



Issue Date: 10 October 2018

OALJ Case No.: 2018-TLC-00030  
ETA Case No.: H-300-18227-424468

*In the Matter of:*

**MAINOR TILE & IRRIGATION, INC.,**  
*Employer.*

Certifying Officer: Lynette Wills,  
Chicago National Processing Center

Appearances:

Andrew M. Jackson, Esquire  
Andrew Jackson Law  
Clinton, NC  
*For the Employer*

Nora Carroll, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, DC  
*For the Certifying Officer*

Before: Steven D. Bell  
Administrative Law Judge

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

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).<sup>1</sup> A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies

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<sup>1</sup> 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.<sup>2</sup>

### STATEMENT OF THE CASE

On August 15, 2018, Mainor Tile & Irrigation (“Employer”) filed (1) Form ETA 9142, *H-2A Application for Temporary Employment Certification* (“Application”) with corresponding attachments; (2) Appendix A to Form ETA 9142; (3) Form ETA 790, *Agricultural and Food Processing Clearance Order* with corresponding attachments; and (4) a cover letter to the Chicago NPC.<sup>3</sup> The Employer requested certification for four drainage and irrigation workers,<sup>4</sup> from October 1, 2018 until June 29, 2019, based on an alleged seasonal need during that period.<sup>5</sup>

Following email correspondence requesting clarification of dates and the location of worksites,<sup>6</sup> the CO issued a Notice of Deficiency dated August 22, 2018, stating that based on the multiple worksites listed on the Application and Form ETA 790 spanning 9 counties and 2 states, it was “unclear if the employer is operating as an Individual Employer or an H-2A Labor Contractor (H-2ALC)” under 20 C.F.R. § 655.103(b), and noted that if Employer was an H-2ALC, it must comply with the application requirements under 20 C.F.R. § 655.132(b).<sup>7</sup> The CO also found the application deficient under 20 C.F.R. §655.141(a) because Employer failed to enter worksite addresses into the ETA Forms 9142 and 790.<sup>8</sup>

Employer filed a Response to Notice of Deficiency, on August 23, 2018, listing worksite addresses for the property owned by Employer, and stating that:

The requested workers are intended to perform the work on employer's farm as well as on farms owned by other farmers, and the employer will control the worksite owned by another farmer while employer's H-2A workers perform work in that field.<sup>9</sup>

The CO then issued a Notice of Required Modification dated August 28, 2018. It stated that:

While Mainor Tile & Irrigation may be considered an “Individual Employer” when the workers are performing job duties on the employer’s individual property, it continues to appear that the employer is operating as an H-2ALC when the furnishing H-2A workers to work on farms owned by other farmers.<sup>10</sup>

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<sup>2</sup> 20 C.F.R. § 655.171.

<sup>3</sup> AF 77-125. In this Decision and Order, “AF” refers to the Administrative File.

<sup>4</sup> SOC (O\*Net/OES) occupation title “Agricultural Equipment Operators” and occupation code 45-2091. AF 80.

<sup>5</sup> AF 77.

<sup>6</sup> *Id.* at 58-62

<sup>7</sup> *Id.* at 65-66.

<sup>8</sup> *Id.* at 67.

<sup>9</sup> *Id.* at 29.

<sup>10</sup> AF 27.

The CO found that Employer failed to provide documentation that it owned and operated all of the work locations at each fixed site agricultural business where the work will be performed, as required under 20 C.F.R. § 655.132(b). The modification required that if Employer was properly defined as a “Fixed-site Employer,” it must provide documentation that it owns or operates each of the work locations on its application.<sup>11</sup>

In its response, Employer provided documentation of its ownership of the properties listed in its response to the notice of deficiency and that it had oral agreements with other farmers that Employer controls the worksite and the worker while on site. It also argued that as a fixed site employer it could not be considered an H-2ALC.<sup>12</sup>

In a Denial Letter issued September 19, 2018, the CO rejected the argument that Employer was a fixed site employer, based on the requirement under 20 C.F.R. § 655.103(b) that agricultural activities be performed as incident or in conjunction with the owner’s or operator’s own agricultural operation. The CO found that oral agreements were insufficient to establish that Employer indeed had control of all the worksites listed in the application which were owned by other fixed-site farmers, and thus Employer failed to submit sufficient documentation to establish whether it was a fixed site employer or acting as an H-2ALC.<sup>13</sup> The application was therefore denied based on a failure to comply with the application requirements under 20 C.F.R. §655.103(b), and 20 C.F.R. §§655.132(a)-(b).<sup>14</sup>

On September 24, 2018 Employer appealed the CO’s denial to the Office of Administrative Law Judges (“OALJ”) and requested expedited administrative review of the CO’s decision.<sup>15</sup> On October 2, 2018, I issued a Notice of Docketing and Order Setting Briefing Schedule, acknowledging the Employer’s request for expedited administrative review and permitting the parties to file briefs within two business days.

Employer filed a brief on October 5, 2018. In its brief, Employer argued that it was a fixed-site employer “because it owns and operates a farm where agricultural activities are performed, and ... intends to employ H-2A workers in conjunction with its own agricultural operation.” It argued that because it was a fixed site employer it could not by definition be an H-2ALC notwithstanding the fact that workers may perform the same job duties at farms not owned by Employer.

## **DISCUSSION AND APPLICABLE LAW**

The Employer bears the burden to establish eligibility for temporary labor certification.<sup>16</sup> In this case, the Employer has appealed the CO’s decision to deny its application. When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (“ALJ”) may only render a decision “on the basis of the written

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 17-23.

<sup>13</sup> *Id.* at 15-16.

<sup>14</sup> *Id.* at 14-16.

<sup>15</sup> AF 1-10.

<sup>16</sup> See e.g. *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); see also *Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015).

record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae.” Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO.

*Status as a Fixed-Site Employer*

At issue in the instant appeal is whether Employer qualifies as a fixed-site employer, or rather is an H-2ALC, which would require additional documentation and information from Employer not provided with its application.<sup>17</sup> A fixed-site employer is defined under the regulations as:

Any person engaged in agriculture who meets the definition of an employer<sup>18</sup> . . . who *owns or operates* a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker . . . as incident to or in conjunction with the owner’s or operator’s own agricultural operation.<sup>19</sup>

An H-2A Labor Contractor (“H-2ALC”) is defined as:

Any person who meets the definition of employer . . . and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or association . . . who recruits, solicits, hires, employs, furnishes, houses, or transports any workers subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.<sup>20</sup>

The definition of an H-2ALC “broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer.”<sup>21</sup>

As stated by the CO in the denial letter, whether Employer is a fixed-site employer hinges on whether the agricultural activities are performed as incident to or in conjunction with the owner’s or operator’s own agricultural operation, and thus whether it *owns or operates* the farms identified as worksites.<sup>22</sup> Employer owns seven of its identified worksites, but not the remaining sites which it has stated are “farms owned by other farmers.”<sup>23</sup> Therefore, Employer must

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<sup>17</sup> See 20 C.F.R. § 655.132.

<sup>18</sup> An employer is defined under the regulations as a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: (1) has a place of business in the U.S. and a means by which it may be contacted for employment; (2) an employer relationship with respect to an H-2A worker or a worker in corresponding employment; and (3) possesses a valid Federal Employer Identification Number (“FEIN”). 20 C.F.R. § 655.103(b).

<sup>19</sup> 20 C.F.R. § 655.103(b) (emphasis added).

<sup>20</sup> 20 C.F.R. § 655.103(b).

<sup>21</sup> Employment and Training Administration, U. S. Department of Labor, comments to Final Rule implementing 20 C.F.R. Part 655, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6886 (Feb. 12, 2010).

<sup>22</sup> See 20 C.F.R. § 655.103(b).

<sup>23</sup> AF 29.

establish that it is the operator of these additional worksites in order to be deemed a fixed-site employer.<sup>24</sup>

Employer relies on oral agreements with the farmers who own the secondary work sites. It does not identify the owners of these sites.<sup>25</sup> Nor does Employer provide a lease contract or any other evidence that could demonstrate the extent and nature of Employer's control over the worksite, aside from a bare assertion that Employer controls the worksite and the worker while on site.<sup>26</sup> Additionally, the CO pointed out that Employer's own website stated that it "offers a full range of services to assist you with the design, installation, maintenance, and repair of your tile and irrigation equipment."<sup>27</sup> This range of specialized services does not indicate that Employer maintains complete control of the agricultural operation of other farmers while on site.

The CO thus accurately concluded that Employer failed to sufficiently establish that Employer indeed has control of all the worksites listed in the instant application.

In prior TLC decisions, providing a service of harvesting and hauling of sugarcane, to farmers at specific locations and handling sprinklers and irrigation for farm fields did not qualify as fixed-site employers.<sup>28</sup> As in those cases, Employer has failed to establish that it had control of the worksites owned by others and was thus an operator of those sites.

Because Employer has failed to establish it is a fixed-site employer under the regulations, and has not met the requirements for an H-2ACL application under 20 C.F.R. §655.132, it has not met its burden of establishing it is entitled to labor certification.<sup>29</sup> Accordingly, the CO's denial of certification is hereby affirmed.

### **ORDER**

It is hereby **ORDERED** that the CO's decision denying temporary labor certification be, and hereby is, **AFFIRMED**.

Steven D. Bell  
Administrative Law Judge

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<sup>24</sup> See *Patout Equipment Co.*, 2015-TLC-00063 (Aug. 17, 2015).

<sup>25</sup> AF 17.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 26.

<sup>28</sup> *Patout Equipment Co.*, 2015-TLC-00063 (Aug. 17, 2015) pdf at 7; *Lorenzo Gabriel Marquez*, 2013-TLC-00009 (Nov. 29, 2012) pdf at 3.

<sup>29</sup> See *Garrison Bay Honey Co., LLC*, 2011-TLC-00054 (Dec. 2, 2010).