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BALCA Case No.: 2018-TLC-00027
ETA Case No.: H-300-18211-887921

In the Matter of:

CROP TRANSPORT, LLC
Employer.

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) & 1188, and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification ("H-2A") program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On July 30, 2018, Crop Transport ("Employer") filed an *H-2A Application for Temporary Employment Certification* on Employment and Training Administration Form ("ETA") 9142 ("Application"). (Administrative File ("AF") 81). The Employer's Application requested labor certification for 16 General Farm Workers - Agricultural Equipment Operators during the period from September 1, 2018, through June 1, 2019. *Id.* On August 6, 2018, the Certifying Officer ("CO") issued a Notice of Deficiency concerning the Application in which was noted that "a previous application was certified under the business name Walker Place, at the same worksite address as this application," with dates of need that overlapped this Application and which—like the Application at issue—requested "agricultural workers to perform job duties classified under the same SOC code, 45-2091." (AF 69). The CO directed Employer to provide "[s]upporting evidence and information to substantiate the nature of the relationship between Crop Transport, LLC and Walker Place and the temporary need for the H-2A worker(s) in the case." (AF 70).

On August 10, 2018, Employer responded to the Notice of Deficiency and submitted a number of documents, including the following: a narrative description of "the differences in business operations between Crop Transport, LLC and Walker Place" (AF 37-38); a document dated May 7, 2009, styled "Amended Partnership Agreement of

Walker Place" (AF 39); and a document dated February 15, 2006, styled "Operating Agreement of Crop Transport, LLC, an Indiana Limited Liability Company." (AF 46).

On August 27, 2018, the CO denied the Application because Employer had "failed to establish that its need for H-2A workers is temporary or seasonal in nature as required by 20 C.F.R. § 655.161(a)." To reach this conclusion, the CO first determined that Employer and Walker Place "while nominally separate, are in fact operating as a single employer and thus their dates of need must be aggregated." (AF 28). As the aggregate period exceeded one year, the CO concluded that there was "a year-round need for the job opportunity sought in the same area of intended employment." *Id.*

On August 29, 2018, Employer filed a request for expedited administrative review of the Final Determination issued by the CO in this matter. (AF 1).[1] I received the AF from the ETA on October 3, 2018. The parties did not submit briefs. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and the written submission by Employer.[2]

BACKGROUND

An application to import a nonimmigrant alien as an H-2A worker may be approved only after the Secretary of Labor ("the Secretary") has certified that "there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and . . . the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1). If either of these conditions is not met, the Secretary may not issue a certification under the Act. *Id.* § 1188(b).[3] To implement this statutory authority, the Secretary has issued procedures to acquire information sufficient to grant or deny the two certifications described above, *see* 20 C.F.R. § 655.100, and has also delegated authority to make these certifications "to the Assistant Secretary for the [ETA], who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC).

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[1] The transmittal letter from the CO characterizes Employer's submission as a request "for an expedited De Novo Hearing." I disagree. Employer did not expressly request a hearing, and referred instead to a "review" of the file. Employer's submission concluded by expressing appreciation for the time spent "in reviewing our case." (AF 1). As such, I will consider Employer's submission to be a request for administrative review as provided by 20 C.F.R. § 655.171(a).

[2] I did not consider any evidence submitted with Employer's request for expedited review that was not already contained within the AF.

[3] The Act also provides four other conditions that would prevent the Secretary from certifying an application to import a non-immigrant alien as an H-2A worker, but none are relevant to the instant facts. *See* 8 U.S.C. § 1188(b)(1)-(4).

The determinations are ultimately made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members; e.g., a [CO].” *Id.* § 655.101.

The Act requires that the Secretary “provide for an expedited procedure for the review of a denial of certification” of an H-2A application, 8 U.S.C. § 1188(e), and such procedure has been promulgated at 20 C.F.R. § 655.171(a). The regulation provides that the Chief Administrative Law Judge may designate either a single administrative law judge or a three-judge panel from the Board of Alien Labor Certification Appeals (“Board” or “BALCA”) to conduct the review. 20 C.F.R. § 655.171. The scope of review is limited to the written record and any non-evidentiary written submissions from the parties. *See id.* § 655.171(a). The reviewing judge or panel may affirm, reverse, or modify the decision by the CO, or remand the case to the CO for further specified action. *Id.* The decision by the judge or panel is the final decision of the Secretary and is not subject to further appeal or review. *See id.*

