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**Issue Date: 06 April 2016**

OALJ Case No.: 2016-TLC-00033  
ETA Case No.: H-300-16049-425847

*In the Matter of:*

**SUGAR LOAF CATTLE CO., LLC,**

*Employer.*

Certifying Officer: Chicago National Processing Center

Before: **PAUL R. ALMANZA**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This matter arises under the temporary agricultural labor or service provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188, (the “Act”), and its implementing regulations at 20 C.F.R. Part 655, Subpart B. This decision and order is based on the written record consisting of the Administrative File (“AF”) forwarded by the Employment and Training Administration (“ETA”).

On March 24, 2016, Sugar Loaf Cattle Co. LLC (“Sugar Loaf” or “Employer”) requested expedited administrative review of the Certifying Officer’s (“CO”) March 17, 2016 denial of Employer’s temporary alien agricultural labor certification (H-2A) application. AF 2-3; AF 5-9. The Office of Administrative Law Judges received Employer’s request for expedited administrative review on March 24, 2016, and received the AF on March 30, 2016.

In expedited administrative review cases, an administrative law judge has five business days after receiving the AF to issue a decision on the basis of the written record, with no new evidence submitted on appeal. 20 C.F.R. § 655.171(a). On March 29, 2016, I issued a Notice of Docketing and Order Setting Briefing Schedule in which I set a deadline of April 4, 2016, for the parties to submit briefs. On March 31, 2016, I received Employer’s request to extend that deadline by one day. On April 1, 2016, I issued an Order Amending Briefing Schedule granting the parties until April 5, 2016, to submit briefs. On April 5, 2016, I received timely briefs on

behalf of both parties. This decision and order is based on the written record consisting of the AF and the written submissions on behalf of the parties.

### *Factual Background*

On February 18, 2016, Employer filed an *H-2A Application for Temporary Employment Certification*, ETA Form 9142A. AF 55-64. In this application, Employer requested temporary labor certification for eight workers whose job title is “Crop Production/Harvest Worker,” and whose SOC (ONET/OES) occupation title is “Agricultural Equipment Operators,” code 45-2091, for the period from April 18, 2016, to February 18, 2017. AF 55. The Employer stated these eight workers would have the following job duties:

Operate tractors and equipment for soil preparation, planting and fertilizing field crops for the seasonal production of hay, forage, and silage; completing the hay harvesting process including cutting, baling, wrapping and preparing for storage and storing field crops; cleaning and maintaining equipment daily, and other activities incidental to the preceding. Job duties also include spreading chicken manure and other fertilizer on fields and drilling seed. It is necessary to have several people working at the same time to complete these seasonal tasks while weather and crop conditions are suitable.

AF 57. The Employer provided the following statement of temporary need:

From the months of April through February, we raise and harvest seasonal crops of hay, forage, and silage on approximately 2000 acres. We begin by cutting, curing, baling, preparing for storage, and storing hay, forage, and silage. In the months of November through February, we are preparing the land by tillage, fertilizing and planting crops for the following season. These activities can only be done during these times of year and requires more people, working at the same time, to complete the job. To prevent crop loss, a sufficient number of workers must be available during the season and available to work at the same time. We have not been able to find willing and capable US workers to fill these positions.

AF 55.

On February 25, 2016, the CO sent Employer a Notice of Deficiency (“NOD”), listing three deficiencies. AF 37-43. One of the identified deficiencies (and the sole basis for denial of certification in this case, AF 7-9) was that the Employer did not establish a temporary need for these workers as required by 20 C.F.R. § 655.103(d). The CO stated that another application was certified for Southall Farms (“Southall”) for the period from December 1, 2015, through October 1, 2016, that Southall’s worksite is close to Employer’s worksite, that Southall’s application and Employer’s application list the same point of contact, Mr. James Southall, that the two applications request the same number of workers for an overlapping period of time, and also included a chart summarizing Southall’s and Sugar Loaf’s applications for overlapping time periods from December 2014 through October 2016. AF 39-40.

