



Issue Date: 08 November 2019

BALCA Case No.: 2019-TLC-00088
ETA Case No.: H-300-19228-106282

In the Matter of:

EVERGLADES HARVESTING & HAULING, INC.,
Employer.

Appearances: David Stefany, Esquire
Allen, Norton & Blue, P.A.
Tampa, Florida
For the Employer

Sarah Tunney, Esquire, and
Rebecca Nielsen, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: TIMOTHY J. McGRATH
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural guest worker provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184 and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B (collectively, H-2A program). The H-2A non-immigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services.

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” or “Application”). A Certifying Officer (“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, an employer may request an administrative review or *de novo* hearing before an Administrative Law Judge ("ALJ") of a decision by the CO. 20 C.F.R. §655.171.

BACKGROUND

On August 16, 2019, the Florida Fruit & Vegetable Association ("FFVA"), acting as an agent on behalf of Everglades Harvesting & Hauling, Inc. ("Employer"), filed a Form 9142A. (AF 303-316, 570).¹ The Employer's Application requested certification for 44 Sugarcane Haulers for an alleged period of seasonal need beginning October 15, 2019 and ending March 29, 2020. (AF 303). Employer is an H-2A Labor Contractor ("H2ALC") which sought to employ "Heavy and Tractor-Trailer Truck Drivers" to assist in loading and hauling raw sugarcane crop from fields and farms to a centralized processing mill. (AF 304, 312). Employer also filed several supporting documents with its Application, including ETA Form 970, a certificate of liability insurance, a lease agreement for housing, itineraries with maps detailing routes for hauling of the sugarcane from worksites to the processing mill, and an independent contractor sugarcane hauling agreement between Employer and the Sugar Cane Grower's Cooperative of Florida ("the Co-op"). (AF 306-570).

On August 23, 2019, the CO issued a Notice of Deficiency ("NOD"), identifying three deficiencies and the modifications required for each. (AF 284-292). Citing to 20 C.F.R. § 655.103(c), the CO found Employer failed to establish that the job opportunity consisted of agricultural labor or services for purposes of the H-2A program.² (AF 284-290). Specifically, the CO explained the transportation activities described in Employer's Application do not qualify either as "agricultural labor," as defined by the Internal Revenue Code of 1986 at 26 U.S.C. § 3121(g), or as "agriculture," as defined by the Fair Labor Standards Act of 1938 at 29 U.S.C. § 203(f). (AF 286-290). The NOD further stated that Employer "may submit information or documentation to establish that its job opportunities qualify" under either definition, and also provided "[f]or example, the employer may evidence of an IRS filing, e.g., Form 943, or

¹ Citations to the Administrative File will be abbreviated with an "AF" followed by the page number.

² The other deficiencies identified by the CO will not be discussed herein because the CO's final determination to deny certification was based solely on this deficiency.

equivalent information to support an assertion that the activities qualify as agricultural labor under the [Internal Revenue Code].” (AF 290).

Employer filed a response on August 30, 2019, with three exhibits attached, including a sample Form 943 from 2018, in order to address the deficiencies found by the CO. (AF 152-283). In relevant part, Employer asserted:

Everglades Harvesting is a diversified agricultural business which employs domestic workers and nonimmigrant foreign guest workers to provide agricultural services to fixed site agricultural businesses throughout Florida and other agricultural producing states. As an agricultural employer, Everglades Harvesting regularly files Form 943s on its labor, as is required by the Internal Revenue Code. A sample Form 943 filing is attached from 2018 (exhibit 1), although the earnings of its H-2A employees are included on such Form 943s only when H-2A employees have requested that withholdings should be made. Therefore, Everglades Harvesting’s job offer meets the current IRC definition of “agricultural labor” to the extent that Everglades Harvesting’s drivers perform agricultural services “in connection with the production or harvesting of any commodity defined as an agricultural commodity in Section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. § 1141j).”

(AF 152). Additionally, Employer explained the “services provided by Everglades Harvesting’s drivers provide a key component to a fully integrated and carefully monitored harvesting process for raw sugarcane.” (AF 152). Employer also stated its workers “perform a critical role in the harvesting of sugarcane cultivated and grown by its fixed-site agricultural business clients[,] [and] [o]f the estimated hours worked by these drivers, 60 percent of their workweek hours takes place on the sugarcane farm property.” (AF 153).

