



Issue Date: 21 March 2008

CASE NO.: 2008-TLC-00018

IN THE MATTER OF

**DAYBROOK FISHERIES, INC.,
Employer**

DECISION AND ORDER

PROCEDURAL STATUS

This matter arises under the provisions of the Temporary Labor Certification provisions of the Immigration and Nationality Act (the Act).¹ It involves a request by Employer, Daybrook Fisheries, for a *de novo* hearing of a decision by Respondent United States Department of Labor Office of Foreign Labor Certification.

On 20 Feb 08, Respondent received Employer's H-2A² request for the approval of 143 purse seine fishermen positions from 5 Apr 08 to 5 Nov 08. On 25 Feb 08, Respondent issued a notice of denial, based on its determination that the fishermen are not agricultural laborers and that the application should have been filed under the H2-B program.³ On 2 Mar 08, Employer filed a request for a *de novo* formal hearing,⁴ arguing that Respondent's interpretation of the regulations is incorrect and contrary to the statute.

I received the case on 6 Mar 08 and conducted a telephone conference call with counsel for Employer and Respondent the same day. Employer's counsel asked if there was any possibility the denial could be reconsidered, particularly in light of the equitable and public interest considerations raised in its request for *de novo* review. Respondent's counsel replied that there was no room in the interpretation of the regulations for discretion in this case, no matter how compelling the equitable argument might be. He reminded Employer's counsel that the application might be approved if submitted under H-2B, but Employer's counsel responded that an H-2B application could not be approved in time to meet Employer's needs for labor during the relevant fishing season, which begins in April and ends in November.

¹ 8 U.S.C. §§1101(a)(15)(H)(ii)(a); 1188(c).

² 20 C.F.R. § 655.9.

³ 20 C.F.R. § 655.1.

⁴ 20 C.F.R. § 655.104(c); 20 C.F.R. § 655.112.

The parties agreed that there was no dispute as to the facts relating to the intended use of the requested workers or as to the facts relating to the equitable arguments presented by Employer. There was a consensus that no benefit would be derived from live testimony or arguments. Both parties waived their right to a personal appearance and agreed to a decision based on the written record.

Employer indicated its previously submitted request for a *de novo* review and attached exhibits would suffice as its filing and argument. Respondent was ordered to file an answer brief by 12 Mar 08 and Employer was given the opportunity to file a reply brief by 18 Mar 08.

LAW

The statutory provision under which the regulations at question in the case are promulgated is the Immigration and Nationality Act. It provides for the temporary admission of

(H) an alien ... (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform 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, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, ...⁵

The statute also provides for the submission and approval of employer petitions for the admission of such workers and clarifies such workers as H-2A workers.⁶

The regulations promulgated by the Secretary of Labor provide that

(c) For the purposes of this subpart, "agricultural labor or services of a temporary or seasonal nature" means the following:

(1) "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. For informational purposes, the statutory provisions are quoted below:

(i) "*Agricultural labor*". Section 3121(g) of the **Internal Revenue Code of 1954** (26 U.S.C. 3121(g)), quoted as follows, **defines the term "agricultural labor" to include** 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,

⁵ 8 U.S.C. § 1101.

⁶ 8 U.S.C. § 1188(i)(2).

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 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, furbearing 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.

(ii) "Agriculture" Section 203(f) of Title 29, United States Code, (section 3(f) of **the Fair Labor Standards Act of 1938**, as codified), quoted as follows, **defines "agriculture" to include:**

(f) * * * 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 as 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.

(iii) "Agricultural commodity". Section 1141j(g) of Title 12, United States Code, (section 15(g) of the **Agricultural Marketing Act**, as amended), quoted as follows, **defines "agricultural commodity" to include:**

(g) * * * **in addition to other agricultural commodities**, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of Title 7.

(iv) "Gum rosin". Section 92 of Title 7, United States Code, quoted as follows, defines "gum spirits of turpentine" and "gum rosin" as--

(c) "Gum spirits of turpentine" means spirits of turpentine made from gum (oleoresin) from a living tree.

