 2004, at which time it was agreed that DOL would file a brief in support of its denial of Carlson's application by Wednesday, July 7, 2004 and that Carlson would file a request for leave to submit any responsive argument and/or to supplement the record by Thursday, July 8, 2004. DOL filed its brief on July 7, 2004, and Carlson filed a request on July 8, 2004 for leave until July 15, 2004 to submit additional documentation supporting its position and to respond to DOL's arguments. Carlson also stated that it waived its right under the regulations to obtain a decision within five (5) working days after the ALJ's receipt of the case file.¹ Counsel to DOL was contacted by telephone, and he stated that DOL had no objection to Carlson's request and would not seek to further respond unless Carlson submitted evidence which it had not previously seen.

By order issued on July 9, 2004, Carlson's request was granted, and it was allowed until July 15, 2004 to offer any additional documentary evidence and its response to DOL's arguments. In addition, DOL was directed to indicate whether it wished an opportunity to respond to any new evidence by July 19, 2004. Carlson filed a brief and supporting documentation on July 15, 2004. On July 16, 2004, DOL filed a timely request, to which Carlson had no objection, for leave until July 21, 2004 to respond to Carlson's reply brief. DOL's request was granted, and DOL's response was received on July 21, 2004. The record is now closed.²

Upon review of the record and the parties' arguments, I find that DOL's rejection of Carlson's H-2A application was consistent with the INA and its implementing regulations. Accordingly, I affirm the administrative determination. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. The H-2A Program and Carlson's Application

On March 2, 2004, John Young of the New England Apple Council, Inc. ("NEAC"), a growers' association acting as Carlson's agent, filed an Application for Alien Employment Certification with ETA for two Fruit Worker I positions. AF 19-25. The application was made under the INA's H-2A program which permits an employer to seek certification from DOL for

¹ Some confusion may have been created by my reference during the July 1, 2004 conference call to a five workday deadline for issuance of the ALJ decision. The five day requirement is contained in section 655.112(a) of the Regulations which governs the procedure for expedited "administrative review" of a temporary labor certification denial and which prohibits the ALJ from admitting any additional evidence. 20 C.F.R. § 655.112(a). In this case, Carlson has requested a *de novo* hearing and an opportunity to offer additional evidence. *De novo* hearings are governed by section 655.112(b) which provides for an ALJ decision "within ten working days after the hearing." 20 C.F.R. § 655.112(b)(iii).

² The record consists of the administrative file ("AF") which was submitted to OALJ on June 29, 2004 by ETA's Regional Certifying Officer ("RCO") and the supporting documentation submitted by Carlson which has been admitted as Petitioner's Exhibits ("PX") 1 - 3. The parties' pleadings will be referred to herein as follows: Carlson's Request for De Novo Hearing ("Carlson RDNH"); DOL's Brief ("DOL Br."); Carlson's Reply Brief ("Carlson RBr."); and DOL's Response ("DOL Resp.").

the employment of foreign agricultural labor on a temporary or seasonal basis. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The H-2A program was established by Section 301(a) of the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, § 301(a), 100 Stat. 3411, 3416 (1986), which amended the INA's temporary alien labor provisions by establishing separate administrative certification programs, one for temporary agricultural labor ("H-2A") and another for temporary nonagricultural labor ("H-2B"). See *Sweet Life v. Dole*, 876 F.2d 402, 406 (5th Cir. 1989). As set forth in the regulations implementing the INA's H-2A provisions, an employer seeking to employ foreign agricultural labor must apply to DOL for certification that,

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 188(a)(1); 20 C.F.R. § 655.90(b). In a cover memorandum accompanying the application for the two fruit worker positions, Mr. Young stated that any reference to cider pressing in the description of duties to be performed by the fruit workers applied to fruit processed or pressed on the farm. AF 18. Mr. Young further explained that the fruit used to produce cider is both grown on Carlson's farm and purchased in their "natural state as apples" from other growers, adding that Carlson purchases "more than 50% of the fruit used to produce cider, from other producers." *Id.* In a letter to Mr. Young dated March 9, 2004, Raimundo Lopez, the ETA RCO, advised that the application had been reviewed and found deficient because it included nonagricultural labor (namely, cider pressing and bottling) which cannot be included as part of an application for H-2A agricultural labor. AF 26-28.³ The RCO requested that Carlson modify its application by deleting all reference to nonagricultural labor. AF 28. The parties agree that Carlson modified this application as requested by the RCO and that it did not appeal the decision rejecting the application that included cider pressing. Carlson explained that it decided not to appeal the RCO's deficiency finding because it could not afford to delay the arrival of the workers requested in the March 1, 2004 application, and because it knew it would be filing later applications for additional workers who could operate the cider press. Carlson RDNH at 2-3.

On April 16, 2004, Carlson's attorneys filed a second H-2A application, again seeking certification for two Fruit Worker I jobs and again including the same job description as originally submitted with the March 2, 2004 application that the RCO had found deficient. AF 29-41. Carlson's attorneys also submitted a detailed explanation of their argument as to why the application should be approved under the H-2A program notwithstanding the inclusion of nonagricultural cider pressing and bottling duties. AF 29-32. Regarding the sources of the cider

³ The RCO acknowledged that certain fruit processing activities can be considered agricultural if they are performed by a farmer on the farmer's own farm, but it stated that processing fruit grown by other farmers does not qualify as agricultural labor. AF 28.

apples, the letter accompanying the application stated that “[t]ypically, about 80 percent of the apples that are pressed into cider at Carlson Orchards, Inc. are cull apples purchased from other growers, and are not produced on Carlson Orchards, Inc.’s own farm.” AF 30. The RCO rejected this application for the same reasons that the March 2, 2004 application had been rejected. AF 42-44. By letter dated April 30, 2004, Carlson’s attorney protested the rejection and returned the rejected application to the RCO, reiterating the arguments previously advanced in support of the requested certification. AF 45-48. The RCO responded on May 6, 2004 that the rejection decision remained unchanged because Carlson had not made the requested modification, and he advised that no further action would be taken on the application because Carlson had not requested an expedited administrative judicial review or *de novo* hearing within seven calendar days of the notice of non-acceptance as required by 20 C.F.R. § 655.104(c). AF 49.

On June 7, 2004, Mr. Young filed the H-2A application at issue herein, seeking certification for four Fruit Worker I foreign laborers to work for Carlson from August 1, 2004 through December 31, 2004 with cider pressing and bottling listed as part of their duties. AF 50-57. As was the case with the earlier applications, Mr. Young’s letter accompanying the third application stated that “[t]he fruit for cider pressing is both grown on the farm and purchased from other growers.” AF 50. The application package included two letters from apple industry experts who stated that pressing apples for cider is a task commonly performed by agricultural workers on New England apple farms and that it is generally not practical for apple growers to employ separate, nonagricultural labor to perform this function. AF 64-67. In addition, Carlson’s H-2A consultant, James S. Holt, Ph.D., submitted a letter asserting that (1) it has been DOL’s longstanding practice to permit cider pressing and bottling functions in H-2A applications irrespective of the source of the fruit, (2) the INA does not prohibit agricultural workers from performing nonagricultural duties that are customarily part of an otherwise agricultural occupation, (3) pressing apples into cider is a common and ordinary activity performed by the seasonal work force on New England apple farms, and (4) denying growers H-2A certification if they purchase apples for pressing into cider will have a significant adverse impact on New England Fruit growers. AF 58-63.