On September 17, 2019, the CO issued a Denial Letter. (AF 141-151). The letter stated Employer’s Application for temporary labor certification under the H-2A program was denied because Employer “failed to establish agricultural labor or services” as required under 20 C.F.R. § 655.103(c). (AF 143). Specifically, the letter stated Employer’s response to the NOD “suggests that the sugarcane haulers only job duty is to remain on the farm while sugarcane is

loaded onto the trucks and to transport the sugarcane from the farm location to the processing mill daily.” (AF 148). The letter also provided a detailed explanation as to why the CO found the job opportunity qualified as neither agriculture under the Fair Labor Standards Act, nor agricultural labor under the Internal Revenue Code. (AF 148-151).

On September 23, 2019, Employer filed a request for an “expedited *de novo* administrative review” of the CO’s decision to deny its application for temporary alien labor certification under the H-2A non-immigrant program.³ I was assigned this matter on September 25, 2019 and subsequently issued a Notice of Docketing and Preliminary Order scheduling a telephonic conference call with the parties for October 4, 2019. The October 4, 2019 telephonic conference call was held to discuss the matter generally and to inquire as to the parties’ availability to hold the *de novo* hearing.

I received the Administrative File from ETA on October 10, 2019, and the following day issued an Order scheduling a telephonic hearing for October 22, 2019. At the telephonic hearing, I admitted into evidence the Administrative File,⁴ Joint Exhibits (“JX”) 1, and Employer’s Exhibits (“EX”) 1 through 46. (TR at 6-7, 11).⁵ Testimony was also heard from John Rotterman, a CO with ETA, Michael Carlton, the Director of Labor Relations for FFVA, and Paul Meador, Employer’s President and CEO. (TR at 18, 101-102, 127). Following the hearing, I also admitted into evidence JX 2 through 4 on October 28, 2019.

On November 1, 2019, the CO and Employer submitted final briefs.

³ In an email dated October 1, 2019, Employer clarified with my Attorney-Advisor, Daniel Williams, it was requesting a *de novo* hearing before an ALJ pursuant to 20 C.F.R. §655.171(b).

⁴ I note the Administrative File was also identified and admitted into evidence as Solicitor’s Exhibit 1, but for purposes of clarity, all citations to the Administrative File are referred to as “AF” followed by the page number.

⁵ “TR” refers to the transcript of the October 22, 2019 telephonic hearing.

DISCUSSION

I. Findings of Fact

Employer is a labor contractor that provides harvesting and hauling services for commodities, such as fruits and vegetables, and it operates in Florida and other states. (TR at 128-130). Employer does not own the farms on which the sugarcane crop is grown, it does not produce any crops, including the sugarcane crop, and it does not own the sugarcane processing mill. (TR at 175-176). Employer currently operates with sixty (60) year-round employees, including ten (10) who work as Agricultural Equipment Operators or Truck Drivers. (TR at 131, 134).

Employer began using the H-2A program in 2001 due to a labor shortage for harvesting in years 1999 and 2000. (TR at 138). Since that time, Employer has relied on the assistance of the FFVA to complete and file its H-2A labor certification applications. (TR at 108, 142). Employer has specifically used the H-2A program to employ agricultural equipment operators or truck drivers since 2017. (TR at 139-140); (*See* EX 1; EX 6). Most recently, on October 16, 2018, Employer obtained certification through the H-2A program to employ 30 truck drivers for the period of November 15, 2018 to May 31, 2019. (TR at 143-144); (EX 8 at 6). Employer submitted its current Application on August 16, 2019. (AF 303-316, 570).

Prior to submitting its current Application, Employer entered into an agreement with Sugar Cane Grower's Cooperative of Florida ("the Co-op") titled "Independent Contractor Sugarcane Hauling Agreement" ("the Agreement") on May 31, 2019. (AF 356-364). According to the Agreement, Employer agreed to provide hauling services for the Co-op, which involve hauling harvested sugarcane from the Co-op's grower member fields located in Palm Beach, Martin, Hendrick and Highland Counties in Florida, to the Co-op's sugar mill in Belle Glade, Florida during the 2019, 2020, 2021, and 2022 harvesting seasons. (AF 356; TR at 28). Additionally, the Agreement specifically refers to Employer as an independent contractor and notes Employer has full and exclusive control over persons it employs. (AF 358). In fact, the Agreement states "[n]othing contained in this Contract shall create nor be construed as creating a partnership, joint venture, or employment relationship between [the Co-op] or any of its grower/members and [Employer]." (AF 358).

