



**Issue Date: 02 July 2019**

**BALCA Case No.:** 2019-TLC-00057  
**ETA Case No.:** H-300-19102-797530

*In the Matter of:*

**DOUBLE J HARVESTING, INC.**  
*Employer.*

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

This case arises from Double J Harvesting, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its application for temporary alien labor certification under the H-2A non-immigrant program. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1), 1188.

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142A, Application for Temporary Employment Certification (“Form 9142A”). A CO in the Office of Foreign Labor Certification of the Department of Labor’s Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

### **BACKGROUND**

On April 12, 2019, ETA received an application for temporary labor certification from Employer. Employer requested certification for five Truck Drivers for an alleged period of seasonal need from June 10 through August 1, 2019. AF 43-53.<sup>1</sup> The CO issued a Notice of Deficiency (“NOD”) on April 18, 2019, finding that Employer failed to submit copies of any Farm Labor Contractor Employee Certificates of its employees authorized to drive. AF 34-36. Employer provided this information, and on April 23, 2019, the CO issued a Notice of Acceptance (“NOA”). AF 23-28. This NOA indicated that Employer’s application had been accepted for processing, but noted that Employer still needed to take additional steps in order to

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<sup>1</sup> Citations to the Appeal File will be abbreviated with an “AF” followed by the page number.

receive a final determination.<sup>2</sup> AF 23. Employer submitted a number of additional documents to the CO following issuance of the NOA. AF 16-22.

On May 3, 2019, the CO issued a Notice of Required Modifications (“NRM”). AF 11-15. It noted that though Employer’s application had been accepted, after further review the CO found that Employer’s application failed to meet the criteria for certification. Specifically, the CO noted that the job duties contained in Employer’s application relate primarily to trucking and hauling crops. The CO directed Employer to provide a written statement describing how its application should properly be considered as agricultural labor under the H-2A program. AF 14-15.

On May 3, 2019, Employer submitted a letter to the CO. AF 10. In this letter, Employer asserted:

Double J Harvesting, Inc. as the H2ALC for the above referenced petition will be harvesting the watermelons for Summer Time Melons, as specified in the Harvest Agreement. We will use workers from another petition (H-300-19106-955148) to harvest said melons. The drivers being requested in this application are not involved in the harvesting or packing portion of the job. Rather, they will strictly drive the field trucks loaded with the watermelons both in the field while workers are loading them and also from the field to the packing facility and vice verse [sic].

They may also be asked to drive the passenger buses with the workers to and from the housing to the job sites.

Since Double J Harvesting, Inc. as the H2ALC, are both harvesting the watermelons (the agriculture commodity) and also hauling it to the packing facility (delivery to storage as the practice in conjunction with the farming operation), we believe this application qualifies to be considered as agricultural labor.

AF 10.

On May 21, 2019, the CO issued a Denial of Employer’s H-2A Application. AF 4-9. The CO found that Employer’s response had failed to establish that the duties of its requested Truck Drivers were agricultural in nature. Specifically, the CO noted that Employer’s description of these duties failed to meet the definition of “agricultural labor or services” under either 26 U.S.C. § 3121(g) or 29 U.S.C. § 203(f). AF 6-9.

Employer appealed the CO’s denial on May 28, 2019 and requested a *de novo* administrative review under 20 C.F.R. § 655.171(b). AF 2-5. Employer noted that ETA had approved a nearly identical application in February 2019 for truck drivers used in its harvest operations in Florida, and argued that the CO had erroneously denied the present application.

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<sup>2</sup> These additional steps included continued recruitment of domestic workers, submission of a recruitment report, and provision of proof of workers’ compensation coverage. AF 23-27.

On June 11, 2019, the CO uploaded the administrative file to the Office of Administrative Law Judges. This undersigned received assignment of this matter on June 12, 2019 and issued an Order scheduling a telephonic hearing for June 20, 2019. At the telephonic hearing, the Tribunal admitted CO's Exhibits ("CX") 1 and 2, and Employer's Exhibits ("EX") 1 through 18. Tr. at 10-11.<sup>3</sup> The Tribunal also heard testimony from Carolina Vargas (Employer's bookkeeper, payroll manager, and H-2A coordinator) and Ishel Quintana (the CO in this matter).

