



Issue Date: 27 March 2015

OALJ Case No.: 2015-TLC-00022
ETA Case No.: H-300-15023-808662

In the Matter of
MCCLURE CUSTOM PUMPING LLC,
Employer

Before: **Larry S. Merck**
Administrative Law Judge

DECISION AND ORDER

McClure Custom Pumping LLC (“Employer”) appeals the Certifying Officer’s (“CO”) denial of the above-captioned application for H-2A temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188 and the implementing regulations promulgated by the U.S. Department of Labor (“DOL” or “Department”), Employment and Training Administration (“ETA”) at 20 C.F.R. Part 655.¹ For reasons set forth below, the Certifying Officer’s denial is **AFFIRMED**.

PROCEDURAL HISTORY

On January 23, 2015, ETA received the Employer’s application for temporary labor certification. AF 110-18.² In particular, the Employer requested certification for six “Agricultural Equipment Operators” for the period from March 23, 2015 through July 1, 2015. AF 110. The application listed the following as the job description: “We are in need of seasonal help to operate trucks and large John Deere tractors to haul and apply fertilizer to the fields and to chop silage. Employees will also need to do infields repairs and maintenance on equipment.” AF 112. The Employer listed the temporary need as “seasonal.” AF 110. The worksite address was listed as 541 160th Avenue, Kirkwood, Illinois, 61447. AF 113.

¹ The H-2A nonimmigrant visa program enables agricultural employers in the United States to import foreign workers on a temporary basis to perform temporary, agricultural labor or services. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188. Employers who seek to hire H-2A nonimmigrant workers must first apply for and receive a “temporary labor certification” from ETA. 8 U.S.C. § 1188(a)(1).

² Citations to the 149 page Administrative File will be abbreviated “AF” followed by the page number.

On January 30, 2015, the CO issued a Notice of Deficiency (“NOD”) to inform the employer that its application failed to meet three criteria for acceptance. AF 93. First, the CO stated that “[t]he employer must submit [Farm Labor Contractor] Certificates that indicate it is authorized for transportation, housing and driving and which are current and updated.” AF 95. Second, the CO stated that the Employer did not submit a surety bond as “proof of its ability to discharge financial obligations under the H-2A program.” AF 95-96. Third, the CO noted that the Employer had failed to provide fully executed contracts with each fixed-site agricultural business in its itinerary. AF 97. In accordance with 20 C.F.R. § 655.142, Employer was invited to submit a modified application within five business days of receipt of the NOD. Alternatively, Employer was reminded of its right under 20 C.F.R. § 655.142(c) to request an expedited administrative review or a *de novo* hearing of the NOD within the same time.

On February 4, 2015, Employer responded by email to the NOD, to which it attached work contracts and stated that “[t]he employer is not a farm labor contractor (H-2ALC). They are a custom manure spreading/pumping business. I will provide the surety bond when we receive it as well as the work contracts, but the deficiency stated in #1 does not apply to this employer.” AF 75-76. Employer attached the work contracts to the email, and provided the surety bond on February 5, 2015. AF 75, 80-91. However, Employer did not provide a Farm Labor Contractor (“FLC”) license.

On February 24, 2015, the CO replied to Employer’s email and requested that Employer submit clarification on its job description by providing a “written, detailed explanation that indicates the percentage of time workers will be engaged in ‘manure spreading/pumping’ and the percentage spent engaged in ‘silage chopping.’” AF 65. In response to this inquiry, the Employer provided a hand-written reply indicating that the company’s manure spreading activities comprise approximately twenty percent of the business, and that silage chopping comprises approximately eighty percent of the business. AF 66.

On March 3, 2015, the CO denied temporary labor certification on the grounds that Employer did not provide an FLC license with its application. AF 58-61. This denial stated in pertinent part:

It appears that the employer is referring to the special procedures for the Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H-2A Program (TEGL 16-06, Change 1). However, the employer’s application as submitted is not considered to fall under these special procedures.

The employer did not provide any additional supportive documentation or any specific cases to reference. The employer is considered to be an H-2ALC in accordance with the regulations of the H-2A Foreign Labor Certification Program and has failed to provide the FLC certificates as requested in the NOD and email correspondences.

...

Because the employer has failed to prove that it is not an H-2A LC and did not provide the FLC documentation as requested, this application for six Agricultural Equipment Operators is denied.

AF 61.

On March 9, 2015, the Office of Administrative Law Judges received a letter from Employer requesting expedited administrative review of the CO's denial. AF 8. In this letter, Employer stated that:

We understand that if you are not a fixed site employer that you need to have a FLC License but custom harvesters are exempt from this requirement.

McClure Custom Pumping is a custom manure spreading business as well as a custom silage chopping business that should fall under the same rules as custom harvesters.

On March 17, 2015, the Office of Administrative Law Judges issued a Notice of Docketing and Order Setting Briefing Schedule inviting both the Employer and counsel for the Certifying Officer ("the Solicitor") to file a brief by the close of business on March 20, 2015. On March 20, 2015, both parties filed briefs with this Court.

Employer's brief asserted that it is exempt from the FLC licensing requirements and stated in pertinent part:

McClure Custom Pumping LLC performs silage chopping and a small percentage of fertilizing and for that reason is a Custom Harvester. As indicated above, fertilizing after the first harvest is standard business practice to allow silage to grow for the second cutting. McClure Custom Pumping LLC intends to file a second filing from September to December to complete the second round of silage cutting. McClure Custom Pumping LLC is in need of an approved labor certification to avoid financial loss due to not being able to service his customer needs.

The Solicitor also filed a brief on March 20, 2015, arguing that Employer has not established that it is entitled to the Special Procedures that would exempt Employer from the FLC licensing requirements. The Solicitor asserted that:

[An] advantage of the special procedures is waiver of the Certificate requirement for [H-2ALCs]. It is understandable that the employer would emphasize the apparent similarities between its operations and custom combining activities, in order to obviate the requirement for FLC Certificate (AF 8), but the employer has not established that it is, in fact, entitled to the benefits of the custom combiners' special procedures. For example, the employer has not established that its equipment and operations are sufficiently similar in function to a custom combine to justify extending the coverage of the custom combine special procedures.

...
The CO properly relied on the information provided and, considering the totality of the circumstances, acted reasonably [when] she denied the employer's H-2A application. Therefore, the employer's appeal should be rejected.

DISCUSSION

Under the implementing regulations a fixed-site employer is "any person engaged in agriculture who meets the definition of employer . . . who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery or other fixed-site location where agricultural activities are performed." 20 C.F.R. § 655.103. In this case, Employer does not operate a farm or other fixed-site location, but rather operates a silage chopping and manure spreading business to service other farms in the area. Therefore, Employer does not meet the regulatory definition of fixed-site employer, and is therefore an H-2A Labor Contractor ("H-2ALC"). The regulations define an H-2ALC as "any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association." *Id.* H-2ALC organizations applying for temporary certification have additional filing requirements in the regulations at 20 C.F.R. § 655.132.

The issue here is whether Employer has properly complied with the application requirements pursuant to 20 C.F.R. § 655.132(b). Under these H-2A regulations, an H-2ALC that files an Application for Temporary Employment Certification must "comply with all of the assurances, guarantees, and other requirements contained in this part." 20 C.F.R. § 132(b). This includes filing an FLC license with the application. 20 C.F.R. § 132(b)(2).

The H-2A regulations also authorize the Department to establish "special procedures" to the H-2ALC filing requirements to allow some flexibility in the processing of applications where employers establish that special procedures are necessary. 20 C.F.R. § 655.102. Pursuant to this authorization, the Department has issued special procedures for multi-state custom combine owners/operators in Training and Employment Guidance Letter (TEGL) 16-06, Change 1 (June 14, 2011). These special procedures include a waiver of the FLC Certificate requirement for H-2ALCs.

The burden is on the employer to establish its entitlement to special procedures. 20 C.F.R. § 655.102. In this case, Employer contends that it is a custom manure spreading and silage chopping business, and asserts that this is equivalent to a custom combine owner/operator business. Employer therefore states that it is entitled to the same special procedures to which custom combine owners/operators are entitled, and they are thus exempt from the requirement of filing an FLC license with the H-2A application.

However, Employer does not provide any basis for this assertion other than stating that their business is eighty percent silage chopping and twenty percent manure spreading. Employer has not provided any supportive documentation showing that it qualifies as a custom combine

owner/operator, nor has it cited any regulations or cases to support its position that it is entitled to special procedures.

I agree with the CO that the Employer has failed to provide an FLC license with its applications as required by the regulations. Further, Employer has not adequately shown that it is entitled to special procedures that would exempt it from this requirement. Thus, I find that the CO's denial of the Employer's application for temporary labor certification was proper.

ORDER

In light of the foregoing, it is **HEREBY ORDERED** that the Certifying Officer's denial determination is **AFFIRMED**.

Larry S. Merck
Administrative Law Judge