As to the job duties provided in its Application, Employer indicated the Sugarcane Haulers' "essential work activity involves transportation of a highly perishable agricultural crop (sugarcane) directly from the farmer's fields to the processing mill[.]" (AF 305). The Sugarcane Haulers would complete a pre-trip inspection of the truck and trailer to ensure it is fit for service. (AF 312). Once the raw sugarcane crop is cut by the harvesting machine, it is deposited into a field cart that is moved by tractor to a centralized on-farm location for loading onto trucks. (AF 312). The Sugarcane Haulers work alongside the harvesters to monitor the loading process to ensure compliance with Department of Transportation regulations. (AF 312). After the loading process is complete, the Sugarcane Haulers drive directly from the centralized farm location to the sugarcane processing mill. (AF 312). When the raw sugarcane crop has been delivered to the processing mill, the Sugarcane Haulers then return directly to the field and continue the loading and hauling process repeatedly until the sugarcane field has been completely harvested to the satisfaction of the farm supervisor. (AF 312).

In fulfilling their job duties, Sugarcane Haulers would need to leave the farms to transport the sugarcane crop to the processing mill. (TR at 176-177). Attached to Employer's Application is a "Worksite List and Itinerary" that provides the locations of the farms and fields where the Sugarcane Haulers would pick-up the harvested raw sugarcane crop. (AF 344-346). Four Co-op member farms are listed: Main Farm, located in Belle Glade, Florida, and Minute Maid, Allapatah, and Farm 1, all located in Indiantown, Florida. (AF 344); (*See* EX 7 at 29). Mr. Meador testified these four farms are all located within approximately 10 miles of the processing mill, located in Belle Glade, Florida. (TR at 148-149).

According to Mr. Meador, the Sugarcane Haulers spend approximately 60% of their work time on the sugarcane farms themselves. (TR at 153, 167-168). This is because the sugarcane farms are quite large, which takes "some time" to get to the loading site on the farm, the loading process itself is time consuming, and the drive "is an off-road environment, so it's not like driving down an asphalt road where you can drive relatively fast." (TR 168).

II. Conclusions of Law

It is Employer's burden to show 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 requested a *de novo* hearing under 20 C.F.R. § 655.171(b); accordingly, I must "independently determine if the employer has established eligibility for temporary labor certification." *David Stock*, 2016-TLC-00040 (May 6, 2016).

As previously discussed, the H-2A non-immigrant 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 (IRC) 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 Sugarcane Haulers would be engaged in the pressing of apples or logging employment. Therefore, in order for Employer's application to be approved, the duties of its requested Sugarcane Haulers must constitute "agricultural labor or services" by fitting within the definition of either "agricultural labor" at 26 U.S.C. § 3121(g) or "agriculture" at 29 U.S.C. § 203(f). For the reasons discussed below, I find the duties of Employer's Sugarcane Haulers do not fall within either definition.

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

As relevant here,⁶ the IRC defines "agricultural labor" as including services "*in the employ of the operator of a farm* in . . . delivering to storage or to market or to a carrier for

⁶ 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) producing and harvesting

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).

In its brief, however, Employer does not directly address whether it qualifies as an “operator of a farm” for purposes of the IRC’s statutory definition of “agricultural labor.” Rather, Employer contends the CO’s “reliance on a restrictively narrow and inflexible reading of the IRC definitional statute and the Internal Revenue Services’ regulations clarifying the scope of tax-exempt earnings is not helpful to the legal analysis presented in this administrative appeal, since [Employer’s] payments to its H-2A workers for their services are not ‘wages’ as defined by the IRC.” (Er. Br. at 31-32) (citations omitted). Employer asserts the “proper analysis” of what constitutes agricultural labor or services is found in a decision by Administrative Law Judge Bergstrom in *Desoto Fruit & Harvesting*, 2012-TLC-00097 (Sept. 26, 2012). (Er. Br. at 29-32).