The CO recognized the applications were “filed under different employer names,” but upon considering the facts that the positions requested fell under the same SOC code, the applications had worksites close to each other, the applications listed Mr. James Southall (“Mr. Southall”) as the point of contact, and the applications sought 8 workers (I note that Southall’s 2014-2015 application sought 6 workers), the CO concluded: (1) “the interlocking nature of these entities [Southall’s and Sugar Loaf’s] and operations renders the fact of separate corporate forms inconsequential;” and (2) “the employers’ [Southall’s and Sugar Loaf’s] close worksites, and same number of workers requested indicates there is a full time need for agricultural labor at this location.” AF 39-40. The CO thus found that “the employer has failed to demonstrate a temporary or seasonal need for Agricultural Equipment Operators from April 18, 2016 through February 18, 2017.” AF 40. The CO required Sugar Loaf to provide evidence supporting its temporary need, including summarized payroll reports for Sugar Loaf and for Southall from April 2014 through January 2016. AF 40.

On March 1, 2015, Sugar Loaf submitted its response to the NOD. AF 14-36.<sup>1</sup> In relevant part, the response included a Statement in Support of Temporary Need signed by Mr. Southall and summary payroll reports for Sugar Loaf and for Southall as requested. AF 15-24. In his Statement in Support of Temporary Need, Mr. Southall stated:

Although the contact person is the same for both entities, the entities are separate. Southall ... is a sole proprietor while Sugar Loaf ... has a partner who owns 49% of the business. The books and records are separate, sep[a]rate tax returns and different return forms are filed. Even though the [work] areas are in close proximity, the separate entities have a distinct role in their respective seasonal processes, and the work that they do is done at different times due to weather, types of crops, and seasonal demands and locations.

...

The work that each entity does involves different seasonal work at different times. For example, the planting of winter wheat does not normally begin until October when the Southall ... workers begin. Spring planting and preparation begin in April when the Sugar Loaf ... workers begin. *Harvest season occurs at approximately the same time for both, and we have tried to have available during the harvest season, the maximum number of workers for both entities. We do not have the same type or amount of work available for full time employees for twelve months of the year for this H2A certification request period.*

*As our payroll records will indicate, we do not have 16 workers here at any one time.*

AF 15 (emphasis added).

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<sup>1</sup> In response to a March 2, 2016 email from the CO acknowledging receipt of Sugar Loaf’s response to the NOD and requesting payroll information for Southall from April 2014 through January 2016, Sugar Loaf submitted a supplemental response to the NOD on March 2, 2016. AF 10-13.

The payroll records Sugar Loaf submitted in response to the NOD establish that three workers have worked for both Sugar Loaf and for Southall. Specifically, three workers outside the H-2A program – identified as Kelsie, Turner, and Joffery – worked for Southall in April 2014 and for Sugar Loaf from April 2014 through January 2016 (with one exception – Joffery did not work for Sugar Loaf in the month of July 2015). AF 18, 21.

Southall's application for the time period from December 1, 2015 to October 1, 2016 seeks 8 workers with the job title, Crop Production/Harvest Worker, and states the applicable SOC (ONET/OES) code and occupation title are 45-2091 and Agricultural Equipment Operators, respectively. AF 113. In relevant part, Southall described the job duties of these workers as:

Workers will drive wheel tractors with other implements and attachments to perform various tasks involved in the processes of cultivating, planting and harvesting crops. Equipment used may include tractors pulling disks, grain drills and brush hogs. Spreading fertilizer and manure on fields. Cutting hay using mowers and/or mower conditions, raking using rakes and/or tedders, preparing for silage and other preservations processes, including baling with round and square balers. Workers will perform daily cleaning and maintenance required for the tractors and equipment being used. Moving products from fields to storage, with tractors and equipment, and hand movement of hay which requires that workers be able to lift 100 pound bales of hay. This job requires heavy lifting, bending, stooping, reaching, prolonged sitting and standing, and working outside in cold, hot and other inclement weather, if safe.