ISSUE

As the Administrative Law Judge designated to conduct this review, I must determine whether Employer has complied with all applicable requirements of 20 C.F.R. Parts 653-655 and is therefore eligible for Temporary Employment Certification. *See* 20 C.F.R. § 655.161(a).[4] These requirements include, but are not limited to, the timeliness

[4] The regulation is silent as to the standard of review to be applied during administrative review of the decision by the CO. 20 C.F.R. § 171(a); *cf. id.* § 655.171(b) (describing the hearing under that procedure as “de novo” and allowing for the introduction of new evidence). Some administrative law judges have reviewed the decision by the CO under a so-called “arbitrary and capricious” standard of review. *E.g., J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (March 7, 2016) (invoking the deferential standard and citing exemplary cases in which the standard was also used). Notwithstanding this apparently common usage, I am not persuaded that any deference is due the decision by the CO during this administrative review. The judge or panel conducting the administrative review of the CO’s decision to deny an H-2A employment certification sits in a very different place than a federal judge appointed under Article III of the Constitution who might be reviewing a similar agency decision. An Article III judge is typically conducting judicial review of a final agency decision from “outside” of the agency, and some deference to agency fact-finding and expertise may be appropriate; in such circumstances, respect for the constitutional separation of powers could justify use of a standard of review that set aside agency action, findings, or conclusions only when found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Under the instant facts, it is important to note that the reviewing judge or BALCA panel is reviewing an *initial* agency decision from *within* the agency itself, and sits in the place of the Secretary of Labor while doing so. *See* 20 C.F.R. § 655.171(a). In such a situation, it is highly appropriate that the reviewing authority have all the powers of the agency official making the initial decision, without application of a deferential standard of review. *Cf. Albert Einstein Medical Center*, 2009-PER-00379, slip. op. at 30 (November 21, 2011) (en banc) (holding that BALCA reviewed the CO decision to deny permanent immigration certification under de novo standard for the same reasons stated above); 5 U.S.C. § 557(b) (providing the same in cases conducted under the Administrative Procedure Act). And finally, it is important to note that I am reviewing the same record relied upon by the CO in denying the application. This is not a situation in which the CO conducted an informal hearing and made credibility determinations after observing witnesses, nor is it the case that the subject matter at issue is especially within the expertise of ETA. Indeed, it is the inexpert application of the legal standards invoked

requirements in § 655.130(b), the offered wage rate criteria in § 655.120, the provision of assurances specified in § 655.135, and the recruitment obligations required by § 655.121 and § 655.152. *See id.*

EVIDENTIARY FINDINGS

As a threshold matter, the CO has not identified any deficiencies in the timeliness of the Application, the requisite assurances from Employer contained therein, the offered wage rate criteria, or Employer's compliance with recruitment obligations prescribed in Part 655. Moreover, my review of the administrative record in this matter corroborates the absence of any such deficiencies and discloses no evidence that there are either sufficient United States workers "who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition," or that use of nonimmigrant labor will "adversely affect the wages and working conditions of workers in the United States similarly employed." As the applicable statutory criteria for certification appear to have been satisfied by Employer, I will limit my discussion to the stated basis for denial by the CO, i.e., that Employer's need for additional labor was actually permanent rather than temporary.[5]

The following relevant facts about Employer are established by a preponderance of the documentary evidence provided in the Administrative File.

1. Employer is an Indiana Limited Liability Company "organized for the transaction of any or all lawful businesses for which limited liability companies may be organized under the Indiana Limited Liability Company Act." (AF 50). More specifically, Employer is a trucking company that hauls agricultural products for several customers during three periods: crops are hauled from local fields from September through November; stored grain is hauled to market from December through March; and liquid fertilizer is hauled to the fields from April through May. (AF 37)

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by the CO that ultimately lead to reversal in this matter. As such, I conclude that no deference should be accorded the conclusions and determination of the CO, and de novo review is the appropriate standard of review when reviewing the denial of an H-2A application under the provisions of 20 C.F.R. Part 655.

[5] AF 27. H-2A applications are frequently denied by the CO because the need stated is not temporary, but there does not appear to be any statutory authority for the Department of Labor to engage in such analysis and deny applications on that basis. My disposition of this matter makes it unnecessary for me to resolve whether ETA possesses the authority it routinely asserts or if I, as an administrative law judge, have the statutory and regulatory authority to review the lawfulness of the assertion. Those issues await resolution in a case in which such determinations are necessary, unless the regulation at issue is subsequently revised to better articulate the basis for ETA's authority to deny certification on substantive bases not named in the statutory grant of authority to the Secretary.

2. The registered office and principal place of business of Employer is 700 E. County Road 600 North, Cayuga, Indiana 47928. (AF 51). This address is also the main worksite listed on the Application. (AF 84)
3. Employer's mailing address as identified on the Application is 27 East Liberty Lane, Danville, Illinois 61832. (AF 82)
4. Employer's company members are Jerry Walker, Ellen Walker, and Jeremy Walker, each with different home addresses. (AF 51)
5. The members manage Employer but cannot act individually as corporate agents without the agreement of at least a majority of the members. (AF 52-53)
6. Jeremy Walker is the Chief Executive Officer of Employer, controls the company's accounts, and makes all personnel decisions for Employer, including hiring and firing employees. (AF 37-38)
7. Stephanie Walker Spiros is employed by Employer as its Managing Partner, is responsible for its books, records, accounting, and tax matters, and can cause title to property to be acquired for the benefit of Employer. (AF 60-61, 63, & 82). Ms. Spiros is also identified as the point of contact for the Application at issue (AF 82), made the requisite Employer Declaration therein (AF 88), was identified as Employer's agent conducting interviews of interested applicants (AF 93), and signed the Employer Certification for the Job Order related to necessary recruitment efforts. (AF 96)

The following relevant facts about Walker Place are established by a preponderance of the documentary evidence provided in the Administrative File.

1. Walker Place is "a general partnership formed for the purpose of conducting a farming operation as a business enterprise engaged in the production of agricultural products." (AF 39). It has operations in Illinois and Indiana, and its activities include planting, cultivating, spraying, and harvesting corn and soybeans. It owns all its farming equipment, but contracts with trucking companies, including Employer, to haul harvested crops. (AF 37)
2. The 11 partners in Walker Place include Jerry Walker, Jeremy Walker, Stephanie Walker Spiros, another individual, and seven Indiana corporations. (AF 39)
3. Of the seven corporations in Walker Place partnership, three have agents or officers that include members or employees of Employer: Sugar Creek Acres – Jeremy Walker; Fiesta Farms – Stephanie Walker Spiros; and G & J Walker Farms – Jerry and Ellen Walker. (AF 41)

4. Stephanie Walker Spiros is also the Chief Financial Officer of Walker Place (AF 37) and makes all employment decisions for the partnership, including the hiring and firing of employees. (AF 38)
5. A single person, i.e., M.D., was employed by both companies in 2016; Employee M.D. worked for Walker Place during each month of that year, but also worked for Employer from January to March 2016. However, comparison of his salary while employed by both companies indicates that he was working part-time at one or both companies during this period. The basis for this finding is that the aggregate monthly salary for the period of joint employment never equaled the average monthly salary during the period of employment by Walker Place from April through December 2016. (AF 63-65)
6. Although Walker Place shares the same physical base of operations as Employer, the accounts, financial records, personnel records, storage, office space, housing, equipment, buildings, other property, and disbursements on behalf of Walker Place are completely independent from those for Employer. (AF 37-38)
7. Walker Place had previously requested and received temporary labor certification for eight nonimmigrant workers characterized generally as "Farm Worker, General" from March 1, 2018, through December 1, 2018. (AF 80)

LEGAL CONCLUSIONS

To assess the legal significance of these facts and the degree of integration of these two enterprises, I will consider the totality of the circumstances, including factors such as the ownership of the two entities, their management, operations, and the control of employment decisions in each.[6]

Ownership

Walker Place and Employer have some aspects of common ownership. Whether directly or indirectly, all three corporate members of Employer—Jerry, Ellen, and Jeremy Walker—have a partnership interest in Walker Place. Moreover, the effect of

[6] This analytical framework—apparently adopted from practice under the National Labor Relations Act rather than the Immigration and Nationality Act or its implementing regulations—is lamentable for employers, certifying officers, and administrative judges alike, both in terms of its awkward fit to immigration practice and its ambiguity. *E.g., Sugarloaf Cattle*, 2016-TLC-00033, slip op. at 6 (April 6, 2016) (citing NLRB decision as source for use of "single-employer" framework). It would be helpful to practitioners and adjudicators alike if meaningful regulatory criteria were promulgated through notice and comment procedures as to when ETA will consider two nominally separate entities as a single applicant for the purposes of temporary labor certifications under the Act.

this overlapping ownership is magnified because Jerry and Jeremy each have a dual role in the exercise of partnership governance, first in their individual capacities as 9% partners, and then as agents of specific corporate partners: Jerry in connection with G & J Walker Farms (with Ellen), and Jeremy in connection with Sugar Creek Acres, Inc. (AF 41-42). But that being noted, neither entity wholly owns the other, nor is it likely that either would qualify as a "subsidiary" of the other, as neither could be said to have a controlling interest in the ownership of the other based upon the evidence of record.[7] As a matter of corporate law, the most that can be safely said in light of this administrative record is that the two entities are affiliates of one another, each with a non-controlling interest in the other.[8]

Management

The common management factor in the two entities is Stephanie Walker Spiros. While an employee and Managing Partner of Employer, she is also a 9% partner and the Chief Financial Officer of the Walker Place partnership. Her presence in the hierarchy of both enterprises is potentially significant, but it must be noted that she is chief executive in neither. And there is no other evidence of common management of the two entities, such as an indemnification agreement between the entities, or other shared managers. Jerry Walker is identified as the chief executive of Employer, but no such evidence exists for the Walker Place partnership.

Operations

There is little evidence of shared operations between the two entities. While it was asserted that Ms. Spiros completed H-2A applications for both, such action was explained on the basis of her previous experience with such applications, and the overwhelming weight of other evidence indicates that the two entities are operationally separate. As previously noted above, the two entities have separate accounts, financial records, personnel records, storage, office space, housing, equipment, buildings, other property, and disbursements.

The CO placed great weight upon the facts that both entities requested the same general category of nonimmigrant worker in their respective applications and that both share a common location as evidence of unitary need and common operations. While the application submitted on behalf of Walker Place is not in the administrative file under review, to gauge the weight to assign this assertion I will assume that the partnership

[7] Cf. *Sugarloaf Cattle*, 2016-TLC-00033 (April 6, 2016) (aggregating need between two entities when one individual had a controlling interest in both).

[8] *Affiliate*, Black's Law Dictionary (10th ed. 2014).

requested Agricultural Equipment Operators with the same Standard Occupational Classification (SOC) requested by Employer, i.e., 45-2091. The applicable O*Net SOC description is incredibly broad in scope: "Drive and control farm equipment to till soil and to plant, cultivate, and harvest crops. May perform tasks, such as crop baling or hay bucking. May operate stationary equipment to perform post-harvest tasks, such as husking, shelling, threshing, and ginning."[9] In my assessment, it is completely reasonable that separate entities performing a variety of different farming tasks could rely upon this single occupational category to request workers as varied as farm hands and laborers as well as tractor and truck drivers.[10] As such, I give no weight to the fact, if it were to be established through evidence of record, that both entities had requested the same category of worker as proof that the two entities were actually the same enterprise with a single and permanent need for workers.

I am similarly unpersuaded by the shared work location as dispositive evidence of unitary operations. I acknowledge that a shared facility could support a theory that two tenants of that location are in fact one legal entity, and it may even be that both entities are in fact subsidiaries working on the land of their heretofore undisclosed parent family farming conglomerate. But while a shared worksite address may be sufficient to alert the staff of the National Processing Center that there may be some connection between two applicants for temporary labor certification, without additional evidence of record of shared operations, it remains nothing more than a speculative theory.[11]

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[9] Retrieved from O*Net Code Connector at https://www.onetcodeconnector.org/ccreport/45-2091.00 on October 18, 2018.

[10] Indeed, the CO gives no indication as to what the "right" answer for an applicant might be in such circumstances, and appears to conflate—as have previous administrative law judges—the single-employer analysis with the consequent analysis of whether the two applications evince a single need for nonimmigrant workers. (AF 31-32). The fact that two putatively separate employers apply for nonimmigrant workers in the same broad occupational category is not persuasive evidence that they are somehow a single entity. *But cf. Larry Ulmer*, 2015-TLC-00003 (November 4, 2014) (holding to the contrary in the case of a father and son operating putatively separate entities requesting same occupational category of workers); *Katie Heger*, 2014-TLC-00001 (November 12, 2013) (holding to the contrary in the case of a husband and wife operating putatively separate entities requesting same occupational category of workers).

[11] It is unclear what more Employer could have done in this circumstance to establish separate operations than what has already been done: disclaim unified operations, proffer supporting evidence, and refer in argument to the differing purposes of the putatively single entities. A common mailing or worksite address shared by putatively separate applicants should be the beginning of the CO's inquiry, not the end. If such a shared address is to give rise to an irrebuttable or otherwise persistent presumption of sorts by the CO in favor of a single enterprise, that implied process should be codified in a formal regulation so as to place employers on notice as to the criteria to be used to evaluate their operations.

Employment Decisions

The evidence of record is uncontroverted that the two entities share similar employee handbooks, but otherwise have personnel policies and operations that are separately developed and executed. (AF 38). Ms. Spiros is responsible for hiring and firing employees at Walker Place, while Jeremy Walker has that responsibility for Employer. The CO placed some weight on the fact that Ms. Spiros was identified as the interviewer for the mandatory recruitment associated with Employer's Application, and it is circumstantial evidence of unified employment practices. That being noted, there is no evidence that Ms. Spiros actually had hiring authority based on the interviews she was to conduct, or if she did, that it was indicative of anything other than a temporary assignment based upon her familiarity with the H-2A process and the work in both entities. Accordingly, I give little weight to her identification as the interviewer for Employer on the Application. I also attribute no significance for the present analysis to the fact that a single employee worked part-time for both entities during a three-month period in 2016.

Concluding Considerations

In denying this application the CO asserted that "[t]he same business and worksite address, in conjunction with the multitude of other facts (shared employees, and similar job duties) all suggest that Crop Transport, LLC and Walker Place are in fact operating as a single entity." (AF 32). I disagree. There is substantial overlap in ownership interests between these two entities, and they are undoubtedly affiliates in terms of black-letter corporate law. That being noted, one is a farming partnership, while the other is a trucking company, each with other customers. (AF 37-38). There is also management overlap in the form of Ms. Spiros, but this is largely unremarkable in that her financial management and administrative skills are relevant to both entities, and there is no evidence of record that she exercises directive management authority between them. The entities apparently perform at least some of their work at a common worksite, but maintain otherwise separate operations and labor practices; separate labor practices are generally considered to be the most important factor of "single-employer" analysis.[12] The fact that both may have used the same broad SOC to request nonimmigrant workers is not legally significant in that the language was apparently paraphrased from the standard definition of the classification—which includes harvest and transport in its terms—and must be read in the context of the purpose and function of each enterprise.

[12] *See, e.g., Romano v. U-Haul Int'l*, 233 F.3d 655, 666 (1st Cir. 2000) (observing the same).

Based on the evidence and conclusions noted above, I conclude that the evidence of record establishes that Employer is not a "single employer" with Walker Place, and their respective dates of need may not be aggregated. I further conclude that a preponderance of the evidence of record[13] establishes that Employer has a need for the agricultural services or labor to be performed on a temporary or seasonal basis. In the absence of any other uncorrected deficiency of record, I conclude that Employer has met the requirements for certification prescribed by the Act and 29 C.F.R. Part 655.

ORDER

The denial of the H-2A Application in this matter is hereby **REVERSED**, and this Application is **REMANDED** to the Certifying Officer for certification.

SO ORDERED:

WILLIAM T. BARTO
Administrative Law Judge

[13] *Cf*. 8 C.F.R. 214.2(h)(5)(iv)(B) (authorizing disapproval of H-2A petition by Department of Homeland Security if "there is *substantial evidence* that the employment is not temporary or seasonal"). My review of the reported cases involving H-2A applications appears to indicate that this reverse "substantial evidence" standard is the de facto standard being used by CO's and many administrative law judges in adjudicating these applications. If this is so, the standard should be promulgated in a regulation to ensure adequate notice to employers, consistent application by administrative law judges, and maintenance of the rule of law and procedural due process in administrative adjudications. In the meantime, it should not be sufficient for a CO to merely note difficulties or inconsistencies in an H-2A application that do not defeat or otherwise undermine the preponderance of the evidence proffered by an applicant, especially when considering an application for temporary labor certification and related documentation prepared without the assistance of an attorney.