



Issue Date: 26 August 2016

OALJ Case No.: 2016-TLC-00071

ETA Case No.: H-300-16200-087349

In the Matter of:

RUSSELL ALAN GRAMLOW,
Employer.

Certifying Officer: Chicago National Processing Center

Before: **ALAN L. BERGSTROM**
Administrative Law Judge

DECISION AND ORDER – AFFIRMING CERTIFYING OFFICER’S DENIAL OF TEMPORARY LABOR CERTIFICATION

The above-captioned case involves a request for certification of nonimmigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. In this case, Russell Alan Gramlow (“the Employer”) has filed a timely request for expedited administrative review of the Certifying Officer’s August 10, 2016 denial of temporary labor certification (AF¹ 2-6). The Decision and Order that follows is based on review of the entire administrative file, including the Employer’s request for review. Pursuant to federal regulations at 20 CFR §655.171(a) evidence that may be considered is that which was before the Certifying Officer, no new evidence submitted on appeal may be considered.

STATEMENT OF THE CASE

On July 18, 2016, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer seeking temporary labor certification for two farm workers to serve as seasonal “Agricultural Equipment Operators”, SOC Code 45-2091, from August 29, 2016 through June 20, 2017. (AF 43-53). The application

¹ Citations to the Appeal File in this case will be abbreviated “AF” followed by the page number(s).

listed the following job duties: “Drive combine and tractors to perform a variety of crop raising duties and fall tillage. Field ready implements and equipment. Harvest crops. Plant, cultivate crops using tractor drawn machinery. Repair and maintain farm implements. Drive truck to haul grain.” (AF 45, Item F.a.5). No education or training requirements were listed, but job applicants were expected to have at least three months of farming experience; a clean driving record; an employment reference, and valid drivers’ license. (AF 46, Item F.b, AF 49 addendum). The number of hours of work per week was listed as “Basic: 48 Overtime: 0.” (AF 45). The worksite address was listed as 9452 88th St. SE, Fullerton, Dickey County, ND 58441. (AF 46, Item F.c).

On July 21, 2016, the ETA Certifying Officer (“CO”) issued a Notice of Deficiency finding that the Employer’s application failed to meet the criteria for acceptance for several reasons. (AF 23-29).

1. “Based on the employer’s requested dates of need and its previous dates of need, same SOC Code 45-2091, and similar job duties, it is unclear how this job opportunity is temporary or seasonal in nature ... The employer must explain why its job opportunity is seasonal or temporary. This explanation must provide in detail as to why its dates of need have significantly changed from November [2015] through June [2016] to its current request of August [2016] through June [2017].”
2. “Based on the employer’s requested dates of need [November 21, 2015 to June 20, 2016 and August 29, 2016 to June 20, 2017] and the previously established dates of need for [interlocking entity] Richard Gramlow [June 1, 2016 to September 1, 2016], the employer has failed to prove it has a temporary or seasonal need ... Because the employer failed to establish a temporary need as required by 20 CFR sec. 655.103(d), it is now required to provide supporting evidence that a temporary need exists. The employer must submit a written explanation which documents the temporary need for H-2A workers, the relationship between the two entities (Russell Alan Gramlow and Richard Gramlow), and payroll documentation for Russell Alan Gramlow and Richard Gramlow ... for a minimum of June 2015 through June 2016 for both entities ... The payroll reports must be a summary of the employer’s individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment for both entities.”
3. “The employer filed with the Chicago NPC 43 days from their start date of need of August 29, 2016. However, the employer did not provide good and substantial cause for the waiver of the 45 day filing period ... The employer must provide a statement justifying good and substantial cause for a waiver to the filing time period or amend the start date of need to no earlier than August 31, 2016, in order to be in compliance with Department regulations as set forth in 20 CFR sec. 655.121(a)(1) and 20 CFR sec. 655.130(b).”
4. “The employer indicates housing will be provided to workers at employer owned 303 N Monroe St., Fullerton, ND 58441 and motel housing at Carrol House 19 N. Monroe St., Fullerton, ND 58441. However, it is unclear if workers will prepare their own meals or be provided three meals a day by the employer while residing in motel accommodations ... The employer must provide clarification if workers will prepare their own meals or be provided three meals a day by the employer (and the amount to be deducted for the cost

of such meals) while residing in Carrol House and amend the application to reflect the clarification. The employer may provide the Chicago NPC guidance and written permission to amend the application accordingly.”

By e-mail of August 3, 2016, the Employer’s agent² responded to the Notice of Deficiency (AF 9-13). She provided a general “schedule of operations throughout a typical year” for the entities Russell Alan Gramlow and Richard Gramlow; summarized payroll records for Russell Alan Gramlow for the period June 2014 through June 2016 and for Richard Gramlow for the period July 2015 to September 2015 and June 2016; and letters from the Director, Dicky County Farm Service Agency, a senior accountant from AgCounty Farm Credit Services, and a senior loan officer from AgCounty Farm Credit Services. She authorized the CO to change the start date of need to August 31, 2016, and reported that “while staying in the Carroll House, workers will still have access to the kitchen and dining facilities of the housing located at 303 N Monroe. The housing inspector has verified the kitchen and dining facilities are large enough to accommodate the workers.”

By e-mail the morning of August 8, 2016, the CO notified the Employer’s agent that from the payroll summaries provided “it is unclear if Russell Alan Gramlow and Richard Gramlow share workers. If these employers, in fact, [are] sharing workers, they should be filing a joint employer application.” (AF 7-8). The CO stated the application could not be processed and that “the employer must clarify if workers are shared between Richard Gramlow and Russell Alan Gramlow.”

The Employer’s Agent responded by e-mail the afternoon of August 8, 2016 objecting to the request for specific names of workers for the submitted payroll and “the suggestion that the employer should be filing a joint employer application.” She reported “Regardless, the names of the workers have been provided on the attached reports.” (AF 7) It is specifically noted that the referenced attachment was received from the NPC after the AF was received by this presiding Judge. The referenced attachment with names of Russell Alan Gramlow employees was marked and considered as AF pages 7-A and 7-B. The referenced attachment with names of Richard Gramlow was marked and considered as AF page 7-C.

On August 10, 2016, the CO denied the July 18, 2016 application for temporary labor certification under the H-2A temporary agricultural program (AF 2-6). The CO reported that the employer provided requested payroll records with names of individual workers on August 8, 2016. The CO found that “The records provided on August 8, 2016, indicate the employers, Russell Alan Gramlow and Richard Gramlow, in fact share workers. Therefore, combined the employers have a one (1) year and 20 day need for workers.”

The CO provided an overview of 4 prior certified applications for temporary labor certifications agricultural equipment operators for Richard Gramlow and 3 prior certifications for temporary labor certifications agricultural equipment operators for Russell Alan Gramlow for the need

² L. Downs was registered as a Farm Labor Contractor pursuant to the Migrant and Seasonal Agricultural Worker Protection Act on August 8, 2012, September 1, 2013, and September 9, 2015, with certificates of registration expiration dates of August 30, 2013, August 30, 2015, and August 31, 2017, respectively. (AF 63, 201, 375).

periods encompassing June 1, 2013 through September 1, 2016,³ and considered that the worksite location for Richard Gramlow was 3.8 miles from that of Russell Alan Gramlow, though both worksites were within the same “area of intended employment”; the two employers shared the housing location at 303 N Monroe St., Fullerton, ND; both employers claimed to own the housing at 303 N Monroe St., Fullerton, ND; both employers had the same job duties and SCO occupation code in their respective applications; both employers used the same H-2A worker, Maksym Botsmanenko during June 2016; and the two employers never filed applications as joint employers.

The CO stated that “Although the employer has filed as two distinct business entities, the interlocking nature of these entities and operations renders the fact of separate corporate forms inconsequential ... the employers have never filed applications as joint employers. Therefore, the two employers are unable to share H-2A workers during concurrent Job Orders. The duties in each application fall within the SCO(O*Net/OES) occupation code and title for 45-2091 Agricultural Equipment Operators and, as such, represent the same job opportunity for purposes of the H-2A program. Furthermore, the employer’s worksites, similar requirements and job duties indicate there is a full time need for farmworkers in the area of intended employment. This is further compounded by the sharing of workers between the two employers. Therefore, based on the employer’s requested dates of need, and the previously established dates of need for Richard Gramlow, coupled with the sharing of workers the employer has failed to prove that it has a temporary or seasonal need. ... As the employer is operating in conjunction with Richard Gramlow and their combined dates of need are greater than 10 months, it is unclear how this job opportunity is temporary or seasonal in nature. Therefore, the application for 2 Agricultural Equipment Operators is denied.”

The employer’s agent timely filed a timely request for expedited administrative review of the CO’s denial on August 12, 2016. (AF 1)

In expedited administrative review cases, the administrative law judge has five working days after receiving the Appeal File to issue a decision on the basis of the written record after due consideration of any written submissions not including new evidence. 20 C.F.R. § 655.171(a). The Appeal File for this case was received by this Administrative Law Judge on Friday, May 27, 2016. The Employer’s request for administrative review, the Appeal File, and employer’s agent’s written argument contained within the Appeal File constituted the entire administrative file and were considered in deliberation.

POSITION OF THE PARTIES

Employer’s position:

Employer’s agent submits that “The only connection between Russell Alan Gramlow and Richard Gramlow are relational. Both Russell and Richard own/operate different farming business. The fact that they have the same job code is not surprising as the majority of general

³ The 7 prior certified applications are included in the AF at pages 65-376. It is specifically noted that the same Farm Labor Contractor was involved in all 8 applications for temporary labor certifications for agricultural equipment operators submitted by the two employers.

farm H2A applications are assigned job code 45-2091, Agricultural Equipment Operator.” She submits that supporting letters from the Director of Dickey County Farm Services Agency, a senior accountant and a senior loan officer “confirm that the operations of [the two employers] are completely separate.” She argues that individual workers employed by the two employers “have absolutely nothing to do with either employer’s seasonal need or the fact that they are completely separate operations, which was the NPC’s initial concern regarding these two employers. The employers have clearly proven they are separate operations.”

Employer’s agent submits that “The suggestion that the employer should be filing a joint employer application would not apply in this situation. The employers are not an association and have different dates of need which preclude them from filing as joint employers. Workers are not ‘shared’. Each employee workers (sic) for the employer for which a visa or I-94 has been approved.”

Employer’s agent essentially argues that certifications under the H-2A program granted to Richard Gramlow cannot be considered when evaluating the application of Russell Alan Gramlow because they are separate entities. She seeks to have the Employer’s application for temporary labor certification approved.

Certifying Officer’s position:

The CO submits that Russell Alan Gramlow and Richard Gramlow are interlocking business operations based on their sharing of a worker in June 2016, claims of ownership of provided H-2A housing, worksite within the same area of intended employment, and family relationship of father and son.

The CO also submits that the employer has failed to establish that the need for the requested H-2A workers is temporary or seasonal based on the similarities in job code, job requirements, job duties, past certified H-2A applications since 2013, overlapping farm worksites, overlapping dates of need in excess of 1 year, shared housing and dining facilities, and sharing of workers.

The CO submits that the denial of the application for the temporary labor certification for 2 Agricultural Equipment Operators be affirmed.

ISSUE

The issue in this case is whether the Employer’s application for two H-2A nonimmigrant Agricultural Equipment Operators is for a period of time exceeding the limited period of “temporary or seasonal” work for which certification is permitted under the INA.

DISCUSSION

The Employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program. *See* 20 C.F.R. § 655.161(a). To be eligible for H-2A labor certification, the Employer must establish that it has a need for agricultural services or labor to be performed on a

temporary or seasonal basis. *Id.* The applicable regulations promulgated by the ETA define “temporary or seasonal” employment as follows:

[E]mployment 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.

20 C.F.R. § 655.103(d). The relevant inquiry is not whether the job itself is temporary, but whether the Employer has established that its *need* for labor is of a temporary or seasonal nature. *Cressler Ranch Trucking LLC*, 2013-TLC-00007 (Nov. 26, 2012).

I. The Employer has failed to establish by a preponderance of the evidence that the Certifying Officer acted in an arbitrary or capricious manner in finding that the business entities of Russell Alan Gramlow and Richard Gramlow were not separate business entities with distinct labor needs.

In the Notice of Deficiency, the CO found that the Russell Alan Gramlow’s business appeared to interlock with Richard Gramlow’s business. The CO determined that the interlocking nature of the two identified businesses raised an inference that the two named employers were, in fact, a single business entity engaged in farming in the same area of intended employment, Dickey County, North Dakota.

The CO noted that the two businesses have separately sought to certify their respective H-2A applications for the same occupation of Agricultural Equipment Operator (O*Net occupational code 45-2091) within sequential time periods that together span more than one year. The evidence of record is summarized as follows: (AF 43-375)

Legal Business Name	ETA Case No. H-300-	Dates of Need Requested	Agricultural Equipment Operators requested	Status
“N/A” in Item C.1-16 ⁴	16200-087349	8/29/16-6/20/17	2	Denied by CO
Richard Gramlow	16095-084027	6/1/16-9/1/16	3	Certified by CO
Russell Alan Gramlow	15268-381042	11/21/15-6/20/16	3	Certified by CO
Richard Gramlow	15083-625205	6/1/15-9/1/15	3	Certified by CO
Russell Alan Gramlow	14209-622204	9/20/14-6/20/15	3	Certified by CO
Richard Gramlow	14094-822873	6/1/14-9/1/14	3	Certified by CO
Russell Alan Gramlow	13170-056958	8/18/13-6/18/14	3	Certified by CO
Richard Gramlow	13091-341961	6/1/13-9/1/13	3	Certified by CO

Each of the 4 applications for Agricultural Equipment Operator for work periods from 6/1/15 provided for 48 hours of work per week between 8:00 AM and 5:00 PM with no overtime; required 3 months of farming experience, clean motor vehicle record, employment references, and a valid drivers' license; used the same verbiage to describe the job duties in the ETA 9142A⁵; used the same housing at 19 N Monroe Street and 303 N Monroe Street, Fullerton, ND; required H-2A workers who began their housing in the Carol House motel at 19 N Monroe Street to move into the "Employer owned house" at 303 N Monroe Street "after the current occupants vacate the home"; provided transportation from the place of the employer provided housing "to the actual worksite & return at the end of the workday"; consistently used the same registered Farm Labor Contractor as their agent during the H-2A process; and required the North Dakota Job Office Service to send all U.S. worker referrals to the Farm Labor Contractor.⁶

The 4 applications for Agricultural Equipment Operator for work period prior to 6/1/15 provided for 36 hours of work per week between 8:00 AM and 5:00 PM with no overtime; required 3 months of farming experience, clean motor vehicle record, employment references, and a valid drivers' license; used the same verbiage to describe the job duties in the ETA 9142⁷; used the same "Employer owned house with kitchen and bath facilities. Capacity: 3" at 303 N Monroe Street; provided transportation from the place of the employer provided housing "to the actual worksite & return at the end of the workday"; consistently used the same registered Farm Labor Contractor as their agent during the H-2A process; and required the North Dakota Job Office Service to send all U.S. worker referrals to the Farm Labor Contractor.

Both business entities claimed that the housing located at 303 N Monroe was the indicated "Employer owned house with kitchen and bath facilities. Capacity: 3." This infers that the two business entities had joint ownership in property used in their respective farming operations.

Payroll records submitted for the period June 2014 through June 2016 indicate that the business entity Russell Alan Gramlow employed H-2A worker M. Botsmanenko from December 2015 through May 2016 and for 152.34 hours in June 2016 and that the business entity Richard Gramlow employed the same H-2A worker for 304.49 hours in June 2016. Though the payroll records reflecting the names of employees were signed on July 28, 2016 by each employer and submitted by their shared agent on August 8, 2016, no payroll records or names of employees were submitted for July 2016. Additionally, though Richard Gramlow was certified to employ H-2A workers from June 1, 2014 through September 1, 2014, no payroll with names of employees were submitted for that period by Richard Gramlow, though Russell Alan Gramlow

⁴ "N/A" was entered in fields 1 through 16 of ETA Form 9142A, Item C, used to identify the employer applying for certification, address, FEIN, and number of non-family employees. Field 17 involving the classification of the type of employer application was left blank. The failure to complete ETA Form 9142A, Item C renders the application as incomplete and not in conformance with the requirements of 20 CFR §655.130(a); sufficient grounds to have denied the application initially and requiring further modifying actions by the employer.

⁵ Applications involving Russel Alan Gramlow included the additional works "Drive truck to haul grain" in its description of job duties.

⁶ It is noted that Richard Gramlow included the ability to speak and understand English as a job requirement in the 3 positions for the period 6/15/15 – 9/1/15 (AF 195).

⁷ Applications involving Russell Alan Gramlow included the additional words "Drive truck to haul grain" in the description of job duties.

did submit workers' names for that period. From the foregoing, it is proper to infer that the two farm business entities shared the temporary employee in the June 2014 overlapped period.

From letters filed by the shared agent it is evidence that both business entities used the same loan and accounting providers. The shared agent also submitted an August 1, 2016 letter from the Director of Dickey County Farm Services who reported that in 2012 Richard Gramlow farmed four tracts of land and that his son, Russell Alan Gramlow, farmed four other tracts of land in a joint venture with Russell Alan Gramlow's mother.⁸ The intra-family relationship that existed in 2012, and remains uncontradicted, permits the inference that the farming efforts of the two business entities are intertwined.

It is specifically noted that no employer name or FEIN is entered on the current ETA Form 9142A, Item C, though the CO treated the current application as coming from business entity Russell Alan Gramlow. The FEIN for the business entity Russell Alan Gramlow is 45-0351459. The FEIN for the Richard Gramlow business entity is 46-1890762. However, the fact that the two business entities have obtained their own FEIN and go by different names does not establish that the two farm operations are not so intertwined that they essentially function as the same farming operation. *See, e.g., Altendorf Transport Inc., 2013-TLC-00026* (Mar. 28, 2013) (finding that the employer had not established it was a separate business entity even though it had its own name, FEIN, and address).

The shared agent did not provide the NPC any affidavits or State filings related to the business form, membership, officers, or property holdings of the two business entities which would shed light on their status as independent operators, an association, a joint venture, a co-operative, or subsidiaries of a shared parent company. The current application fails to indicate the "Type of Employer Application" in ETA Form 9142A, Item C.17.

The business relationship of the two farm business entities and the agent/registered Farm Labor Contractor, further calls into question the actual working relationship of the two farm business entities. From the actions of the shared agent with the NPC; her directed involvement with all State Workforce Agency (SWA) referred U.S. workers; her registration as a Farm Labor Contractor authorized to recruit, solicit, furnish, hire and employ foreign workers but not transport, house or drive foreign workers; the duplication of the application packages inferring she created all documents and took all actions necessary to achieve certification of H-2A employment at the farms except signing as the employer; and the application packages complying with the requirements of 20 CFR §655.132, except for her not signing the applications as the employer and attaching a surety bond and contracts with the two fixed-site farm business entities involved, infer that the two farm business entities involved were acting in concert and merely signing the forms where indicated in order to circumvent the H-2A program requirements placed on H-2A Labor Contractors and to create the illusion that they were acting completely independent of the other.

After considering the entire administrative record and the Employer's arguments, this Administrative Law Judge finds that the Employer did not submit sufficient information to

⁸ The Director infers that "Ruby" is the wife of Richard Gramlow; but the evidence of record does not clearly state such a family relationship.

distinguish its farming operation and labor needs from those of employer Richard Gramlow; that it was reasonable for the CO to infer on the basis of the available facts that the farm business entities of Russell Alan Gramlow and Richard Gramlow were interlocking and functioned as one business entity for purposes of the H-2A program; that the Employer has failed to establish by a preponderance of the evidence that it is a separate business entity with separate seasonal/temporary needs for agricultural equipment operators to work at a separate fixed farm site; and, the Employer failed to establish the CO acted in an arbitrary and capricious manner in determining the two farm operations were interlocking and were not separate business entities with distinct labor needs.

II. The Employer has failed to establish by a preponderance of the evidence that its need for H-2A workers as Agricultural Equipment Operators was temporary or seasonal in nature.

In determining the “seasonal and temporary” nature of the H-2A work, it is the need for the duties to be performed which determines the temporariness of the job. *In the Matter of Artee Corp.*, 1982 WL 1190706 (BIA Nov. 24, 1982); *In the Matter of William Stanley*, 2009-TLC-60 (Aug. 12, 2009) An employer may not manipulate its “season” when the record shows a year-round need for the labor. *In the Matter of Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011) Nor may an employer continually shift its need in order to utilize the H-2A program to fill non-temporary labor needs. *In the Matter of Salt Wells Cattle Co.*, 2010-TLC-00134 (Sep. 29, 2010)

As discussed above, the farm business entity Richard Gramlow was certified for 3 Agricultural Equipment Operators for the same June 1 to September 1 period in 2013, 2014, 2015 and 2016. The farm business entity Russell Alan Gramlow was certified for 3 Agricultural Equipment Operators for period that overlapped the September 1 to June 1 period in 2013, 2014 and 2015. Russell Alan Gramlow currently seeks two Agricultural Equipment Operators for the period from August 29, 2016 (modified to August 31, 2015) through June 20, 2017, a term overlapping the period certified for Richard Gramlow for 2016. As noted above, the job qualifications, job duties, housing and transportation requirements, and applications since 2013 are essentially the same. The listed worksite on the ETA 9142A and 790 differ for the applications of the respective business entities; but they both state that transportation from the place of the employer provided housing, owned jointly by the two business entities, “to the actual worksite & return at the end of the workday” will be provided. In 2012 there were four farm sites per business entity registered as “FSAs” with the Dickey County Farm Agency. There is no indication that the number of farm sites operated by the two business entities have increased or decreased. The ETA 790 transportation language is not in conflict with the concept that the H-2A workers would be transported to any of the numerous FSAs in Dickey County, North Dakota operated by the two business entities.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Employer has failed to establish by a preponderance of the evidence that it is operating independently of the business entity Richard Gramlow; that the Employer has failed to establish by a preponderance of the evidence that the need for the work of the requested Agricultural Equipment Operators does not exceed one year in length and is temporary or seasonal in nature; and that it was reasonable for the CO to determine, on the basis of the available evidence, that

the need for the job of Agricultural Equipment Operators exceeded one year. Accordingly, the Employer has failed to establish by a preponderance of the evidence that the CO acted in an arbitrary or capricious manner in finding that the Employer's need for the requested Agricultural Equipment Operators was not temporary or seasonal in nature, as required by 20 CFR Part 655. Accordingly, the determination of the CO to deny Employer's application in ETA Case No. H-300-16200-087349 must be affirmed.

ORDER

It is hereby **ORDERED** that the Certifying Officer's denial determination of August 10, 2016, is **AFFIRMED**.

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia