



**Issue Date: 21 May 2009**

**CASE NO.: 2009-TLC-38**

**IN THE MATTER OF**

**BARRETO FORESTRY CONTRACTING, INC.**

**Employer**

## **DECISION AND ORDER**

### **BACKGROUND**

This case 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), and implementing regulations set forth at 20 C.F.R. Part 655.

On February 6, 2009, Barreto Forestry Contracting, Inc., (Employer) filed an application with the U. S. Department of Labor (DOL) seeking the hiring of H-2A temporary alien agricultural workers. By letter dated February 23, 2009, the Certifying Officer denied their application, and by notice of appeal filed March 6, 2008, Employer sought a de novo administrative hearing before this office on the grounds the denial was in error and that Employer's application fell within the scope of agricultural labor or services under 20 C.F.R. 655.

The appeal was assigned to the undersigned on March 26, 2009, and a telephonic conference was that day conducted with Employer's Counsel and an attorney from the Solicitor's office. In that conference it was agreed the expedited requirements of the regulations would be waived, and that prior to conducting a de novo hearing Employer would supplement the documentary evidence previously offered in an effort to resolve the matter without the need of a trial. In the weeks that followed, five additional telephone conferences were conducted, but by April 17, 2009, the parties acknowledged they were at an impasse and unable to resolve the matter and a de novo hearing was scheduled for May 4, 2008.

At the time and place designated for hearing, present were the Employer, David Barreto, his attorney, three witnesses (Clinton Andrews, Richard Green, and James Elledge), the court reporter and the undersigned. Participating by telephone was Harry Sheinfeld, Counsel for DOL and the Certifying Officer, Robert Myers. In addition to the

testimony of Mr. Barreto and his three witnesses, placed into evidence as ALJ Exhibit 1 was the original administrative record; ALJ Exhibit 2 the notice of de novo hearing and as Employer's Exhibit 1, the supplemental materials Employer had furnished the Solicitor's office in an attempt to resolve the matter without further litigation.<sup>1</sup>

## **STATEMENT OF THE CASE**

In the cover letter over Employer's application, the need for temporary laborers was explained as follows:

Barreto Forestry Contracting, Inc has been experiencing difficulties in hiring laborers to work during our seasonal months from April 1 2009 to December 15, 2009. We are a Forestry Contractor located in Gloster, Mississippi performing manual labor necessary to develop, maintain, or protect forest, forested areas, and woodlands through such activities as raising trees and planting, transporting tree seedlings, fertilizing, spraying to control unwanted vegetation and insects pests, and diseases harmful to trees. Other duties may include building erosion and water control structures and fences using hand tools. Due to our work load we are in need of additional laborers from April 1, 2009 to December 15, 2009 to work at our locations in Lamar, Pearl River, Hancock and Walthall County.

In the last two planting seasons we have found ourselves short of tree planters and find ourselves struggling to meet our contractual obligations and projected deadlines because we are unable to hire local workers for our temporary needs. We have advertised through the Natchez Democrat, placed flyers in local businesses, and by word of mouth for Forestry Workers to fill out temporary positions. To date, we have not been successful in finding workers willing to work in these positions.

(ALJ Exhibit 1, p. 63).

Following a review of the materials furnished by Employer and found at ALJ Exhibit 1, the Certifying Officer denied the application, giving as his reasons the following:

Per DOL regulations at 20 CFR 655.10(d)(1)-(2) require that the job opportunity consist of agricultural labor or services. On February 17, 2009 this office issued a Notice of Deficiency Letter requiring the employer to describe why this job opportunity is agricultural labor or services. In response received

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<sup>1</sup> At the conclusion of the hearing it was agreed the expedited requirements of the regulations would continue to be waived and that the parties would have up to an until May 18, 2009, to file post-trial briefs, after which I would have until June 1, 2009, to issue my Decision and Order.

on February 20,2009 the employer states that they perform manual labor necessary to develop, maintain, harvest and/or protect tree farms, forested areas, and woodlands through such activities as raising and harvesting trees, transporting tree seedlings, fertilizing, and spraying to control unwanted vegetation and insects, pests, and diseases harmful to trees. The employer failed to show that these activities are logging activities and/or activities performed by a farmer or on a farm as an incident to or in conjunction with such farming. Therefore, Barreto Forestry Contracting, Inc. failed to provide valid arguments that this job opportunity meet the requirements at 20 C.F.R. 655.100(d)(1)-(2).

(ALJ Exhibit 1, p. 6).

In response to the denial, and in Employer's notice of appeal the reasons for the appeal and request for de novo hearing were set out as follows:

20 C.F.R. 655.100(d)(1) specifically states under the Heading "Agricultural Labor or Services," that agricultural labor and services includes agriculture as defined in 29 U.S.C. 203(f), and that an occupation that fits within that definition of "agriculture" shall be "agricultural labor or services" notwithstanding the exclusion of that occupation from other statutory language. Then in 20 C.F.R. 655.100(d)(1)(ii)(f) Agriculture is defined as "farming in all its branches and among other things includes...growing, and harvesting any agricultural or horticultural commodities...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..." This definition includes "farming in all its branches" and forestry and the planting of trees is a branch of farming. Further, there simply is no statement in the definition of "Agricultural commodity" in 12 U.S.C. 1141j(g) that excludes timber or forestry products; rather, it specifically states, "in addition to other agricultural commodities,." Therefore, there can be no finding that planting timber, harvesting timber, preparing soil for the planting of timber, or building erosion controls around planted timber is not within the scope of agricultural labor or services.

There is no doubt that in the State of Mississippi, timber is an agricultural commodity. In fact, the Mississippi Legislature has set forth in Miss. Code. Ann. Section 49-19-3, that the State Forester is "[t]o encourage forest and tree planting for the production of a wood crop..." See also Miss. Code Ann Sections 29-3-45 and 49-19-111. Therefore, tree planting in Mississippi definitely includes agricultural labor and services, as a crop and harvest is produced.

Further, as demonstrated by the application submitted, including the letter from Randy Browning of the United States Department of Interior, the temporary work required at Barreto Forestry involves more than simply planting a crop, or harvesting a crop, the work also includes herbicide site preparation by hand, building erosion and water control structures, and combating pest. All of these activities involve agriculture and an agricultural commodity.

(ALJ Exhibit 1, p. 2)

## **DISCUSSION AND FINDINGS**

The Solicitor urged at the hearing, and again set out in DOL's post-hearing brief, that the labor for which Employer seeks approval is not by definition agricultural labor or services under 20 C.F.R. 655.100(d)(1)-(2). Specifically, the Solicitor states that because the H-2A program allows certification only for agricultural labor and because forestry work on tree farms is not within the definition of agriculture for purposes of the H-2A program, the Employer's application must be denied.

Employer, on the other hand, argues that its activities meet the definition of "agricultural labor or services of a temporary or seasonal nature" and entitle Employer to have approval of its application for H-2A temporary alien agricultural workers.

I agree with Employer and reverse this Certifying Officer's denial. Why DOL has chosen to be hyper-technical with this application is not fully appreciated by the undersigned.

The term "agricultural labor or services" is defined in the INA by reference to the Regulations and other statutes as: "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..." 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(d)(1)-(2).

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).

The definition obviously includes “farming in all its branches”, and I find nothing in the definition of “agricultural commodity” in 12 U.S.C. 1141j(g) that excludes timber or forestry products. As far as the activities not being performed by a farmer or on a farm incident to or in conjunction with such farming operations, the supplement filed by Employer marked Employer’s Exhibit 1 contains the affidavit of Clinton Andrews stating under oath that Employer “performs services to personal farmers on personal farms,” all of which was more fully verified by the sworn testimony of the witnesses at the de novo hearing and succinctly enumerated in Employer’s post-hearing brief as follows:

1. Application of herbicide to control unwanted vegetation (P. 16 Ln. 3-4);
2. Boundary Line Maintenance (P. 16 Ln. 4);
3. Remove diseased trees (P. 17 Ln. 15);
4. Repair fences (P. 18 Ln. 15);
5. Erosion Control (P. 18 Ln. 17);
6. Plant grasses and acorn producing trees for wildlife (P. 19 Ln. 22-24);
7. Cooperate with landowners’ plan for crops and wildlife (P. 20 Ln. 5-7);
8. Follow a plan for the conservation of wildlife, soil and water (P. 20 Ln. 8-12);
9. Barreto Forestry is not simply in the tree planting business, that is simply a part of the business that takes place during a three (3) to four (4) month time period of the year (P. 23 Ln. 5-6) and he requests H-2B workers for that time period (P. 21. Ln. 19-21);2-
10. Barreto Forestry purchases herbicides to spray for private landowners (P. 27 Ln. 22-23);
11. The spraying of herbicides is for invasive weed control (P. 28 Ln 7);
12. Barreto Forestry is hired to kill unwanted vegetation, not to cut timber (P. 29 Ln. 2-6);

13. The use of the herbicides during the subject peak time period April 15 through December 15 is very time sensitive (P. 30 Ln. 3-9);
14. The control of unwanted vegetation has nothing to do with tree planting (P. 30 Ln. 16);
15. Considerations are made for such things as wildlife, pasture land and crop land (P.32 Ln. 14-18);
16. Barreto Forestry is involved in brush control, boundary line maintenance, site preparation, and prescribed burning (P. 34 Ln. 10-12);
17. Erosion control, disease control and water conservation is part of the plan Barreto Forestry takes part in (P. 36 Ln. 1-6; P. 37 Ln. 16-22);
18. Barreto Forestry's activities are involved in assisting private farmers with streams of income including pine straw, pine cones, wildlife easements and hunting leases (P.40 Ln. 13-16; P.47 Ln. 16-21; P. 51 Ln. 7-25; P.52 Ln. 1-3);
19. Barreto Forestry's activities are involved in the relocation of wildlife and preservation of endangered species such as the gopher tortoises (P. 40 Ln. 17-19; P. 50 Ln. 5-17);
20. Barreto Forestry's activities include grass production for farmers (P. 41 Ln. 2-3);
21. Barreto Forestry is involved in plans to control fire ants (P. 42 Ln. 1-5);
22. Barreto Forestry is brought in to follow a "prescription" to kill certain plants, and instructed on what types of native grasses or species of trees necessary for wildlife to protect (P. 43 Ln. 11-15); and
23. Barreto Forestry performs services for private farms with cattle operations, chicken houses and hay production (P. 44 Ln. 19, 25).

In sum, I do not agree with DOL's position that the definitions of agriculture expressly excludes the proposed forestry work sought to be performed by Employer, nor do I agree that Employer has not shown it performs work on private farms incident to or in conjunction with such farming. In other words, I find the activities explained by Employer sufficient to fall within the definition of agricultural labor or services.

The Certifying Officer's denial of labor certification on the grounds given is reversed.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**