



ISSUE DATE: 13 FEBRUARY 2015

OALJ CASE NO: 2015-TLC-00016
ETA CASE NO: H-300-14356-281487

In the matter of:

**JOSEPH ARNOLD NATALI
d/b/a NATALI FARMS**

Decision and Order Affirming Denial

Joseph Arnold Natali d/b/a Natali Farms (Joseph Natali Farms) has asked for administrative review of the denial of a request for temporary alien employment certification.¹ The application it filed on December 16, 2014 seeks visas for six farmworkers/laborers to enter the United States as non-immigrant workers under the H-2A visa program to do “seasonal work” at “102 E. Highway 90, Iowa, Louisiana 70647”² for the “crawfish and rice season.”³ Joseph Natali Farms would employ them in the seven months from February 20, 2015 to September 30, 2015.

This and a separate application from a related entity (Jevon Natali Farms) would employ six workers for a full year, with each of the six workers spending roughly half a year working for each employer, so each can claim the workers fill a seasonal need. As the applicant, Joseph Natali Farms has failed in its burden to demonstrate the aliens who would be the beneficiaries of its application would be doing seasonal work. The two related farms appear to need six permanent workers. The H-2A visa program does not allow employers to sponsor the admission of aliens to fill permanent agricultural jobs. The denial of this application was correct, and is affirmed.

¹ The denial is found at Administrative Record (Admin. R.) P9–P13; 20 C.F.R. § 655.33(a).

² Admin. R. P33.

³ Administrative Record (Admin. R.) P32.

A. Labor Certifications

The Secretary of Labor's certification is a precondition for an alien worker to obtain H-2A immigration status from the Department of Homeland Security.⁴ Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA), as amended, codified at 8 U.S.C. 1101(a)(15)(H)(ii)(a), creates the H-2A visa classification for temporary agricultural workers. The visa is available to admit a worker to the United States who has "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 . . . of a temporary or seasonal nature."⁵

U.S. Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security, adjudicates petitions for H-2A status.⁶ USCIS consults with the Secretary of Labor because the Department of Labor's temporary agricultural certification process determines "whether employment is as an agricultural worker, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements."⁷

A business entity like Joseph Natali Farms that petitions for the admission of an H-2A worker also must show USCIS that the:

"employment proposed in the certification is of a temporary or seasonal nature. 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. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year."⁸

To USCIS, the "temporary agricultural labor certification proceedings [at] the Department of Labor separately tests whether employment qualifies as temporary or seasonal. Its finding that employment qualifies is normally sufficient for the purpose of [adjudicating] an H-2A petition . . ."⁹ Even with Department of Labor certification, USCIS may deny the visa certification when there is

⁴ 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(5)(iii) (2014).

⁵ 8 U.S.C. 1101(a)(15)(H)(ii)(a); see also 8 C.F.R. § 214.2(h)(1)(ii)(C).

⁶ 8 CFR 214.2(h)(5) et seq.

⁷ 8 U.S.C. § 1188; 8 C.F.R. § 214.2(h)(5)(ii).

⁸ 8 C.F.R. § 214.2(h)(5)(iv)(A).

⁹ 8 C.F.R. § 214.2(h)(5)(iv)(B).

“substantial evidence that the employment is not temporary or seasonal.”¹⁰

A Certifying Officer of the Office of Foreign Labor Certification, a part of the Employment and Training Administration of the U.S. Department of Labor, disposes of applications for temporary labor certifications.¹¹ The Officer determines whether the “employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis.”¹² The Secretary defines the term “temporary or seasonal nature” as USCIS does. The definitions by both agencies, as will be seen, are identical.

B. Procedural background

The Certifying Officer issued a Notice of Deficiency that allowed Joseph Natali Farms to remedy what the Officer regarded as the application’s failure to satisfy the requirement that the non-immigrants to be admitted would do seasonal or temporary work.¹³ Joseph Natali Farm’s e-mail response of January 6, 2015¹⁴ failed to convince the Certifying Officer the work was temporary or seasonal, which led to the denial of the application.¹⁵

After Joseph Natali Farms sought expedited administrative review,¹⁶ the Certifying Officer presented the appeal file here on January 30, 2015. The written arguments from the Department of Labor and the lawyer for Joseph Natali Farms were received by February 6, 2015.

Joseph Natali Farms did not request a de novo hearing.¹⁷ In the expedited administrative review it chose, Joseph Natali Farms “may not include new evidence.”¹⁸

The Secretary’s regulations authorize an Administrative Law Judge to affirm a denial, direct the Certifying Officer to grant temporary employment certification, or remand the matter to the Certifying Officer for additional action.¹⁹

¹⁰ 8 C.F.R. § 214.2(h)(5)(iv)(B).

¹¹ 20 C.F.R. § 655.140.

¹² 20 C.F.R. § 655.161(a).

¹³ A Notice of Deficiency is described at 20 C.F.R. § 655.141(b)(1). This one, dated December 29, 2014, is found at Admin. R. P19–P22.

¹⁴ Admin. R. P14–P16.

¹⁵ The denial appears at Admin. R. P9–P13.

¹⁶ Admin. R. P3.

¹⁷ 20 C.F.R. § 655.171(b). The applicant may request either expedited administrative review, or a de novo hearing. 20 C.F.R. § 655.164(b).

¹⁸ 20 C.F.R. § 655.171(a).

¹⁹ 20 C.F.R. § 655.171(a).

C. Only temporary or seasonal work qualifies under the H-2A visa program

The Secretary of Labor's regulations for an H-2A temporary employment certification permit an employer to hire a foreign worker to perform agricultural services "on a temporary or seasonal basis."²⁰ The definition in the Secretary's H-2A regulations of "a temporary or season nature" reads:

For the purposes of this subpart, 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. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.²¹

Word-for-word this is the definition the Department of Homeland Security uses, as quoted above at footnote 8.

D. The Natali Farms application raised questions about whether the jobs were permanent

The Certifying Officer recognized that Jevon Natali Farms, which uses the same business address as Joseph Natali Farms, also had submitted an application for six non-immigrant workers that the Department of Labor certified on August 20, 2014.²²

That the two businesses from the same city share the same family name was the first reason to believe they are related. The identical worksite address both applications list was the second: 102 East Highway 90, Iowa, Louisiana.²³ The specific geographic places of employment included one common worksite: 9079 Harris Mott Road.²⁴ The work the Jevon Natali application described (the earlier of the two) was "Farmworker and Laborers, Crop job opportunities."²⁵ That is the same occupation code (45-2092) and title (Farmworker and Laborer) the Joseph Natali Farms application proposed.²⁶ Both listed

²⁰ 20 C.F.R. § 655.161(a).

²¹ 20 C.F.R. §655.103(d).

²² Application H-300-14213-358834, made part of this Administrative record at P57-P124.

²³ Admin. R. P35 at F.c. & P41 at 2. for Natali Farms, and P90 at F.c. & P99 for Jevon Natali.

²⁴ Admin. R. P35 at7a. for Natali Farms, P92 at 7a. for Jevon Farms.

²⁵ Admin. R. P57.

²⁶ Admin R. for Natali Farms at P32 at B.2. (ONET Code 45-2092) & B.3. (Farmworkers and Laborers, Crop, Nursery and Greenhouse"); P34 at F.a.1 ("Farmworker"); similarly for Jevon Farms at P89 at B.2. (ONET Code 45-2092) & B.3 (Farmworkers and Laborers, Crop Nursery and Greenhouse"), and P91 at F.a.1. ("Farmworker and Laborer, Crop").

the same address and telephone number as the Employer point of contact information.²⁷ Both said three months experience was required.²⁸ The end date for the certification for Jevon Natali Farms was March 1, 2015,²⁹ the start date for Joseph Natali Farms was to be one week earlier, February 20, 2015.³⁰

The Notice of Deficiency asked Joseph Natali Farms to explain why its job opportunity was seasonal or temporary, and the difference between the business operation of Joseph Arnold Natali d/b/a Natali Farms and Jevon Natali Farms.³¹

E. The reply to the notice of deficiency

Contrary to the brief filed by Joseph Natali Farms, on this record it was no error on the Certifying Officer's part to ask for an explanation of why the applications of Joseph Natali Farms and Jevon Natali Farms do not show a need for farm labor that is permanent, rather than temporary or seasonal.

The response to the Notice of Deficiency emphasized several facts. Joseph Natali Farms and Jevon Natali Farms have different federal employer identification numbers. Applications with similar work dates have been approved for Joseph Natali Farms for the last three years, and the current (fourth) application asks for similar dates. The work Joseph Natali Farms described is those old applications and the current application is said to be similar too.³² The response stated that the worksite common to both the Joseph Natali Farms and Jevon Natali Farms applications "is an office building both Joseph Arnold Natali and Jevon Natali share for mailing purposes and office use."³³ The application of Jevon Natali Farms shows the joint address is a building supply store, Friendly Builders.³⁴ Presumably the farm offices are shared with the building supply venture. This does nothing to dispel the notion that the two farms operate a common enterprise. The several work locations in both applications are all work sites in Iowa,

²⁷ Admin. R. P33 at D.5. – D.12 for Joseph Natali Farms and P90 at D.5.–D.12 for Jevon Natali Farms.