By letter dated June 16, 2004, the RCO notified Carlson that the most recent application would not be considered as it was found deficient for the same reasons cited in response to the earlier applications. AF 68-70. The RCO’s rejection letter advised Carlson that it could submit a modified application by June 21, 2004 or request either expedited administrative review or a *de novo* hearing within seven calendar days of the non-acceptance of the application. Carlson declined to file a modified application and instead filed its request for a *de novo* hearing on June 25, 2004.⁴

⁴ The Regulations provide that a notice of a rejected H-2A application shall state that in order to obtain expedited administrative review or a *de novo* hearing, “the employer, within seven calendar days of the date of the notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor . . .” 20 C.F.R. § 655.104(c)(3). Although Carlson’s request for a *de novo* hearing was not filed until June 25, 2004, nine calendar days after the RCO’s June 16, 2004 notice of rejection, DOL has not argued that the request is untimely, apparently in view of the OALJ Rules of Practice and Procedure which provide with respect to time computations that intermediate Saturdays, Sundays, and holidays shall be excluded when the period of time prescribed is seven (7) days or less. 29 C.F.R. § 18.4(a). The

B. The INA and “Agricultural Labor or Services”

As discussed above, DOL rejected all three of Carlson’s H-2A agricultural labor applications on the ground that they included pressing and bottling cider from apples imported from other growers which DOL considers to be a nonagricultural function. The term “agricultural labor or services” is defined in the INA by reference to the Regulations and other statutes: “agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26 and agriculture as defined in section 203(f) of title 29, of a temporary or seasonal nature” 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The Secretary of Labor’s regulations implementing the INA’s H-2A provisions state that "agricultural labor or services of a temporary or seasonal nature" means the following:

(1) "Agricultural labor or services". Pursuant to section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), "agricultural labor or services" is defined for the purposes of this subpart as either "agricultural labor" as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or "agriculture" as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be "agricultural labor or services", notwithstanding the exclusion of that occupation from the other statutory definition.

20 C.F.R. § 655.100(c)(1). Section 3121(g) of the Internal Revenue Code of 1954, 26 U.S.C. 3121(g), contains a lengthy definition, set forth in the footnote below, of the term "agricultural labor" which is also addressed in the implementing regulations promulgated by the Internal Revenue Service (“IRS”).⁵ As pertinent to the issue presented by Carlson’s H-2A application,

OALJ Rules of Practice and Procedure are applicable to *de novo* hearings on denials of H-2A applications. 20 C.F.R. § 655.112(b).

⁵ Section 3121(g) defines "agricultural labor" as including all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) Services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4) (A) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural

the IRS regulations state that “processing services which change the commodity from its raw or natural state do not constitute agricultural labor” and explain that “[f]or example the extraction of juices from fruits or vegetables is a processing operation which changes the character of the fruits or vegetables from their raw or natural state and, therefore, does not constitute agricultural labor.” 26 C.F.R. § 31.3121(g)-l(e)(4). The Fair Labor Standards Act (“FLSA”) contains the following definition of agriculture:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f). As is the case with the IRS regulations, DOL’s regulations issued under the FLSA exclude processing of agricultural commodities from the FLSA’s definition of agriculture:

Thus, "production" as used in section 3(f) does not refer to such operations as the grinding and processing of sugarcane, the milling of wheat into flour, or the making of cider from apples. These operations are clearly the processing of the agricultural commodities and not the production of them (*Bowie v. Gonzalez*, 117 F.2d 11).

commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

26 U.S.C. § 3121(g).

29 C.F.R. § 780.117(a) (citation in original).⁶ Nevertheless, DOL does consider the process of pressing cider by a farmer *from apples grown by that farmer* to qualify as agriculture under the “any practices performed by a farmer on a farm incidental to or in conjunction with such farming” clause of section 203(f). DOL Brief at 3, n.1. On the other hand, DOL has taken the position that pressing apples not grown on the farmer’s own farm falls outside of the FLSA’s incidental or secondary definition of agriculture. Significantly, Carlson concedes that DOL has “historically taken the position that the pressing of cider on the farm from apples not grown on the farm does not meet the secondary definition of agriculture”, and it states that it “does not dispute this point or contest the USDOL’s interpretation of the secondary definition of agriculture.” Carlson RDNH at 6, n.7; Carlson RBr. at 11-12.

