



Issue Date: 02 February 2011

OALJ Case No.: 2011-TLC-00164

ETA Case No.: C-10340-25712

In the Matter of

CAMP RIO VISTA, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On January 19, 2011, Camp Rio Vista, Inc. (“the 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. § 655.171(a). On January 25, 2011, 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 business days after receiving the file to issue a decision on the basis of the written record. 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On December 1, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification for nine (9) farm workers from February 5, 2011 to December 20, 2011. AF 214-234.¹ In its statement of temporary need, the Employer stated the following:

The seasonal workers help with clearing cedar stumps, prickly pear cactus, thick brush, and surface rocks in the pasture. They will help build new or repair old barbed wire pasture and privacy fences. In the months of February through May the workers will focus on clearing cedar, brush, and cactus. From May thru August the workers will focus on removing surface rocks. From August through December the workers will focus on removing surface rock and repairing or building pasture and privacy fences. We have a temporary need for these workers because much of the winter the temperature is too low and most workers suffer from allergic reactions, because during winter, cedar trees emit strong reactants in the air that cause problems to most people working outside.

AF 215. The Employer described the job duties as clearing the land of cedar, cactus, thick brush, and surface rocks, building pasture and privacy fences, and helping with the ranch horses and any other ranch hand labor. AF 217.

On December 13, 2010, the CO issued a *Notice of Deficiency* (“NOD”), finding five deficiencies with the Employer’s application. AF 188-203. Among the five deficiencies, the CO found that based on the job description in the application, it is presumed that the job opportunity falls under the H-2B program and does not meet the definition of agricultural labor or services as defined by 20 C.F.R. § 655.103(c). AF 190. The CO required the Employer to either provide a detailed explanation describing why this job opportunity meets the definition of agricultural labor or services, or file an application under the H-2B program. AF 190.

The Employer responded to the NOD on December 20, 2010 and submitted a statement describing why the job opportunity was agricultural in nature. AF 160-187. The Employer’s statement provided, in relevant part:

Camp Rio Vista, Inc is in fact a summer camp that operates two months out of the year, but includes over 100 acres of ranch land to care for. The 6 workers needed under the H-2A visa program are needed to maintain and improve the ranch land and also help care for the horses. They are not being recruited for help with the summer camp.

Cedar clearing is critical to maintaining a property. If not cleared, the property will become overrun and overpopulated by second growth cedar. Second growth cedar over consumes water, which kills native grasses, erodes the soil, and devalues the land. It also makes the land unsuitable for grazing and horseback riding.

¹ Citations to the 234 page Administrative File will be abbreviated “AF” followed by the page number.

The workers will also help with clearing the pasture land of cactus and surface rocks, which will help native grasses to grow and thrive.

AF 160. On December 29, 2010, the CO issued a second NOD, finding two deficiencies with the Employer's application. AF 155-159. The CO determined that the Employer's response to the NOD did not sufficiently describe the difference between Camp Rio Vista's operations as a summer camp from Camp Rio Vista's operations as a ranch, and therefore, it was unable to determine whether the job opportunity consists of agricultural labor or services. Thus, the CO required the Employer to submit a written explanation providing details outlining the difference between its two operations including the FEIN information, its use of horses, if the Employer raises cedar as a commodity, and any other agricultural commodity that the ranch produces. AF 157. The Employer responded to the second NOD on January 7, 2011. AF 143-154. The Employer's written explanation provided that:

Camp Rio Vista, Inc. is one business that operates under one FEIN number, but includes acres of ranch land to care for, improve, and utilize, and is not just a summer camp. The workers needed under the H-2A visa program are needed to maintain and improve the ranch land. They are not being recruited to be part of the summer camp. We have a separate staff of over 100 people that are hired for just June through July that work at our camp facilities on the property.

In addition to the below agricultural services of clearing cedar and rock, the workers are also involved in the prepping, planting, maintain, and harvesting of a large organic garden that consists of corn, green beans, tomatoes, yellow squash, zucchinis, melons, and peppers.

[...]

Cedar is not being used as a commodity, but is being cleared to bring back the native grasses, potential of dry creeks starting to run again, and to have the potential to graze more animals.

AF 148. On January 13, 2011, the CO denied the Employer's application, finding that the job opportunity did not involve agricultural labor or services as defined by 20 C.F.R. § 655.103(c), and therefore was not eligible for the H-2A program. AF 140-142. Specifically, the CO determined:

The employer did not provide details as to what animals will be grazing other than horses, nor did it provide information on it utilizing animals as a commodity. The employer did not indicate if horseback riding is a service used in conjunction with

its operations as a summer camp or if horseback riding is a commodity it is selling to the public. The employer also did not indicate if the large organic garden was being utilized to supply the needs of the summer camp, nor if the vegetables were being raised as a commodity. Furthermore, other than mentioning horseback riding, the employer did not provide details as to how the horses were being utilized in the context of its ranch operations.

Since the employer failed to provide adequate explanation and documentation regarding why its job opportunity meets the definition of agricultural labor or services, the employer's application is being denied for nine (9) workers.

AF 142. The Employer requested expedited administrative review on January 19, 2011, attaching copies of its certified applications for the same position for the past four years. AF 1-139. The CO submitted an appellate brief, arguing that the job duties listed in this application resemble landscaping duties, for which an H-2B application would be appropriate.

DISCUSSION

In order to establish eligibility for the H-2A program, an agricultural employer must establish that it has a temporary or seasonal need for agricultural labor or services. 20 C.F.R. § 655.130; 20 C.F.R. § 655.161. At issue in this case is whether the Employer has demonstrated that the job opportunity consists of agricultural labor or services. The applicable regulation at 20 C.F.R. § 655.103(c) provides:

(c) *Definition of agricultural labor or services.* For the purposes of this subpart, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed below.

(1)(i) *Agricultural labor* for the purpose of paragraph (c) of this section means all service performed:

(A) 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 fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, 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;

(C) 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;

(D) 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;

(E) in the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(iv) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, 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 year in which such service is performed;

(F) The provisions of paragraphs (c)(1)(iv) and (c)(1)(v) of this section 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

(G) 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.

(ii) As used in this section, 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.

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means 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 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. See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) 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. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

The Employer does not proffer which of the above definitions of agricultural labor or services encompasses the job opportunity that is the subject of this application. While the Employer listed numerous fruits and vegetables that it grows on its land in its second response to the NOD, there is no indication that the produce is in any way a commodity.² The Employer stated that it does not raise or clear cedar as a commodity. AF 148. Therefore, while the Employer asserts that it is a ranch, it is not a ranch that is involved in the raising of any agricultural or horticultural commodities, and therefore is not a farm under 20 C.F.R. § 655.103(c)(1)(ii). Because the Employer is not a farm, the job opportunity cannot be “agricultural labor” as defined by 20 C.F.R. § 655.103(c)(1)(i)(A), (B), (D), (E), or (G). Nor does the job opportunity fall into the definition of “agricultural labor” under 20 C.F.R. § 655.103(c)(1)(i)(C), because the labor on the Employer’s land is not in connection with the production or harvesting of any commodity. Lastly, the job opportunity does not fall under the definition at 20 C.F.R. § 655.103(c)(1)(i)(F), because it does not involve commercial canning or the freezing of a commodity. Therefore, I find that the job opportunity in this application does not fall under any of the types of agricultural labor under the IRS Code.

Next, I consider the definition of agriculture under the Fair Labor Standards Act (“FLSA”). I find that the job opportunity in this application also does not fall under the FLSA definition of agriculture, as provided in the H-2A regulations at 20 C.F.R. § 655.103(c)(2), because although it has fur-bearing animals (horses) on its property, they are not used primarily for the raising of agricultural or horticultural commodities. Similarly, clearing cedar, surface rocks, repairing fences are not agricultural work under the FLSA definition of agriculture. While these duties may serve a vital purpose, they are not agricultural and therefore not eligible for the H-2A program.

² Moreover, the job duties of the “farmworkers” in the application involve clearing cedar stumps, prickly pear cactus, thick brush, and surface rocks, repairing fences, and do not include any cultivation of these fruits and vegetables. AF 160.

Based on the foregoing, I find that the CO properly denied certification because the Employer has not established that the job opportunity in the application is agricultural.³

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

³ It appears that the Employer has received temporary labor certification several times for this same job opportunity in previous years. While undoubtedly this denial has caused the Employer confusion and frustration, the fact that the CO has not enforced this regulatory requirement in the past does not prevent it from now correcting this oversight. I am similarly bound by the clear language of the regulations.