(h) "Gum rosin" means rosin remaining after the distillation of gum spirits of turpentine.⁷

Under Section 3121(g), employees raising, feeding, and caring for frogs and various kinds of fish on a farm are agricultural labor, even though frogs and fish are properly classified as wildlife.⁸ "However, the mere maintenance of a natural environment is not considered to be the operation or maintenance of a farm and, generally, the services performed in connection therewith, including services relating to the guarding of the property and the trapping or taking of fur-bearing animals and wildlife therefrom, do not constitute 'agricultural labor' within the meaning of [section [3121(g)]."⁹

Unless specifically provided for, administrative adjudicative bodies lack the inherent authority to rule on the validity of a regulation or invalidate regulations as written.¹⁰ It is clear that, upon review of administrative actions, Article III judges must give deference to an agency's reasonable interpretation of its own regulations and may not substitute their interpretation for that of the agency.¹¹ This is particularly true where a regulatory provision is ambiguous.¹² In determining the agency's interpretation, it is the "DOL's interpretation, not the ALJ's or the BRB's interpretation, to which [Article III courts] owe the usual deference that courts give agencies' interpretations of their own regulations or governing statutes."¹³

⁷ 20 C.F.R. § 655.100 (emphasis added).

⁸ Revenue Ruling (69-364).

⁹ Revenue Ruling (57-217).

¹⁰ *Dearborn Pub. Schools*, 1991-INA-222 (Dec. 7, 1993) (en banc).

¹¹ *Cf. e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹² *Smith v. Harvey*, 458 F.3d 669 (7th Cir. 2006).

¹³ *Old Ben Coal Co. v. Director, Office of Workers' Compensation Programs*, 292 F.3d 533, 538 (7th Cir., 2002).

DISCUSSION

Employer initially argued in its request for a *de novo* hearing that the regulations relied upon in the denial were in direct contradiction to Congressional authority and that public policy and equitable considerations weighed heavily in favor of granting the request. However, in its reply brief it conceded, for the purposes of this case, that the administrative law judge under the Act cannot consider the public interest or find the regulations void as written.

Thus, the real question is one of regulatory interpretation. Nowhere in the regulation is there an inclusion of fishermen. The regulation does incorporate by reference definitions from the Internal Revenue Code and Fair Labor Standards Act, which both in turn incorporate definitional language from the Agricultural Marketing Act. In its definition, that Act provides a list that includes as a preface the language “in addition to other agricultural commodities.”

That is the language upon which Employer rests its contention that the alien fishermen it seeks to hire would be agricultural workers. In support of that contention, Employer accurately points out that the revenue rulings and Code sections cited in Respondent’s answer brief do not specifically address the “in addition to other agricultural commodities” incorporated by reference in Section 3121(g)(3) through the Agricultural Marketing Act. On the other hand, Employer’s reading of the revenue rulings may be too narrow, as both appear to have considered and relied on Section 3121(g) in its entirety and not simply subsections (1) and (2).

The phrase Employer relies upon is clearly ambiguous and at least two levels of incorporation removed from the controlling regulation. In cases of ambiguous regulatory language, courts generally give deference to the agency’s reasonable interpretation. This is a *de novo* hearing and requires more than a simple review for legal sufficiency. However, it makes little sense to apply a different standard in terms of determining the applicable substantive regulatory standard from the one that will be applied on review by an Article III court. Thus, I must give deference to any reasonable agency interpretation of the regulation.¹⁴

Given the regulatory construction and language, it appears that it was not the intent of the agency to include the fishermen Employer seeks to hire within the definition of H-2A agricultural workers. They would not fall within the specified Internal Revenue Code or Fair Labor Standards Act definitions of agricultural workers. The ambiguous language in the Agricultural Marketing Act does open the door for Employer to look to and cite other statutes in support of its interpretation. However, those were in the context of defining agricultural products for labeling the country of origin or other issues related to product exports.¹⁵ Although those citations are not wholly irrelevant, in that they relate to the ambiguous language, they do not make the agency interpretation unreasonable.

¹⁴ An argument could be made that there is no agency interpretation until a final agency determination is made. Since that will not happen until administrative review of the case is complete, administrative law judges are not required to give deference to any agency regulatory interpretation, reasonable or not. Such an argument does not fully account for the limitations on the administrative law judge as a finder of law and is contrary to the case law cited above. However, even if I were to give no deference *ab initio* to the Respondent’s position on the interpretation of the regulation, my decision would be the same, as I find it to be a more likely reflection of the agency’s intent.

¹⁵ See, e.g., 7 U.S.C. §§ 1638, 5602(7).

In sum, the compelling nature of Employer's public interest argument and equitable position notwithstanding, its argument that purse seine fishermen are H-2A agricultural workers within the provisions of the Act and implementing regulation must fail.

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

A

PATRICK M. ROSENOW
Administrative Law Judge