On June 25, 2019, the CO and Employer submitted final briefs.

## **DISCUSSION**

### **I. Findings of Fact**

The salient facts of this case are not in dispute. Employer is a farm contractor that provides agricultural harvesting services, operating primarily as a seasonal watermelon harvester in Florida and Georgia. Tr. at 18, 40. Employer does not own the farms on which it works, does not operate on the farms, and is not involved in any farming operations until the harvest. Tr. at 40-41.

Employer utilizes at least four types of workers in its harvesting operations: cutters, loaders, truck drivers, and unloaders/packers. Tr. at 20-24. The cutters go through the fields first to identify and cut rip watermelons from the vine. Next, a 12-man loading crew goes through the fields alongside a driver in a field truck designed to transport watermelons. The driver drives slowly through the fields as the loaders toss the cut watermelons from person to person until they reach the field truck. Tr. at 25-27. This loading process takes about 45 minutes to fill the transportation vehicle with watermelons, at which point the driver hauls the watermelons from the farm to an off-site packing facility.<sup>4</sup> The driver drops off the full field truck to be unloaded and promptly returns to the farm with an empty field truck to start the loading process again.

Employer's truck drivers spend approximately 55% of their working time operating a field truck during the harvesting process. These drivers spend the remainder of their working time driving field trucks to and from the packing facility (40%) and transporting domestic and H-2A workers to and from the watermelon fields (5%). Tr. at 32-33, 65-66.

This was the first year that Employer sourced its drivers through the H-2A program. Truck drivers were in demand at the same time of Employer's need due to the citrus season, and consequently Employer had difficulty hiring enough drivers. Employer first requested truck drivers under an H-2A visa in connection with its 2019 harvesting operations in Florida, which ETA approved. Tr. at 28-29; EX 3. The Department of Labor ultimately certified five truck drivers for this work, who worked in Florida alongside one domestic truck driver. Tr. at 30-31.

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<sup>3</sup> "Tr." refers to the transcript of the June 20, 2019 telephonic hearing.

<sup>4</sup> These packing facilities are located 10-30 miles away from the farms. Tr. at 19.

Having successfully requested and recruited truck drivers under the H-2A program in Florida, Employer again requested five truck drivers for its harvesting operations in Georgia. Tr. at 35. Except for the dates of requested employment, location of the harvest, the housing, and the rate of pay, Employer's H-2A applications for truck drivers in Florida and Georgia were identical. Tr. at 36. The job duties for the truck driver positions were the same in both locations, and Employer planned to request to transfer its five H-2A truck drivers from its Florida operations to Georgia. Tr. at 26.

However, after receiving an initial Notice of Acceptance on April 23, 2019 (AF 23) and conducting additional recruitment (AF 16-23), the CO found that Employer's application was deficient (AF 11-15). Tr. at 37.

## **II. Conclusions of Law**

It is Employer's burden to show that certification is appropriate. 20 C.F.R. § 655.161(a). The applicant bears the burden of proving compliance with all applicable regulatory requirements in order to achieve certification. 8 U.S.C. § 1361. Employer has requested a *de novo* hearing under 20 C.F.R. § 655.171(b); accordingly, this Tribunal must "independently determine if the employer has established eligibility for temporary labor certification." *David Stock*, 2016-TLC-00040 (May 6, 2016).

The H-2A nonimmigrant visa program permits employers to hire foreign workers "to perform agricultural labor or services, as defined by the Secretary of Labor in regulations" within the United States on a temporary basis. 8 U.S.C. § 1101(a)(15)(H). The H-2A regulations define "agricultural labor or services" as any of the following:

1. Agricultural labor as defined and applied in section 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g);
2. Agriculture as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f);
3. The pressing of apples for cider on a farm; or
4. Logging employment.

20 C.F.R. § 655.103(c). Employer does not argue that its truck drivers would be engaged in the pressing of apples or logging employment. Thus, for Employer's application to be approved, the duties of its requested truck drivers must constitute "agricultural labor or services" by fitting within the definitions of "agricultural labor" at 26 U.S.C. § 3121(g) or "agriculture" at 29 U.S.C. § 203(f). As explained below, this Tribunal finds that the duties of Employer's truck drivers do not fall within either.

