



**Issue Date: 30 December 2014**

BALCA Case No.:2015 -TLC-00008  
ETA Case No.: H-300-14316-371184

*In the Matter of:*

**ANTHONY MOCK,**  
*Employer.*

**Before: JOHN P. SELLERS, III**  
U.S. Administrative Law Judge

### **DECISION AND ORDER**

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration, and the written submissions of the parties.

### **BACKGROUND**

On October 29, 2014, the Employer, Anthony Mock (“the Employer”), filed an *Application for Temporary Employment Certification* with the U.S. Department of Labor (“the Department”), Employment and Training Administration (“ETA”). AF 60-68. In this application, the Employer requested H-2A temporary-labor certification for two “Farmworker[s]” from January 6, 2015, through April 30, 2015, based upon a purported seasonal need. The job duties were described as follows: “Care and tend for cattle in winter stalls during cold weather months. Calve out calves and care for calves and nursing mothers. Shop work and general facility and equipment maintenance. Transporting hay.” AF 61.

Additionally, the Employer provided the following statement of temporary need:

Anthony Mock is a cattle and grain farming operation in central North Dakota. Traditionally mixed farming operations in the Dakota’s [*sic*] has a fixed calving season in the cold weather months when grain is not being produced. Seasonal sickness also increases cattle work loads during this time of the year, causing a need for additional help. During this period of time the cattle are located in winter stalls, where the winter weather and lack of pastures for feeding causes

much additional cattle maintenance duties. We also haul hay that we previously produced through this period of time as well. Once the weather warms in April the cattle are taken back out to summer grazing pastures where they require minimal care. Therefore, we hire temporary seasonal cattle workers between January and April of each year.

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The Employer's application was reviewed by the Certifying Officer ("CO"), who issued a Notice of Deficiency dated November 19, 2014. AF 45-48. The CO determined that the Employer had failed to prove that it had a temporary or seasonal need for farmworkers between January 6, 2015, and April 30, 2015. Specifically, the CO noted that previous applications had been certified under the business name of Mock Farms, with the same worksite address as contained in the present application. The CO remarked that the two previous certifications for Mock Farms were for employment periods between for March 1, 2013, through December 31, 2013, and for March 1, 2014, through December 31, 2014, respectively.

The CO further reasoned that although the previous applications had been filed "under different employer names," because all applications were for farmworkers at the same worksite, the two different business entities of Mock Farms and Anthony Mock were "interlocking" in nature and therefore their "separate corporate forms [were] inconsequential." AF 47. According to the CO, the duties described in each application fell within the SOC (O\*Net/OES) occupation code and title for 45-2903 "Farmworker," and therefore represented the same job opportunity for purposes of the H-2A program. The CO added: "Furthermore, the employer's worksite, experience requirement and similar job duties (care for calves and nursing mothers during the spring months; fencing and haying) indicate that there is a full time need for Farmworkers, Farm, Ranch, and Aquacultural Animals at this location." The CO therefore instructed the Employer to explain "why its job opportunity is seasonal or temporary." Moreover, the Employer was advised that its explanation "must provide in detail why its dates and need have significantly changed from the established season of March through December to its current request of January through April."

The Employer responded to the Notice of Deficiency by letter dated November 25, 2014. AF 29-31. The Employer explained that it was a "family farming operation" which began in 1993 and was located in central North Dakota and was owned solely by Anthony Mock and his wife, Mandi Mock. The Employer further described itself as "a large scale farming operation which grosses approximately \$1,200,000 in farming revenue each year." According to the Employer, it owns its own land and equipment and employs its own permanent and temporary workers.

In contrast, the Employer stated that Mock Farms, which began operation in 1982, was solely owned by Daniel Mock, Anthony Mock's brother. Both brothers, according to the Employer, inherited some of the land that they farmed from their father. According to the Employer, the land the two brothers had inherited had been in the family for generations, and because of that fact they "shared the farming headquarters where the shop and some of the barns are located." However, the Employer asserted, this was the only association between the two

entities. Other than sharing the shop and some of the barns, the Employer stated that the “land, equipment, workers, etc., are all assets and employees of each particular entity and are not shared in any capacity.” Neither entity, the Employer stated, shared ownership with the other; the books were kept separately; and there was no intermingling of finances “in any capacity.” As stated by the Employer, “These are simply two brothers that run their own separate businesses that share a shop and other buildings which is the only portion of their farming land that has a physical address. The two entities do not even produce all of the same commodities.”

To support its position that the brothers’ farming operations were two separate entities and not interlocking as found by the CO, the Employer enclosed a copy of its IRS Form 1040 in order to demonstrate that “Anthony Mock and Mandi Mock are their own sole farming entity with their own tax ID number that is shared with no other individual.” Moreover, the Employer provided print-offs from the Environmental Working Group’s (“EWG”) online Farm Subsidy Data “which annually monitors and posts all farm subsidy payments from the federal government to U.S. farmers.” The Employer pointed out that Anthony Mock and Daniel Mock were separately listed on the database, indicating that they received separate subsidy payments from the federal government for their separate operations.

Further, the Employer asserted that Anthony Mock and Mock Farms produced their own commodities in their own proportions “based upon [their] own farming philosophies and management styles.” To support this contention, the Employer pointed to the EWG’s Farm Subsidy database, which, according to the Employer, showed “the amount of subsidy for each crop produced, which is vastly different per farming entity.” As stated by the Employer, “Each entity is managed by separate persons that have separate styles of farming and managing their own assets.”

With regard to the seasonal and temporary nature of the farm work, the Employer first referred to its statement on ETA Form 9142. In response to the CO’s request that the Employer explain “why its dates of need have changed from the established season of March through December to the current request of January through April,” the Employer protested that this request was predicated upon the false assumption that the Employer and Mock Farms were the same farming entity. The Employer observed that it had previously filed H2-A applications stating the same need as its present application (January through April) since 2011, whereas, in contrast, Mock Farms had requested the dates of need of March through December “for many years.”

In further explanation of its different needs for seasonal and temporary work, the Employer stated:

Mixed grain and cattle operations in the Dakota’s [*sic*] operate under differing sets of philosophies. Calving and turning out cattle is always seasonal in these operations; however, different farmers have different ideas of the best time to perform certain duties based on an array of factors. Some farmers calve in the fall, others in the winter and others in the spring. While some operations split into two calving periods between the seasons. The mentalities here are based upon

weather, labor shortages, and ever changing agriculture[al] science...suggesting different approaches.

In support of its contention that different livestock producers may have differing approaches to “seasonal livestock production in the Dakota’s [sic],” the Employer submitted an NDSU Extension Service article entitled “When Should I Turn Out the Bulls?” According to the article, those utilizing the CHAPS system use the date the third mature cow calves as a triggering event. The article then stated that historical data indicated that the date the third mature cow calved was March 12 in 2000, March 10 in 2002, March 13 in 2003, March 13 in 2004, and March 13 in 2005. The article noted that even taking into consideration those producers who utilize the CHAPS program, and the changing nature of individual herds, “the middle of March remains the general time period producers want calving season to start.” However, the article noted that “though calving time has not changed dramatically, attitudes are changing primarily due to an aging work force and a shortage of labor.” The article then stated: “Regardless of the reason, when current producers find themselves with off-farm obligations, they are short effective backup help and the absenteeism creates difficulty when the cows are calving. Frankly, the backup labor pool isn’t available.”

According to the Employer, this article demonstrated “that there are many approaches to a seasonal livestock operation in the Dakota’s [sic] based upon an array of factors.” The Employer then asserted that, because it and Mock Farms “were not the same farm or farmers,” each followed their own approaches. The Employer then remarked, “This is specifically why each employer has its own temporary need that is different from the other.”

The Employer concluded by noting that further information could be gained from the EWG Farm Subsidy Database, but that it experienced difficulty printing off relevant pages from the website. Therefore, the Employer provided two web addresses to instead.<sup>1</sup> According to the Employer, the information available “should serve to indisputably show that Anthony Mock and Daniel Mock (Mock Farms) are not the same entities in any capacity but are separate farming operations.”

On December 5, 2014, the CO denied the Employer’s application for temporary labor certification. AF 2-6. In explanation of its decision, the CO acknowledged the Employer’s argument that it and Mock Farms were separately owned business entities with separate needs for temporary worked based upon different mentalities regarding to seasonal livestock production. The CO also acknowledged the Employer’s argument that the two operations produce different commodities and do not share employees, equipment, or other assets, while maintaining separate books with no intermingling of finances in any capacity.

However, the CO noted that the Employer and Mock Farms both sought certifications for farm workers and shared the same worksite address. The CO determined that that the two companies, therefore, had an “interlocking nature” which “renders the fact of separate corporate forms inconsequential.” According to the CO, the facts of the present case were similar to those contained in recent decisions finding companies to be interlocking for the purpose of labor

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<sup>1</sup><http://farm.ewg.org/persondetail.php?custnumber=A07612148/>  
[http://farm.ewg.org/persondetail.php?custnumber=A07612345.](http://farm.ewg.org/persondetail.php?custnumber=A07612345)

certification. Specifically, the CO cited the decision of *In the Matter of Larry Ulmer* 2015-TLC-00003 (2014), in which the administrative law judge found that business entity seeking certification for seasonal and temporary labor was so “intertwined” with another business entity that it was reasonable to infer that they “functioned as one” and therefore the hiring needs of the two businesses were “overlapping” and separate certification applications were an attempt “to circumvent the temporary employment requirement.” Moreover, the CO cited to the decisions in *Altendorf Transport Inc.*, 2013-TLC-00026 (2013), and *In the Matter of Katie Heger*, 2014-TLC-00001 (2013), for the proposition that different Federal Employer Identification Numbers (FEIN) do not establish the separate nature of otherwise intertwined business entities or disprove that they are functioning as one operation. AF 4.