AF 115. Southall provided the following statement of temporary need:

Employer owns and operates farms, producing for sale and consumption by livestock, silage, hay, and other field crops. We have a need to have workers to perform seasonal work to prepare soil, plant, fertilize, and harvest field crops. During the months of December through April, we prepare the land by cultivating, fertilizing, and planting crops for harvest. The harvest period begins in April and goes to October. During this period workers cut, bale, and store the silage and hay. In each step of the processes of planting and harvesting silage, hay and field crops, it is essential that several people work at the same time to complete these tasks while weather and crop conditions are suitable. Otherwise the crops cannot be produced and/or they will ruin in the fields.

AF 113.

On March 17, 2016, the CO denied certification on the grounds that Sugar Loaf failed to prove it has a temporary or seasonal need for the requested workers. The CO specifically found that “[t]he job duties listed for ... [Sugar Loaf] and Southall ... are identical” and cited *Altendorf Transport, Inc.*, 2013-TLC-00026 (ALJ March 28, 2013) and *Katie Heger*, 2014-TLC-00001 (ALJ November 12, 2013) for the proposition that “two nominally distinct corporations functioning as one to service the same need” would not justify finding a separate period of

temporary or seasonal need when the two entities' periods of need overlap to establish a year-round need. AF 5-9.

### *Discussion*

An employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program. 20 C.F.R. § 655.161(a). The applicable regulations explain:

[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).

In *Katie Heger*, the CO found that a previous application had been certified for an entity named "Steven Heger" for a time period that overlapped that requested in the application and that described a position with the same job title, job duties, job requirements, and worksite address. The CO considered these facts and the "apparent interlocking nature of the two business entities" and "inferred that Steven Heger and ... [Katie Heger] were, in fact, a single business entity with a year-round rather than temporary seasonal need for workers. The ALJ in that case agreed, finding that the record did not establish that Steven Heger and Katie Heger were separate entities with distinct labor needs, and thus that "their 'temporary' needs merge into a single year-round need...." *Katie Heger*, 2014-TLC-00001, slip op. at 2, 4-6.

In *Altendorf Transport*, the CO found that a previous application had been certified for an entity named "VDI" for a time period that overlapped that requested in the application, that the two entities were "so interconnected" and the jobs described in each application were "so similar" that Altendorf Transport "has failed to establish how ... [its] job opportunity is temporary, rather than permanent and full-time, in nature." The ALJ in that case agreed, finding in relevant part that the two entities were "intertwined" and that the overlapping time periods in the two applications established a thirteen month period of need, and thus period of need that was neither seasonal nor temporary. *Altendorf Transport*, 2013-TLC-00026, slip op. at 3, 7-8 (internal marks omitted).

In *Larry Ulmer*, 2015-TLC-00003 (ALJ Nov. 4, 2014), the CO found overlapping periods of need in an application filed by a father and in previous applications filed by a company owned by his son for the same work at the same location meant that the latest application did not establish a temporary need because the applications together established a full-time need. The ALJ agreed, stating that since the two entities "appear to function as a single entity and have requested workers for sequential periods of time for the same work, their 'temporary' need merges into a single year-round need...." In his decision, the ALJ explained that the mere fact that the two entities had separate Federal Employee Identification Numbers did not establish they "d[id] not essentially function as one farming operation" because they perform duties during

different parts of the year and they used the same employee the previous year. *Larry Ulmer*, 2015-TLC-00003, slip op. at 2, 3-4 (citing *Katie Heger* and *Altendorf Transport*).

In its brief, Sugar Loaf has succinctly stated the issue I must decide: “[t]his case turns on whether Sugar Loaf is an independent business entity with its own seasonal need.” Sugar Loaf’s Brief, at 1. As explained below, I find that Sugar Loaf has not established that it is independent from Southall and thus has not established its own seasonal need. I must therefore affirm the CO’s denial of certification.

In determining whether Sugar Loaf and Southall are sufficiently intertwined as to constitute a single employer, I apply the four-part test outlined in *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131 (D.C. Cir. 2015). That test requires me to consider the following four factors (none of the four is controlling on its own, and all four need not be found to find two entities are acting as a single employer): “(1) common ownership or financial control; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations.” *Id.* at 1141 (citations omitted).

The first factor supports finding the two entities are a single employer. As Mr. Southall stated in the response to the NOD, “Southall ... is a sole proprietor while Sugar Loaf ... has a partner who owns 49% of the business.” AF 15. In other words, the clear implication is that Mr. Southall owns Southall as a sole proprietorship, while he owns 51% of Sugar Loaf, the remaining 49% being owned by a partner.<sup>2</sup> Based on this information, I find that Mr. Southall owns Southall and has a controlling interest in Sugar Loaf, and thus find the first factor met.

The second factor also supports finding the two entities are a single employer. Not only is Mr. Southall the same contact person for both entities, in his response to the NOD Mr. Southall made two things clear: first, he is intimately familiar with the operations of both entities; and second, he has management control over both entities (*e.g.*, when explaining that they “have tried to have ... the maximum number of workers for both entities” during harvest season). AF 15. I thus find the common management factor met.

The third factor also supports finding find the two entities are a single employer. Most notably, the payroll records submitted in response to the NOD show that as the workforce at Southall falls, the workforce at Sugar Loaf increases (and as outlined above, both are highest during the harvest season). AF 12-13, 16-22). Most notably, Mr. Southall’s own words indicate that the two entities’ operations are essentially one. Specifically, in explaining the two entities’ payroll records, he states: “[a]s our payroll records will indicate, we do not have 16 workers here at any one time.” AF 15. As none of Southall’s or Sugar Loaf’s applications sought more than 8 workers, this sentence only makes sense if “we” meant one entity comprising both Sugar Loaf and Southall. This conclusion is buttressed by Mr. Southall’s use of “here,” which indicates that

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<sup>2</sup> Sugar Loaf appears to provide conflicting information concerning its ownership in its brief. Specifically, Sugar Loaf’s brief is consistent with the response to the NOD by stating that “Southall ... is a sole proprietorship owned and operated by James Southall.” Sugar Loaf’s brief, at 4. But it states that “Sugar Loaf is an Arkansas limited liability company which was formed ... by Lynda Southall, John Southall and James Southall.” *Id.* Any apparent inconsistency concerning who owns Sugar Loaf is of no moment, however, as I cannot consider on appeal new information not previously submitted to the CO. 20 C.F.R. § 655.171(a).

Sugar Loaf's and Southall's work locations, while perhaps distinct in terms of their addresses, are fundamentally at the same place. I thus find the interrelation of operations factor met.

The fourth factor also supports finding the two entities are a single employer. The job descriptions, while using different language, describe the same duties: operating farm equipment for soil tillage, cutting and baling hay and other crops, and equipment maintenance. AF 57, 115. Moreover, the record establishes that the two entities employed the same workers, in that three workers outside the H-2A program worked for Southall in April 2014 and for Sugar Loaf from April 2014 through January 2016 (with one exception – one of the three did not work for Sugar Loaf in the month of July 2015). AF 18, 21. Finally, as addressed in the discussion of the third factor, the workforce at one entity rises while the workforce at the other falls, with both workforces at maximum during harvest season – this indicates a certain amount of coordination. Based on the similarity in the job duties, the cross-over among employees between Sugar Loaf and Southall, and the varying sizes of the two entities' workforce during the year, I find the centralized control of labor factor met.

For these reasons, I find that Sugar Loaf has failed to establish a seasonal or temporary need. The overlapping nature of its requested period of need (April 18, 2016, to February 18, 2017) and the period of need in the application certified for Southall (December 1, 2015, to October 1, 2016), together with the intertwined relationship between Southall and Sugar Loaf and the similarity in the job duties for the requested workers, indicates that Sugar Loaf's need for the requested labor is not seasonal or temporary. Rather, the record indicates that Sugar Loaf and Southall together have a year-round need for agricultural equipment operators. In reaching this conclusion, I have found persuasive and have followed the reasoning of my colleagues as expressed in their opinions in *Altendorf Transport*, *Katie Heger*, and *Larry Ulmer*.

### **ORDER**

In light of the foregoing, it is hereby ordered that the Certifying Officer's denial of certification is AFFIRMED.

Given the timing, I am requesting that this notice and order be served by fax in addition to by regular mail.

**SO ORDERED.**

**PAUL R. ALMANZA**  
Administrative Law Judge

Washington, D.C.