Thus, the issue in this case is not whether Carlson’s pressing of apples purchased from other growers constitutes agricultural labor or services as that term is defined by the INA for H-2A purposes, but whether DOL should have approved Carlson’s H-2A application even though it contained a concededly nonagricultural function among the duties to be performed by the alien workers.

C. Carlson’s Arguments and Evidence

Carlson advances multiple arguments in support of its appeal. Initially, it acknowledges that the INA does not specifically authorize certification of temporary alien agricultural labor when the work to be performed includes duties that are not encompassed within the statutory definition of agriculture. Carlson RBr. at 2-3. Nevertheless, it argues that DOL is wrong in contending that because the INA does not specifically address situations where an employer seeks to include some nonagricultural duties in an H-2A application, it precludes H-2A certification of occupations that include any nonagricultural duties. Carlson RBr. at 3. On this point, Carlson states there is nothing in the INA, its legislative history or the Regulations to suggest that only occupations comprised exclusively of agricultural activities may be certified under the H-2A program, and it submits that that the most reasonable reading of INA section 101(a)(15)(H)(ii)(a) suggests that the Congress intended an expansive interpretation of the term “agriculture”. *Id.* Carlson also alleges, as discussed in greater detail below, that DOL

⁶ In the case cited in 29 C.F.R. § 780.117(a), the Court of Appeals for the First Circuit held that grinding sugar cane to produce raw sugar constitutes the “processing” of agricultural products and not the “production” of them, and hence employees engaged in sugar mills and transportation facilities were not exempt from the coverage of the FLSA on ground that they were engaged in “agriculture” as defined in the FLSA. In this regard, the Court stated,

The grinding and processing operation through which the sugar cane goes results in the production of raw sugar. Such an operation is similar to the milling of wheat into flour and the making of cider from apples.

Bowie v. Gonzalez, 117 F.2d 11, 17 (1st Cir. 1941). *See also Mitchell v. Budd*, 350 U.S. 473, 482 (1955) (affirming DOL’s position that employees engaged in “bulking” of tobacco, a process that changes the natural state of freshly cured tobacco and turns it into an industrial product, were not engaged in agriculture exempted from the FLSA, even though the farmer performing the bulking process also grew the tobacco); *Donovan v. Frezzo Brothers*, 678 F.2d 1166, 1170-1171 (3rd Cir. 1982) (affirming DOL’s determination that processing mushrooms into compost does not constitute agriculture within the meaning of the FLSA’s agricultural exemption and noting that DOL’s FLSA regulations are entitled to judicial deference, except in cases of flagrant abuse, in light of DOL’s expertise).

historically treated cider pressing, regardless of the source of the apples, as included within the definition of agriculture from 1976 when its H-2A regulations were published “until its arbitrary decision in 2004 to reverse that longstanding interpretation.” Carlson RBr. at 3-4.

Second, Carlson charges that DOL “disingenuously suggests that it lacks the authority under the current regulatory regime for making certification decisions regarding applications that combine agricultural and nonagricultural positions” because the INA, regulations and DOL’s own policy guidance provide a legally sufficient basis to issue certification decisions on an application that combines H-2A agricultural and H-2B nonagricultural duties. Carlson RBr. at 4-5. Specifically, Carlson states that INA section 288(c)(3)(A), 8 U.S.C. § 1188(c)(3)(A) and section 655.102(c) of the regulations, 20 C.F.R. § 655.102(c), as well as the ETA H-2A Program Handbook, direct DOL to apply the normal and accepted qualifications required by non-H-2A-employers in the same or comparable occupations and crops. Carlson RBr. at 5-6. Noting that it has presented evidence with its application that cider pressing is a common activity on New England fruit farms that is commonly performed by seasonal farm workers, rather than by a different workforce, Carlson contends that it has demonstrated that cider pressing is “precisely the type of occupational qualification the USDOL is authorized to find permissible in an H-2A application.” Carlson RBr. at 6. Carlson also disputes DOL’s characterization of its application as an H-2A/H-2B “hybrid” which would allow an employer, who is seeking aliens to perform nonagricultural labor, to sidestep the H-2B cap, asserting that the cider pressing duties at issue herein constitute a substantially minor portion of a Fruit Worker’s overall duties. Carlson RBr. at 4, 7. Carlson additionally points out that it has no advantage to gain from obtaining approval of its H-2A application because the H-2A program requires greater worker benefits and protections than the H-2B program. Carlson RBr. at 7-8.

Third, Carlson states that, contrary to DOL’s contentions, it has produced substantial documentary evidence showing that it was DOL’s longstanding practice prior to 2004 to certify H-2A applications which combined agricultural and nonagricultural duties, including cider pressing. Carlson RBr. at 8. In this regard, Carlson’s evidence shows that DOL approved 16 of its H-2A applications from 1998 through 2003 that listed cider pressing and/or bottling among the duties to be performed. PX 2. In addition, Carlson’s evidence shows that between 2000 and 2003, NEAC growers obtained DOL certification of 87 H-2A applications covering 459 workers that specifically listed cider pressing among the duties to be performed. PX 1; PX 3 (Affidavit of John Young, NEAC Executive Director). As further evidence of DOL’s alleged practice prior to 2004 of approving H-2A applications for jobs that included nonagricultural duties Carlson relies on the affidavit of Mr. Young who has been the NEAC Executive Director since 1993. PX 3. Mr. Young states that he is personally familiar with all H-2A applications files by NEAC members and that prior to the applications filed by Carlson in 2004, he knows of no instance in which an application was rejected for inclusion of cider pressing or where a grower was asked about the source of the apples to be used to make cider. *Id.* at 1-2. Mr. Young also states that all NEAC members who have had H-2A applications approved have been audited by DOL’s Wage and Hour Division for compliance with the H-2A program’s regulations as well as other applicable labor laws, that these audits routinely included inquiring into the sources of apples to determine compliance with the overtime provisions of the FLSA, that DOL agents were aware that some apples pressed for cider on NEAC farms were obtained from other growers, and that in no instance was any NEAC member ever cited for a violation based upon the grower’s use of H-

2A labor to press cider from apples purchased from other growers. *Id.* at 3. Based on this evidence, Carlson states that it operated under the reasonable assumption that H-2A applications including cider pressing and bottling duties would be accepted. Carlson RBr. at 9. Carlson also argues that DOL’s longstanding practice of approving H-2A applications which listed cider pressing among the duties to be performed by alien agricultural workers demonstrates that DOL exercised its discretion to interpret the INA to permit routine certification of applications combining agricultural and nonagricultural duties, and it submits that DOL can now only resort to rulemaking if it desires to change existing policy. Carlson RBr. at 10-11.

Finally, Carlson charges that DOL’s rejection of its H-2A application is “tantamount to refusing to permit growers to use temporary foreign labor to press and bottle cider”, and it claims that DOL’s decision “will create a significant economic hardship on New England apple growers because seasonal farm labor is very difficult to obtain, and many growers are dependent on the H-2 programs for seasonal labor.” Carlson RBr. at 12-13. Carlson states that DOL has a “serious responsibility to the regulated public” and that it has disregarded this responsibility by cavalierly dismissing as “irrelevant” Carlson’s economic concerns. Carlson RBr. at 13. As outlined above, Carlson asserts that DOL “also has a significant responsibility to engage in rulemaking if it implements a total reversal of its longstanding practice, as it is attempting to do here.” *Id.* Carlson thus requests that DOL “resume its longstanding practice of certifying under the H-2A program agricultural job opportunities in occupations in which workers normally and commonly also perform some duties that, under some circumstances, may be nonagricultural under the applicable program definitions” and it seeks an order directing DOL to immediately certify its H2-A application. Carlson RBr. at 13-14.

D. DOL’s Response

DOL does not deny that it has the authority to issue a regulation permitting certification of hybrid H-2A/H-2B applications, but it responds that the current framework adopted by Congress and DOL does not permit such certification. DOL Resp. at 2. In this regard, DOL notes that the INA only permits certification of H-2A applications that describe “agricultural labor” as defined in the Internal Revenue Code, the FLSA or through regulations issued by the Secretary of Labor, and that DOL has chosen to define “agricultural labor” solely by reference to the two statutes and has not added a definition of “agricultural labor” that includes some nonagricultural activities. *Id.* Since Carlson concedes that pressing another grower’s apples to produce cider is not “agricultural labor” under either the Internal Revenue Code or the FLSA, DOL argues that its H-2A application is not for “agricultural labor” under the INA or DOL’s implementing regulations. *Id.*

With regard to Carlson’s argument that the ETA H-2A Handbook reflects an exercise of DOL’s regulatory authority under the INA to consider common industry practices in ruling on H-2A applications for foreign agricultural labor, DOL responds that the Handbook is not a regulation and that, in any event, the language relied upon by Carlson is directed to the obligations of an H-2A applicant and is silent on whether it is appropriate for the RCO to accept a hybrid agricultural/nonagricultural application. That is, the Handbook requires an H-2A applicant to include “prevailing, normal or common practices” in its job offer and does not address what DOL must do in considering the application. *Id.* DOL similarly responds that the

sections of the INA and its implementing regulations cited by Carlson are also inapposite in that 8 U.S.C. § 1188(c)(3)(A) and 20 C.F.R. § 655.102(c) set standards for determining when a job qualification is appropriate and do not address, in any way, whether an H-2A application can include nonagricultural work in its job description. DOL Resp. at 2-3.

Regarding Carlson's "past practice" argument, DOL admits that it has been the agency's "longtime practice to certify H-2A applications that include cider-pressing in the job description." DOL Resp. at 3. However, DOL responds that its past practice "does not matter" because: (1) the INA only permits H-2A certification for "agricultural labor" and permits DOL to define "agricultural labor" only through the use of a regulation, so DOL's past practice cannot change what is permissible under the INA; and (2) none of the approved applications introduced by Carlson state that the foreign workers will be pressing apples purchased from other growers. Since the RCO in this case knew that the employees covered by Carlson's H-2A application would be pressing apples purchased from other farms, DOL contends that any past practice of approving H-2A applications that were silent as to the source of cider apples is simply irrelevant. *Id.* Also irrelevant, according to DOL, is Carlson's contention that DOL Wage and Hour investigators never cited Carlson, or any other NEAC grower, for a violation based on their use of H-2A labor to press apples imported from other growers. While DOL acknowledges that Carlson's representations in this regard may be true, it states that the RCO does not control the Wage and Hour agents whose functions are separate and distinct from those of the RCO whose responsibility is to examine an employer's H-2A application and determine if it meets the requisite standards. DOL Resp. at 3-4.

Lastly, DOL submits that Carlson's policy and adverse economic impact claims are irrelevant since the RCO is not empowered to make policy and is required to follow the procedures and rules laid out by the INA and the implementing regulations. DOL further responds that the RCO correctly concluded that the INA and DOL regulations required him to deny certification to Carlson's H-2A application, and it requests that this court affirm the RCO's decision not to accept Carlson's application. DOL Resp. at 4.

E. Discussion and Conclusions

Congress designed the H-2A program to balance two competing interests, that is, "to assure an adequate labor force on the one hand and to protect the jobs of citizens on the other." *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir.1977) (footnote omitted), *cert. denied*, 439 U.S. 803 (1978). Where these interests collide, courts are guided by "a given, that it has always been a Congressional policy to prefer domestic workers in all fields . . . [and] in case of conflict, wide leeway favoring domestic workers is given the U.S. Secretary [of Labor]." *Flecha v. Quiros*, 567 F.2d 1154, 1155 (1st Cir.1977), *cert. denied*, 436 U.S. 945 (1978). Accordingly, Carlson's argument that Congress intended an expansive treatment of the H-2A program is rejected, and I find that Carlson has not shown that DOL's position that the current scheme established by the INA and regulations precludes consideration of an H-2A application that includes nonagricultural duties is erroneous. In addition, I find that DOL's distinction between a grower using H-2A labor to press his own apples into cider, which DOL views as incidental to agricultural operations within the meaning of the FLSA and INA, and a grower using H-2A labor to process apples purchased from other growers, which DOL does not view as incidental to

agriculture, is entirely reasonable and strikes an appropriate balance between the competing interests of employers and the domestic workforce.

I also reject Carlson's other challenges to DOL's decision on its H-2A application. Carlson argues that the INA, implementing regulations and H-2A Handbook all provide DOL with the authority to certify H-2A applications which include nonagricultural duties such as pressing cider from apples not grown by the employing grower, but, as DOL points out, the INA, regulatory and Handbook provisions cited by Carlson all relate to an employer's obligations with respect to qualifications in an H-2A job offer and do not address whether the RCO can approve an H-2A application that includes nonagricultural duties. As for the claim that DOL has established through "past practice" an interpretation of the INA that permits an H-2A application to include cider pressing without regard to the source of the apples, I find that Carlson has not met its burden of proof under section 291 of the INA because it has failed to introduce evidence that any H-2A application that DOL approved prior to 2004 included pressing apples purchased from other growers.⁷ While DOL admits that Wage and Hour agents who conducted compliance audits of growers using H-2A labor may have been aware of the growers' use of H-2A workers to press cider from apples purchased from other growers, DOL explained that the Wage and Hour agents are not controlled by the RCO and perform a different function, namely, ensuring compliance with overtime rules. Moreover, acceptance of Carlson's "past practice" argument would necessitate a determination that DOL is estopped from disapproving its 2004 H-2A applications because it approved similar applications in the past and because Wage and Hour employees were aware of its use of H-2A labor for nonagricultural purposes and did nothing. However, estoppel against the government, if available at all, can only be invoked in extreme cases, and a party seeking to avail itself of the doctrine "must, at the very least, demonstrate that government agents have been guilty of affirmative misconduct." *Dantran, Inc. v USDOL*, 171 F.3d 58, 66-67 (1st Cir.1999) (affirmative misconduct requires more than simple negligence, and failure of prior Wage and Hour investigator to challenge employer's wage practice does not amount to affirmative misconduct necessary to equitably estop the government from later prosecuting employer for the wage practice). *See also U.S. v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985) (vagueness or lack of artistry by government bureaucrats not affirmative misconduct); Carlson has neither alleged nor shown that the Wage and Hour employees' failure to challenge the practice of using H-2A workers to process apples imported from other growers amounted to affirmative misconduct. Therefore, any suggestion that DOL is estopped by past action or inaction from denying Carlson's H-2A application is without merit.

⁷ INA section 291, in relevant part, provides:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be.

8 U.S.C. § 1361.

Finally, I conclude that Carlson's policy and economic impact arguments exceed the scope of *de novo* consideration of whether Carlson's H-2A application comports with the INA and H-2A program regulations. Such arguments are more appropriately addressed in a request for rulemaking by DOL or to the Congress.

Based on the foregoing, I conclude that the RCO properly declined to consider Carlson's H-2A application because it included nonagricultural duties.

III. Order

The Respondent's decision denying the Petitioner's H-2A application is **AFFIRMED**.

SO ORDERED.

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DANIEL F. SUTTON
ADMINISTRATIVE LAW JUDGE

Boston, Massachusetts