The CO concluded by finding that the Employer had “failed to prove that it has a temporary or seasonal need in nature.” *Id.* According to the CO, the Employer’s explanation “failed to demonstrate a seasonal or temporary need for H-2A workers or establish itself as a separate entity from Mock Farms.” Therefore, the CO denied the Employer’s application for two farmworkers.

On December 10, 2014, the Employer requested expedited administrative review of the CO’s denial. AF 1. The Employer argued that it had been denied the ability to utilize the H2-A program simply because Anthony Mock shared a worksite address with his brother and conducted his farming operation “side by side” with Mock Farms. The Employer asserted that the CO’s denial was based solely on its “association [with] his brother[’]s separate farming operation.” Furthermore, the Employer took issue with the CO’s reliance on *In the Matter of Larry Ulmer, supra*, arguing that the decision in that case should be distinguished because the two farms in that case were both owned by a single individual, Larry Ulmer. The Employer restated its argument that Anthony Mock and Mock Farms were not the same and that that Anthony Mock should not be “scrutinized along with his brother[’]s farming operation, which is solely owned by his brother.” The Employer further noted that Anthony Mock and Mock Farms “started farming in different decades,” and that Anthony Mock owned “his operation entirely.” Therefore, the Employer argued, this case presented facts different from those in *In the Matter of Larry Ulmer* and should result in a different outcome because it had successfully demonstrated that it was not an interlocking operation with Mock Farms.

On December 19, 2014, this Office received a letter brief constituting the CO’s position statement.

## **DISCUSSION**

It is the Employer’s burden to establish eligibility for labor certification. 20 C.F.R. § 655.161(a). Therefore, in the case presented, it is the Employer’s burden to establish that it has a need for agricultural services or labor to be performed on a temporary or seasonal basis. *Id.* The applicable regulations provide that employment is of a seasonal nature “where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.” 20 C.F.R. § 655.103(d). Moreover, employment is of a temporary nature “where

the employer's need to fill the position with a temporary worker will, except in ordinary circumstances, last no longer than 1 year." *Id.*

In the present case, the Employer provided a statement which explained the basis of its purported need for seasonal and temporary work.

Anthony Mock is a cattle and grain farming operation in central North Dakota. Traditionally mixed farming operations in the Dakota's [*sic*] has a fixed calving season in the cold weather months when grain is not being produced. Seasonal sickness also increases cattle work loads during this time of the year, causing a need for additional help. During this period of time the cattle are located in winter stalls, where the winter weather and lack of pastures for feeding causes much additional cattle maintenance duties. We also haul hay that we previously produced through this period of time as well. Once the weather warms in April the cattle are taken back out to summer grazing pastures where they require minimal care. Therefore, we hire temporary seasonal cattle workers between January and April of each year.

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In denying certification, the CO did not appear to challenge the need itself for additional farmworkers during cold weather months. Rather, the CO took issue with the Employer's contention that the need was temporary. Focusing on the fact that the Employer shared a worksite address with his brother's farming business, Mock Farms, the CO concluded that the two farming operations were "interlocking." Noting that Mock Farms had expressed a need in previously filed applications for farmworkers in the months of April through December, the CO concluded that, together with the Employer's stated need of farmworkers during the months of January through the end of April, the composite need of the two companies functioning together was continuous throughout the year, not temporary.

Central to the CO's conclusion, as noted, was the fact that the two farming operations shared a worksite address, if not the same landholdings. Moreover, it would be disingenuous to suggest that the fact that operations shared the Mock name did not play a major role in the CO's determination that the two farming operations were so "intertwined" that they should be considered as essentially the same employer under different guise. Finally, it cannot be overlooked that the Employer's stated need for farmworkers are for months which round out the calendar year if considered along with the previous certifications for farmworkers granted to Mock Farms.

The CO's close scrutiny of the application may have been fully justified, therefore, given the red flags necessarily raised by the similarity and side-by-side nature of the two farming operations. However, the CO's conclusion that the two operations were "interlocking" or "intertwined," cannot be sustained if those terms are to be given any real meaning. The evidence is uncontradicted that the two companies are separate legal entities. The Employer's assertion that the two companies keep separate payrolls, maintain separate FEIN numbers, receive separate farm subsidies, and do not share ownership, employees, or assets has not been seriously

challenged. Absent evidence that the two operations function as alter-egos, there is no basis to draw the conclusion that they constitute one business as opposed to two.

The CO correctly noted that an opposite result was reached in *In the Matter of Larry Ulmer, supra*. *Ulmer* involved two farming operations at the same worksite, one owned by the father, Larry Ulmer, and the other owned by his son, Chad Ulmer. Unlike the case here, however, there was evidence that the two operations worked in tandem toward one purpose. One operation focused on growing and harvesting the crops, while the other focused on hauling the same crops. Moreover, Larry Ulmer, according to the decision, acknowledged that his operation performed the winter duties while the other operation worked during the rest of the year. Finally, and significantly, the two farms admittedly used the same employee.

Similarly, in the case of *In the Matter of Cressler Ranch Trucking LLC*, 2013-TLC-00007 (2012), the owner of the company that filed the application was also the owner of the other business entity which had previously applied for and received H2-A temporary labor certification. In the case of *In the Matter of Altendorf Transport, Inc., supra*, the two companies involved had the same principal place of business, the same telephone number, the same registered agent, and the timing of the formation of the businesses strongly suggested one was created primarily to afford legal separation from the other. In the case of *In the Matter of Lancaster Truck Line*, 2014-TLC-00004 (2014), the two companies actually shared a FEIN number. In the case of *In the Matter of The Fingerling Company*, 2013-TLC-00017, the employer confirmed that it employed the same farm manager and that both companies shared the same office space, phone number, and point-of-contact e-mail address while conceding that it and the other company shared a “longstanding relationship.” Therefore, the administrative law judge found a sufficient evidentiary basis to affirm the CO’s determination that the two companies were “closely related” in their activities, and that consequently the composite job opportunity was, in truth, year round rather than seasonal or temporary. Finally, in the case of *In the matter of Katie Heger*, 2014 TLC-00001, the employer’s argument that it was separate from another operation at the same location because it was “half” owned and operated by the owner’s wife failed to convince the administrative law judge that the half the wife owned was not “half” of a single unit.”

In sum, all the cases cited above are distinguishable from the present case, where there is no evidence of shared ownership, shared employees, shared duties, or even a shared history. As noted, according to the Employer, the two operations came into existence in different decades. Clearly this is a case in which the scrutiny and request for additional information by the CO was warranted given the shared Mock name and work address. Beyond whatever suspicion these circumstances may have aroused, however, there is nothing in the record to demonstrate that the two farming operations are “interlocked” or “intertwined” in any business or legal sense. Indeed, everything in the record suggests otherwise. Unless mere suspicion aroused by a shared address is sufficient to treat two companies as the same for the purpose of labor certification, the undersigned cannot find that it was reasonable to deny certification upon the basis that the Employer and Mock Farms should be treated as one farming operation.

Furthermore, the undersigned cannot find any other grounds to challenge the Employer’s stated need for seasonal work. When treated as only one entity, the Employer’s request for

seasonable or temporary labor in the cold weather months when the cattle are brought into the barn is imminently reasonable.

Notably, in its position statement submitted before the undersigned, the CO argues that the Employer failed in its burden to establish that the services or labor were traditionally tied to a season or recurring in nature. However, it would seem manifest that bringing cattle into the barn during the cold weather months is inherently seasonal and recurring in nature, particularly in the Dakotas. The CO also argues that the Employer's assertion that he and his brother operate according to different philosophies and are not the same farm is too general to satisfy its burden of proof. This argument, like much of the CO's reasoning below, seems predicated upon an implicit presumption that, because of the shared Mock name and worksite address, Anthony Mock and Mock Farms were the same, and that the Employer's burden was to overcome this presumption by a greater quantum of proof than usual. The cases discussed above, however, do not create such an implicit presumption, but, rather, rest on the facts of co-ownership, shared employees, and mutual commercial endeavor, which give rise to a reasonable inference of intertwinement. Here, as discussed, the facts on the record before me simply do not support such an inference. Accordingly, I find that the Employer provided sufficient explanation of the difference in philosophies and operation of Anthony Mock and Mock Farms to carry its burden of proof that the two farming enterprises operated "side by side" but were not "interlocked" or "intertwined."

### **ORDER**

In light of the foregoing, I hereby **REVERSE** the denial and **REMAND** this matter to the Certifying Officer with instructions to continue processing the Employer's application consistent with this decision.

JOHN P. SELLERS, III  
Administrative Law Judge