### **A. Section 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. § 3121(g)**

As relevant here,<sup>5</sup> the Internal Revenue Code defines "agricultural labor" as including services performed "*in the employ of the operator of a farm in . . . delivering to storage or to*

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<sup>5</sup> The definition of "agricultural labor" also includes several other types of services, such as (1) raising or harvesting any agricultural or horticultural commodities on a farm, (2) maintenance of a farm, and (3)

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.” 26 U.S.C. § 3121(g)(4)(A) (emphasis added).

Under this definition, the job opportunity in Employer’s application is not “agricultural labor” because it does not involve performing a service “[i]n the employ of the operator of a farm.” 26 U.S.C. § 3121(g) (emphasis added). Employer testified that it is not an operator of a farm,<sup>6</sup> and is instead a labor contractor that harvests and transports watermelons to a packing facility located 20-30 minutes away from the grower’s farm. Tr. at 19, 40-41, 45. Thus, this job opportunity does not satisfy the IRC’s definition of agricultural labor. *See ATP Agri-Services Inc.*, 2019-TLC-00050 (May 17, 2019) (holding that a labor contractor’s job opportunity did not meet the IRC’s definition of agricultural labor because the contractor’s H-2A workers would not be “in the employ of the operator of a farm”).

B. Section 3(f) of the Fair Labor Standards Act of 1938 at 29 U.S.C. 203(f)

Employer may also demonstrate that the duties of its truck drivers constitute “agricultural labor or services” by showing that such work would be considered “agriculture” under the Fair Labor Standards Act (“FLSA”). 20 C.F.R. § 655.103(c). As explained in federal regulations, the FLSA definition of “agriculture” recognizes two branches of agriculture: “primary” agriculture, consisting of “farming in all its branches”; and “secondary” agriculture, consisting of “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 (explaining the application of 29 U.S.C. § 203(f)).

Included in the primary meaning of “agriculture” is the “growing and harvesting of any agricultural or horticultural commodities.” 29 C.F.R. § 780.105(b). An employee engaged in any of these activities is engaged in agriculture “regardless of whether he is employed by a farmer or on a farm.” *Id.* The regulations define “agriculture or horticultural commodities” to include “[g]rains, forage crops, fruits, vegetables, nuts, sugar crops, fiber crops, tobacco, and nursery products.” 29 C.F.R. § 780.112. Relatedly, “harvesting” “includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position.” 29 C.F.R. § 780.118(a). Activities such as “cutting of grain” and “picking of fruit” are included in this definition. *Id.* The term “harvesting” is applied to activities through the harvest process—including cutting, loading, and transportation—until the crops have been transported to a “concentration point” on the farm. *Id.*

Applying these regulations here, the Tribunal finds that only 55% of the duties of Employer’s requested truck drivers constitute “agriculture” under section 3(f) of the FLSA. Specifically, the truck driver’s work in driving the through the fields alongside the loaders while

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producing and harvesting agricultural commodities. *See* 26 U.S.C. § 3121(g)(1)-(3). Employer has not argued that the duties of its truck drivers would fall under any of these categories, and the undersigned finds that they would not.

<sup>6</sup> An “operator of a farm” is an “owner, tenant, or other person, in possession of a farm and engaged in the operation of such farm.” 26 C.F.R. § 31.3121(g)-1(e)(2).

the watermelons are loaded onto the field truck satisfies the definition of “primary” agriculture. The regulations specifically include fruit in the definition of “agriculture or horticultural commodities,” and the truck driver’s work is part and parcel of the harvesting process by which the watermelons are cut, loaded, and transported to a “concentration point” on the farm. 29 C.F.R. §§ 780.112, 780.118(a). Though the “concentration point” is simply the field truck in which the harvested watermelons are then transported to an off-site packing facility, there is no good reason to hold that such direct consolidation does not fall within the definition of harvesting under 29 C.F.R. § 780.118(a).<sup>7</sup>

However, at least 40% of Employer’s truck driver duties do not meet the definition of “agriculture” under the FLSA.<sup>8</sup> Employer’s truck drivers spend approximately 40% of their working time driving field trucks to and from the packing facility to transport the picked watermelons. Tr. at 32-33, 65-66. This activity is clearly not “primary” agriculture, as “harvesting” ends at the “concentration point *on the farm*.” See 29 C.F.R. § 780.118(a) (emphasis added). And though transportation of any agricultural or horticultural commodities “to market or to carriers for transportation to market” may satisfy the “secondary” meaning of “agriculture” (see 29 C.F.R. § 780.154), such activity may only do so when “performed by a farmer or on a farm.” 29 U.S.C. § 203(f); 29 C.F.R. § 780.105. Since Employer’s is an independent farm contractor—not the owner or operator of the farm—and its truck driver’s transportation of the watermelons to an off-site packing facility does not occur on the farm, this activity does not constitute “agriculture” under its “secondary” meaning.<sup>9</sup> See 29 C.F.R. § 780.152.

Since Employer’s requested truck drivers would spend at least 40% of their time performing labor that would not constitute “agricultural labor or services” as that term is defined under 20 C.F.R. § 655.103(c), the CO correctly denied Employer’s application. See *Carlson Orchards, Inc.*, 2004-TLC-00009 (July 23, 2004) (holding that an employer’s H-2A application was properly denied where the duties of the workers included both agricultural and nonagricultural components).

### C. ETA’s Approval of Identical Past Applications

Employer also argues that it has been prejudiced by its reasonable reliance upon ETA’s approval of its past identical application. It also cites to a number of similar applications that the Department has approved, arguing that they have created an industry-wide reliance interest that must be taken into account.<sup>10</sup> Emp’r Br. at 13-15 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)).

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<sup>7</sup> The CO argues—via footnote and without explanation—that Employer’s job opportunity does not involve harvesting of agricultural or horticultural commodities. See CO Br. at 6 n.4.

<sup>8</sup> As this finding is sufficient to affirm the CO’s denial of certification, the undersigned need not determine whether the job duty of picking up H-2A employees for transportation to the farm constitutes “agriculture” under the FLSA.

<sup>9</sup> Employer argues that such activity should be considered within the

<sup>10</sup> Employer and the CO both discuss the application of FLSA exemptions to their case. See Emp’r Br. at 14 (citing to 29 C.F.R. § 780.906 for the proposition that FLSA exemptions apply to nonfarmers engaged in the transportation of fruits and vegetables “from the farm to a place of first processing”); CO Br. at 8

However, as the CO correctly notes in her brief, BALCA has consistently held that “the fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial.” CO Br. at 9 (quoting *ATP Agri-Services Inc.*, 2019-TLC-00050, slip op. at 9 (May 17, 2019)). The Tribunal is cognizant that Employer has suffered unnecessary expenditures due to a potentially uneven application of the regulatory standard for H-2A workers; however, the harm produced does not justify ignoring clear regulatory guidance.<sup>11</sup> See *Alma Collier, Inc.*, 2018-TLN-00073, at 5 (Mar. 22, 2018) (finding that the CO’s prior decision to grant certification did not relieve the employer from its obligation to demonstrate that its current application complied with regulatory requirements); *DialogueDirect, Inc.*, 2011-TLN-00038, at 8 n.5 (Sept. 26, 2011) (same).

For these reasons, the Tribunal finds that the CO properly denied Employer’s request. The CO’s denial of Employer’s application is hereby affirmed.

**SO ORDERED.**

For the Board:

**SCOTT R. MORRIS**  
Administrative Law Judge

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(citing to 29 C.F.R. § 780.11 for the position that an employee who works in both exempt and non-exempt work is considered non-exempt for that week). However, the undersigned finds FLSA exemption status tenuous at best, since the relevant inquiry is whether the job duties satisfy the definition of “agriculture.”

<sup>11</sup> To the extent that Employer’s argument can be considered an argument for estoppel, the Tribunal rejects it. See *Carlson Orchards, Inc.*, 2004-TLC-00009 (July 23, 2004) (noting that estoppel against the government can only be invoked in extreme cases).