²⁸ Admin. R. P34 at F.a.5. for Joseph Natali Farms, P92 at F.a.5.for Jevon Natali Farms.

²⁹ Admin. R. P71.

³⁰ Admin. R. P32.

³¹ Admin. R. P22.

³² "Consistent with previous years, Natali Farms . . . seeks temporary workers to fulfill the following duties: [duties are described]." Admin R. P16. This may be so, but I have no way to know, based on this record. No portion(s) of the applications approved for Natali Farms in 2012, 2013 and 2014 were offered with the response. All I have to work from is the Administrative Record in this case.

³³ Admin. R. P16.

³⁴ Admin. R. P114.

Louisiana and Lake Charles, Louisiana. All are geographically close, within Calcasieu Parish, Louisiana. Most telling is the fact that both applications share one common worksite: 9079 Charles Mott Road.³⁵

The applications describe different duties to be performed:

“rice and crawfish farm, employer property [work] that includes “tractor driving, field prep, water maintenance, fertilizing, planting and harvesting of crops. . . . Help repair and maintain equipment and farm, field, levees, roads, shops properties; load/unload trucks,” and crawfish farming³⁶ for Joseph Natali Farms, as contrasted with

“rice cutting, soybean harvesting, and rye grass planting for cattle; winter duties include cutting baling, shipping hay; general farm duties: maintaining farm fences, farm maintenance, farm mowing”³⁷ for Jevon Natali Farms.

F. The applications describe year round employment by integrated entities

These duties have indicia of an integrated, ongoing farm whose workers do the things described in the Jevon Natali Farms application early in the calendar year, and those described in the Joseph Natali Farms application later in the year. The start date for the workers under the Joseph Natali Farms application corresponds almost exactly with the end date of the Jevon Natali Farms application.

In assessing whether the applicant’s need is temporary, the nature of the need, not the nature of the duties control.³⁸

Separate federal employer identifications numbers is weak evidence of independent operation, and not dispositive.³⁹ Even with separate worksites, entities that operate from the same office with the same telephone number have significant indicia of joint ownership. The start and stop dates for the two applications fit together too well to be happenstance, given all the other factors already described. By setting a three month experience requirement, the same workers will repeatedly qualify for the jobs on both farms.

Engaging in a similar fact-intensive analysis, an application for temporary employment certification from one of two neighboring catfish farms was denied because the applications actually divided

³⁵ Admin. R. P35 and P92 each at F.c.7a.

³⁶ Admin. R. P34 at F.a.5.

³⁷ Admin. R. P91 at F.a.5.

³⁸ *William Staley*, 2009-TLC-00009 at 4 (Aug. 28, 2009) (*relying on In the Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982)).

³⁹ *Katie Heger*, 2014-TLC-00001, slip op. at 5 (Nov. 12, 2013) (“However, the fact that the Employer has obtained its own FEIN and goes by the name ‘Katie Heger’ instead of ‘Steven Heger’ does not establish that the two businesses are not so interlocking that they essentially function as the same farming operation.”)

permanent positions.⁴⁰ Those employers had, among other things, the same worksite address, phone number, and mailing address. The chronologically later applicant claimed the entities has different federal employer identification numbers, different seasonal needs, separate payroll records, individual workers' compensation insurance, separate bank accounts, and owned different fishing ponds. The argument failed. By dividing catfish production operations between two separate, but closely related entities, the two companies sought to hire H-2A seasonal workers for the same job opportunity, year round, within one area of intended employment.⁴¹ A similar result was reached in applications divided among related farms cotton, peanuts, corn, wheat, sorghum, barley, and oats.⁴²

Much the same thing is going on here. Joseph Natali Farms and Jevon Natali Farms need six permanent workers. Their need for farm labor is neither temporary nor seasonal. The denial by the Certifying Officer was correct, and is affirmed.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

⁴⁰ *The Fingerling Company*, 2013-TLC-00017, slip op. at 4 (Jan. 18, 2013).

⁴¹ *The Fingerling Company*, 2013-TLC-00017, slip op. at 4 (Jan. 18, 2013).

⁴² *JSF Enterprises*, 2015-TLC-9 (Jan. 22, 2015).