In *Desoto Fruit & Harvesting*, an employer sought certification for 17 non-immigrant workers to work as drivers to transport citrus fruits from the groves owned by a fixed-site agricultural employer. (*Desoto Fruit & Harvesting*, slip op. at 2-3). Specifically, the employer’s description of the work to be performed by the H-2A workers as “solely the transportation of citrus from the citrus groves of Sorrells Citrus, Inc., to numerous citrus processing plants in Florida.” *Id.* at 3. Administrative Law Judge Bergstrom found the evidence established the employer established its classification under the H-2A program as an agricultural labor contractor and the work involved is agricultural in nature. *Id.* at 4. However, unlike the employer in *Desoto Fruit & Harvesting*, Employer here is not seeking certification of H-2A workers to transport agricultural commodities from fields owned by *one* farmer-employer to a processing mill; instead, Employer seeks certification of H-2A workers to transport agricultural commodities from *multiple different farms* within an agricultural association of farmers. (*See AF 344; Desoto Fruit & Harvesting*, slip op. at 3). Accordingly, I find the facts in *Desoto Fruit & Harvesting* are distinguishable from the facts presented in the present matter, and I am not persuaded to follow the “proper analysis” of what constitutes agricultural labor or services that was suggested by Employer.

agricultural commodities. *See* 26 U.S.C. § 3121(g)(1)-(3). Employer does not argue that the duties of its Sugarcane Haulers would fall under any of these categories, and the undersigned finds they would not.

Considering the record as a whole, I find Employer’s job opportunity does not meet this IRC definition of “agricultural labor” because it does not involve performing a service that is “in the employ of the operator of a farm.” 26 U.S.C. § 3121(g)(4)(A). Employer, on its own Application, affirmatively indicated that it is a *labor contractor* and it harvests and transports sugarcane from multiple farms to a processing mill. (AF 304-305, 312). At the hearing, Mr. Meador testified that Employer does not grow any crops, it does not own a farm, and it does not own the processing mill that is used for the sugarcane. (TR at 181-183). Thus, the record establishes that Employer is not an operator of a farm, but is rather a labor contractor that harvests and transports sugarcane to a processing mill. Therefore, because Employer’s H-2A workers would not be “in the employ of the operator of a farm,” the Employer’s job opportunities for Sugarcane Haulers does not satisfy the definition of agricultural labor provided in 26 U.S.C. § 3121(g)(4)(A).

Other Administrative Law Judges recently reached the same conclusion in addressing the issue of whether drivers, who are employed by entities not considered to be the operator of a farm, perform agricultural labor or services when transporting commodities from the field to off-site processing and/or packing facilities. *See Double J Harvesting, Inc.*, 2019-TLC-00057 (July 2, 2019) (finding labor contractor transporting watermelons to a packing facility located 20-30 minutes from the farm was not performing agricultural labor); *ATP Agri-Services Inc.*, 2019-TLC-00050 (May 17, 2019) (finding truck drivers who haul crops from the field to processing and packing facilities were not performing agricultural labor where they were not employed by the operator of a farm). Accordingly, while the members of the Co-op may be able to employ the Sugarcane Haulers under the H-2A program as operators of farms, the Employer, who does not operate a farm, may not. *See* 26 U.S.C. § 3121(g)(4)(A).

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 Sugarcane Haulers constitute “agricultural labor or services” by showing such work would be considered “agriculture” under the Fair Labor Standards Act of 1938 (“FLSA”). 20 C.F.R. § 655.103(c). In its brief, Employer

presents no argument its job opportunity qualifies as agriculture under the FLSA's definition at § 203(f).

Under the FLSA, "agriculture" is defined as follows:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g)[2] of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) 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.

29 U.S.C. § 203(f).

As set forth in the federal regulations, the FLSA's definition of "agriculture" is separated into "two distinct branches" of agriculture: "primary agriculture," which consists of "farming in all its branches;" and "secondary agriculture," which consists 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. Employer's job opportunities of hauling sugarcane from the farms to the processing mills does not meet the definition of "primary agriculture" because it does not involve farming. *See* 29 C.F.R. §§ 780.105, 780.105(b).

Additionally, Employer's job opportunity does not meet the definition of "secondary agriculture," because it is not performed "by a farmer or on a farm." 29 U.S.C. § 203(f); 29 C.F.R. § 780.105(c). Employer is not a farmer and the H-2A workers it seeks to employ would not be farmers. (TR at 181-182). Mr. Meador testified that the H-2A workers would leave the farm to transport the sugarcane to the processing mill, indicating the hauling of sugarcane is not performed "on a farm." (TR at 176-177, 182-183). Likewise, the itineraries and hauling contracts included as part of Employer's Application show that the H-2A workers would leave the farms in order to transport the sugarcane to the processing mill. (AF 344-346). Although Mr. Meador suggests the farms are within 10 miles of the processing mill, the record establishes that 40% of the workers' time is spent off the farms. (*See* TR at 153, 167-168).

In order to qualify under the “secondary agriculture” definition within the FLSA, it is not enough that an activity is “an incident to or in conjunction with” farming operations. Rather, the activities must be performed “*by a farmer or on a farm* as an incident to or in conjunction with” primary farming operations. 29 U.S.C. § 203(f) (emphasis added); 29 C.F.R. § 7801.105(c). Given Employer’s status as a labor contractor—not the owner or operator of the farm—and the fact that its Sugarcane Hauler’s transportation of the sugarcane from multiple farms to an off-site processing mill does not occur on the farm, this activity does not qualify as “agriculture” under the secondary meaning provided in the FLSA. *See* 29 C.F.R. § 780.152.

C. ETA’s Approval of Identical Past Applications

Employer primarily argues the CO’s denial of the current Application is arbitrary and capricious, and contends it has been prejudiced by its reasonable reliance upon ETA’s approval of its past identical application. In doing so, the Employer cites to several claimed similar applications the Department has approved, arguing those approvals created an industry-wide reliance interest that must be taken into account. (Er. Br. at 32-35). Since the facts and circumstances of Employer’s cited cases are not before me, I therefore cannot determine whether the activities in those cases would be performed by a farmer, on a farm, or in the employ of the operator of a farm. Accordingly, I cannot determine whether those other job opportunities qualify as agricultural labor or services for purposes of the H-2A program. 20 C.F.R. §655.103(c).

Even if I were to consider the other applications cited by Employer to be legally and factually similar, the fact that the CO approved similar applications in the past is not sufficient grounds for reversal of the denial. *See ATP Agri-Services Inc.*, 2019-TLC-00050 (May 17, 2019) (citing *Rollins Sprinkler & Landscape, LLC*, 2017-TLN-00020 (Feb. 23, 2017) (noting that perhaps both applications should have been denied, and “two wrongs would not make a right”)).

Employer suggests the Department has changed its interpretation of the H-2A program, and as a consequence it and other industry applicants will be harmed by relying on past approvals. Employer argues such a change in interpretation required the Department to notify industry through rule making. (Er. Br. at 33). After the hearing the parties submitted Joint

Exhibits 2 through 4, which were admitted into evidence. JX 2 is a letter dated September 16, 2019 to the Acting Secretary of Labor from forty two Congressional representatives requesting information about the Department's policies for administration of the H-2A temporary agricultural labor program, and recent denials of H-2A applications of labor contractors seeking to employ truck drivers to transport agricultural products. In a response dated October 19, 2019, Deputy Assistant Secretary Wheeler addressed the concerns raised by the Congressional representatives, and noted "there has been no change in the Department's interpretation." JX 3 at 2.

At the hearing, Mr. Meador testified credibly about the many efforts his company has undertaken to try to recruit U.S. workers, and when it was not successful, turned to the H-2A program. Mr. Meador discussed those efforts and detailed the costs the Employer has now incurred after signing a four year contract for hauling services for the Co-op. While I can understand the Employer's frustration about its unsuccessful Application, and its perceived view of an unfair Department of Labor process, but based on the facts before me, I find the Employer failed to meet its burden in showing it complied with all the regulatory requirements to achieve certification. I do not find the Certifying Officer's actions in denying certification to be arbitrary and capricious.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial of the Employer's application for H-2A temporary labor certification is **AFFIRMED**.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts