



Issue Date: 04 August 2017

OALJ Case No.: 2017-TLC-00022
ETA Case No.: H-300-17159-748748

In the Matter of:

HALTER WINERY, LLC,
Employer.

Before:

JONATHAN C. CALIANOS
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL
OF EMPLOYER'S H-2A APPLICATION**

This matter involves an appeal arising under provisions of the Immigration and Nationality Act governing temporary agricultural employment of non-immigrant workers (H-2A workers) and the corresponding regulations at 20 C.F.R. Part 655, Subpart B. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, & 1188. For the reasons set forth below, I affirm the Certifying Officer's denial of the Employer's *H-2A Application for Temporary Employment Certification*.

BACKGROUND

On May 25, 2017, the Employer, Halter Winery, LLC, filed an *H-2A Application for Temporary Employment Certification* ("Application") with the U.S. Department of Labor's ("DOL") Employment and Training Administration. (AF at 98). The Employer seeks temporary certification for one seasonal "agricultural grape analyst" whose daily tasks include:

- Closely monitoring the vines and analyzing grape development throughout the process of cultivating, maturation, harvesting, and the fermentation process of the wine-grape crop for high quality wine production;
- Perform proper sampling and testing procedures of grapes and its fluids to determine their PH concentration, density, sugar levels, acidity, and the ratio of the density of the liquid to the density of water to . . . determine the ripeness of the grape for its harvesting;
- Perform close assistance with grape processing (de-stemming, sorting and crushing the grapes) once the grapes are harvested and transported to the Crush Pad;

- Perform close assistance with fermentation management (pump-overs, punch downs, testing of must) once the grapes are in the tanks;
- Prepare reports of test results to document fermentation speed and measurements.

(AF at 57); *see also* (AF at 89, 91, 108, 115).

On June 30, 2017, the CO denied the Employer's Application because "the employer failed to establish that the job opportunity fits within the definition of agricultural labor or services as those terms are defined" under 20 C.F.R. § 655.103(c). (AF at 43, 45). Specifically, the CO reasoned:

While the planting, harvesting, and cultivation of grapes in a vineyard may qualify as agricultural labor or services as those terms are defined for purposes of the H-2A program, the remaining activities . . . do not. They involve the conversion of an agricultural commodity, grapes, from its unmanufactured state, to its final, manufactured state, wine, and therefore fall outside the scope of the H-2A program.

(AF at 47).

On July 10, 2017, the Employer requested a de novo hearing before the Office of Administrative Law Judges. (AF at 2). With its request, the Employer submitted a brief in which it argued the DOL guidelines permit H-2A workers to perform duties incidental to the agricultural labor or services for which temporary labor certification is sought. (AF at 3-10). During a conference call with the undersigned, the parties elected to forego a de novo hearing and proceed with administrative review under 20 C.F.R. § 655.171(a) as all facts are undisputed and only a legal issue remains. Both parties filed briefs accordingly.

DISCUSSION

The Employer failed to prove its eligibility for temporary employment certification. The H-2A program defines "agricultural labor or services" as: "the pressing of apples for cider on a farm"; "logging employment"; or as defined and applied in the Internal Revenue Code of 1986 ("IRC") found at 26 U.S.C. § 3121(g) or in the Fair Labor Standards Act of 1938 ("FLSA") found at 29 U.S.C. § 203(f). 20 C.F.R. § 655.103(c). "An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition." *Id.* The statutory definitions encompass processes incidental to farming operations; however, neither definition extends to processes more akin to manufacturing such as processes to transform an agricultural commodity from its raw or

natural state nor to the production of harvested food into nonagricultural commodities for market consumption. *See id.*

A. Definition and Application of “Agricultural or Labor Services” Under the IRC

The IRC defines agricultural labor as all services performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity . . . ;

. . .

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act . . . ;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed . . .

. . .

20 C.F.R. § 655(c)(1)(i) (emphasis added) (quoting IRC found at 26 U.S.C. § 3121(g)(4)(A)).

The IRC regulations lend further guidance on the definition of agricultural labor by explaining:

(4) Processing services which change the commodity from its raw or natural state do not constitute agricultural labor. For example the extraction of juices from fruits or vegetables is a processing operation which changes the character of the fruits or vegetables from their raw or natural state and, therefore, does not constitute agricultural labor. Likewise, services performed in the processing of maple sap into maple syrup or maple sugar do not constitute agricultural labor. On the other hand, services rendered in the cutting and drying of fruits or vegetables are processing operations which do not change the character of the fruits or vegetables and, therefore, constitute agricultural labor, if the other requisite conditions are met. Services performed with respect to a commodity after its character has been changed from its raw or natural state by a processing operation do not constitute agricultural labor.

26 C.F.R. § 31.3121(g)-1(e)(4).

B. Definition and Application of “Agricultural or Labor Services” Under the FLSA

Under the FLSA, agricultural labor means:

[F]arming in all its branches and among other things includes . . . the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . and any practices . . . performed by a farmer or on a farm as an

incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

20 C.F.R. § 655.103(c)(2) (quoting FLSA found at 29 U.S.C. § 203(f)).

The DOL issued clarifying regulations that categorize the FLSA's comprehensive statutory definition of agricultural labor into two distinct branches. 29 C.F.R. § 780.105. "First, there is the primary meaning," which "includes farming in all its branches." 29 C.F.R. § 780.105(b); *see also Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949); *Holtville Alfalfa Mills v. R.R.*, 230 F.2d 398, 401, 403 (9th Cir. 1955). Then there is the broader secondary meaning of agricultural labor, which includes "operations other than those which fall within the primary meaning of the term. It includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with 'such' farming operations." 29 C.F.R. § 780.105(c); *see also McComb*, 337 U.S. at 762-63; *NLRB v. Olat Sugar Co.*, 242 F.2d 714, 718 (9th Cir. 1957).

Work is "incident to or in conjunction with" farming operations "only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business." 29 C.F.R. § 780.144. Operations and processes "more akin to manufacturing than to agriculture . . . are not included." *Id.* *See also Mitchell v. Budd*, 350 U.S. 473, 481-82 (1956); *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 264-65 (1955). For example, operations to transform a commodity "from its raw and natural state" have been considered processes "more akin to manufacturing than to agriculture." *Maneja*, 349 U.S. at 265 (analyzing transformation of sugar cane from its raw or natural state through grinding processes); *see also Holtville Alfalfa Mills*, 230 F.2d at 403 (exploring whether alfalfa was sufficiently changed from its raw or natural state upon chopping such that it was no longer an agricultural commodity). Notably, just because a process causes some change in the raw or natural state of a commodity does not necessarily mean it falls outside the definition of agricultural services; instead, there must be sufficient change to constitute a complete transformation. *See Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1188 (10th Cir. 2004) (holding process of skinning, trimming, and dying pelts did not change commodity from raw or natural state where pelts were still substantially preserved in same state as they were before processing).

The FLSA regulations also provide guidance on the definition of “production” as used in 26 C.F.R. § 31.3121(g)-1(e)(4) by explaining that “production” does not extend to certain processing operations. According to 29 C.F.R. § 780.117(a):

The word “production,” used in conjunction with “cultivation, growing, and harvesting,” refers, in its natural and unrestrained meaning, to what is derived and produced from the soil, such as any farm produce. Thus, “production” as used in section 3(f) does not refer to such operations as the grinding and processing of sugarcane, the milling of wheat into flour, or the making of cider from apples. These operations are clearly the processing of the agricultural commodities and not the production of them.

See also Bowie v. Gonzalez, 117 F.2d 11, 19 (1st Cir. 1941).

Further, while “harvesting” falls within the definition of agricultural labor under the FLSA, the regulations make clear that the term does not extend to the preparation of harvested commodities for market consumption. 29 C.F.R. § 780.913(b). In other words:

“Harvesting” does not extend to operations subsequent to and unconnected with the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession. For example, the processing of sugarcane into raw sugar . . . or the vining of peas are not included.

29 C.F.R. § 780.118(b); *see also Bowie*, 117 F.2d at 19.

Although activities in “preparation for market” generally fall outside the definition of agricultural labor as defined under the FLSA, there are some enumerated exceptions. For example, “[a]ssembling, ripening, cleaning, grading, sorting, drying, preserving, packing, and storing” activities to prepare fruits for market consumption may fall within the definition of agricultural labor under 29 U.S.C. § 203(f). 29 C.F.R. § 780.151(b).

C. Application of “Agricultural Labor or Services” Under the H-2A Program

While case law directly interpreting 20 C.F.R. § 655.103(c) is sparse, *Domaine Drouhin Oregon*, 2004-TLC-00008 (ALJ Gee Jun. 7, 2004) is instructive in distinguishing between agricultural work and manufacturing as it relates to grapes and wine-making specifically. *See also Grade A Crawfish*, 2016-LHC-00009, slip op. at 6 (ALJ Romero Jan. 6, 2016). In that case, the ALJ found that the tasks performed in a “farm machine operator” position did not constitute “agricultural or labor services” under the H-2A program. *Domaine Drouhin Oregon*, at 2, 4-5. The duties involved were:

tends machines such as crusher and stemmer that separates crop from waste of grass, leaves, rocks and twigs. Turns switches to activate conveyors, blowers and shakers. Adjusts machinery to obtain optimum separations. Loads conveyors, hoppers and wheels to feed machines. Positions boxes at discharge end of conveyors to catch products. Moves baffle lever that channels product flow to container or stops flow during exchanges. Observes machine operation to detect malfunctions and adjusts machine, lubricates parts and replaces pieces to improve performance. Pulls debris or overloads to prevent clogging. May mix and pour and pour chemicals in treating tanks. Transports materials.

Id. at 2.

In affirming denial of certification, the ALJ reasoned most of the required tasks were preliminary steps to converting grapes into wine. *Id.* at 4-5. Specifically, “while grapes are being handled and processed . . . the commodity in question is the wine that will ultimately be produced.” *Id.* at 4. The grapes were being sorted, cleaned and destemmed, and loaded into hoppers and wheels so they could ultimately be crushed and processed into wine, not so they could be stored or sold as grapes. *Id.* All in all, “[t]he tasks to be performed by the farm machine operator are not yielding farm produce. They yield a product processed from farm produce.” *Id.* at 4-5.

D. The Duties Performed in the Agricultural Grape Analyst Occupation Do Not Constitute Agricultural Labor or Services to Qualify for Temporary Employment Certification Under the H-2A Program.

Similar to *Domaine Drouhin Oregon*, the primary tasks to be performed in the grape analyst role at issue here involve preliminary steps to converting grapes into wine. By the Employer’s own admission, closely monitoring vines and grape development during cultivation, maturation, harvesting, and fermentation is for “high quality wine production”; the same is true with respect to sampling and testing the grapes. *See* (AF at 57, 108, 115). The remaining duties, i.e., grape processing, fermentation management, and report preparation, are all post-harvesting activities related to the transformation of grapes from their raw or natural state into a manufactured, non-agricultural commodity – to wit, wine. *See id.* None of the duties required in the grape analyst role are designed so that grapes, the agricultural commodity, can be developed, stored, and sold as grapes in their unmanufactured state; the duties are all part of the wine-making process. *See id.* The agricultural grape analyst position is not agricultural.

ORDER

Because the agricultural grape analyst position is not considered agricultural as defined and applied under 20 C.F.R. § 655.103(c), it is hereby ORDERED that the Certifying Officer's decision denying the Employer's *H-2A Application for Temporary Employment Certification* is **AFFIRMED.**

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge