DECISION AND ORDER AFFIRMING DENIAL OF 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. 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 Certifying Officer denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.  

1 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (b)(5)(A).
2 20 C.F.R. § 655.171.
STATEMENT OF THE CASE

On August 12, 2019, Gomello, LLC (“the Employer”) filed the following documents with the Certifying Officer (“CO”): (1) Form ETA 9142, H-2A Application for Temporary Employment Certification (“Application”); (2) Appendix A.2 to Form ETA 9142; (3) Form ETA 790, Agricultural and Food Processing Clearance Order; and (4) Attachments to Form ETA 790. (AF 55-110). The Employer requested certification for 30 harvesting workers from September 1, 2018 to April 30, 2020, based on an alleged seasonal need during that period. (AF 55-66). In the “Job duties” section of its Application, the Employer explained that the harvesting workers would pick the watermelon from the fields and then toss the watermelon to the next worker until the watermelon was placed inside the transporting bus. (AF 57). Once the bus was filled with watermelon, the bus will transport the watermelon to the packing house where the watermelons would be separated by size and then labeled and packed. (Id.). Also at the packing location, the workers would pick vegetables and put them in buckets or bushels to dump in the truck. (AF 57-61).

On August 23, 2019, the CO rejected the Employer’s Application and issued a Notice of Deficiency (“NOD”). (AF 40-47). The NOD noted three deficiencies, including that the Employer failed to establish that the crop packing duties are included in the definition of “agricultural labor or services” under 20 C.F.R. § 655.103(c); that the Employer had several errors and/or inaccuracies on its Application, including its stated start date of September 1, 2018, which had already passed and was inconsistent with other references to a start date of September 1, 2019; and that the Employer indicated that it would deduct state income tax from the workers’ paychecks when Florida—the state in which the workers’ would be employed—does not deduct income tax. (Id.).

The Employer responded to the CO’s NOD on August 23, 2019. (AF 22-39). With regard to the first stated deficiency, the Employer gave the following explanation:

Gomello, LLC hopes the following will help explain what the duties of the H2a worker will be doing. To clarify, Packing: When the bus/trailer is full, it will be taken to the packing house where th/e [sic] unloaders will unload the product by /hand and put it in a conveyer belt that will transport the product into the packing house where it will be separated by size, labeled, and packed by hand for the farmer by the packing workers who will be employed by Gomello, LLC. Work completed at the packing house will be done for the farmer listed on the “Agreement to Harvest” not a separate company. (AF 24-25).

The Employer also provided responses for the other two deficiencies, including allowing the CO to modify the start date to September 1, 2019. (AF 25-28).

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3 AF is an abbreviation for the Administrative File.
4 SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” and occupation code 45-2092. (AF 55).
Despite finding that the latter two deficiencies had been cured, the CO found that the Employer still had not demonstrated how the packing duties are included in the definition of “agricultural labor or services.” (AF 16-21). Therefore, the CO issued a Notice of Required Modification (“NRM”), allowing the Employer another opportunity to cure the deficiency. (Id.). Specifically, the CO noted that while the harvesting crop duties contained in the job description may qualify as agricultural labor or services, the crop packing duties are considered secondary agriculture under the Regulations and, thus, must be performed by the farmer or employees of the farmer, not by a labor contractor. (Id.). Consequently, the CO mandated that the Employer “clearly indicate whether the worksite locations listed in the application, work contracts and itineraries are farms and/or packing houses” and, if applicable, amend its application to be consistent on this information throughout. (Id.). In the alternative, the CO proposed that the Employer simply “remove the packing duties and packing house worksite location(s) from its application[.].” (Id.).

On September 11, 2019, the Employer responded to the NRM, again providing the CO with the contact information for itself and the farmer it contracted with in the “Agreement to Harvest,” but no additional information. (AF 15). Thereafter, on September 16, 2019, the CO issued a final determination, which denied the Employer’s Application because it had failed to establish that the workers would be performing “agricultural labor or services” as required by 20 C.F.R. § 655.103(c).

On September 23, 2019, the Employer appealed the CO’s decision to deny its Application. (AF 1-7). On October 1, 2019, 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 three business days after receipt of the AF. On October 3, 2019, the Office of Administrative Law Judges (“Office”) received the AF from the CO. Thereafter, the Employer informed the Office that it would be relying on the explanations provided in its appeal request. On October 8, 2019, the CO submitted its brief, requesting an affirmance of the CO’s Notice of Denial.

DISCUSSION AND APPLICABLE LAW

The Employer bears the burden to establish compliance with all applicable regulatory requirements in order to achieve certification. 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. Under the H-2A regulations, “agricultural labor or services” includes the statutory definition of “agricultural labor” as defined and applied by Section 3121(g) of the Internal Revenue Code of 1986 (“IRC”), the statutory definition of “agriculture” as defined and applied by Section 3(f) of the Fair Labor Standards Act of 1938 (“FLSA”), the pressing of apples for cider on a farm, and logging employment.

5 8 U.S.C. § 1361; 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).
7 20 C.F.R. § 655.103(c).
As described above, the job duties outlined by the Employer in its Application and job opportunity involve harvesting watermelons and vegetables along with packing the watermelons at a packing house. (See AF 57, 76-77). The critical component of the job description that is contested by the CO is the performance of the packing duties. According to the CO, the packing duties described by the Employer do not constitute “agricultural labor or services” under 20 C.F.R. § 655.103(c). (Certifying Officer’s Brief, unpaginated). Therefore, the CO contends that it was justified in denying the Application as it included nonagricultural duties, and thus, rendered the entire job opportunity ineligible for certification. (Id.).

In this case, the Employer does not allege that its harvesting workers would be engaged in the pressing of apples or logging employment. Therefore, in order for the Employer’s Application to be approved, the packing duties of these proposed workers must fall within the statutory definition of “agricultural labor” under Section 3121(g) of the IRC or within the statutory definition of “agriculture” Section 3(f) of the FLSA.

1. “Agricultural Labor” under Section 3121(g) of the IRC

Section 3121(g) of the IRC defines “agricultural labor,” in relevant part, as services performed “in the employ of the operator of a farm… delivering to storage or to market or to 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 services is performed.”

In this case, the record reflects that the Employer is a labor contractor providing labor service to a farmer under a harvesting agreement. Specifically, in response to the NOD and NRM, the Employer clarified that “Gomello, LLC,” i.e., the Employer, would employ the harvesting workers and that they merely contracted with the farmer, Stephen Sexton, Island Coast Farms, as part of the harvesting contract. (AF 15, 24-25, 56). Therefore, the duties performed by the harvesting workers cannot constitute “agricultural labor” as they are not “in the employ of the operator of a farm,” but rather, a labor contractor.

Accordingly, I find that the packing duties described by the Employer do not fall within the statutory definition of “agricultural labor” under the IRC and, therefore, do not constitute “agricultural or labor services” pursuant to this avenue. However, the Employer may still demonstrate that its harvesting workers’ packing duties constitute “agricultural or labor services” by showing that such work falls under the FLSA’s definition of “agriculture.”

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8 Located at 26 U.S.C. § 3121(g).
10 See 26 U.S.C. § 3121(g)(4)(A); see also 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”); see also Rev. Rul. 56-35, 1956 C.B.453 (holding that services performed by a partnership’s employees were not “in the employ of the operator of a farm” and, therefore, the “services performed in the employ of the partnership, a custom operator, in handling and packing the lettuce, hauling it to the cooling plant … do not constitute ‘agricultural labor’”).
11 See 20 C.F.R. § 655.103(c).
2. “Agriculture” under Section 3(f) of the FLSA

The FLSA definition of “agriculture” recognizes two branches of agriculture: (1) primary agriculture and (2) secondary agriculture. Primary agriculture refers to “farming in all its branches.” Included in this definition is the “growing and harvesting of any agricultural or horticultural commodities,” which, in turn, is defined to include “[g]rains, forage crops, fruits, vegetables, nuts, sugar crops, fiber crops, tobacco, and nursery products.” Additionally, “harvesting” is defined to “include[] all operations customarily performed in connection with the removal of crops by the farmer from their growing position” and 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. Finally, an employee engaged in any of these primary activities is engaged in agriculture “regardless of whether he is employed by a farmer on a farm.”

Meanwhile, the second type of agriculture, “secondary” agriculture, 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.” Thus, practices that are “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” are included in the secondary type of agriculture so long as the practices occur on a farm or by a farmer.

Based on the foregoing rules, I find that the workers’ duties of picking the watermelons by cutting them from the stem, passing them person to person, and loading them into the bus on the farm are encompassed in the definition of “primary” agriculture. The Regulations specifically include fruit in the definition of “agriculture or horticultural commodities,” and the harvesting workers’ responsibility of cutting, moving, and loading the watermelon on a bus, i.e. “concentration point” on the farm falls within the statutory definition.

The question remains, however, whether the crop packing duties performed by the workers at the packing house are included in this definition. I find that they are not. According to the Employer, once at the packing house, the harvesting workers would be responsible for separating, labeling, and packing the watermelons for transport. While these activities clearly do not fall within the definition of primary agriculture as the practices do not involve “farming and all its branches,” they can be considered “[p]reparation for market” and “delivery to storage” under the secondary agriculture prong; however, such practices may only be considered to

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14 Id.
15 29 C.F.R. § 780.105.
16 29 C.F.R. § 780.112.
17 29 C.F.R. § 780.118(a).
18 29 C.F.R. § 780.105(b).
19 29 C.F.R. § 780.105.
20 29 C.F.R. § 780.128.
constitute secondary agriculture if it is performed on a farm or by a farmer.\textsuperscript{21} Pursuant to 29 C.F.R. § 780.135, a “farm” is defined as “a tract of land devoted to the actual farming activities [included in primary agriculture].” In this case, the farm and the packing house where the packing duties are to be performed are two separate locations. According to the Employer, the farm serviced under the contract is located at 2922 Evans Road, Labelle, Florida while the packing house is located at 1184 Marshall Field Road, Labelle, Florida. (AF 58; AF 4). Therefore, as the farm and the packing house are two separate locations, the packing duties performed at the packing house cannot be considered secondary agriculture as the practices are not performed at a farm. Likewise, as conceded by the Employer, the harvesting workers would be employed by the Employer, who is a labor contractor and not a farmer. (AF 15, 24-25, 56).\textsuperscript{22}

Accordingly, despite being incident to the farming operations, the packing duties performed by the harvesting workers do not fall within the definition of secondary agriculture as they are not performed on a farm or by a farmer. As a result, I find that the crop packing duties do not constitute “agriculture” as defined by Section 3(f) of the FLSA.

3. Conclusion on “Agricultural Labor or Services”

As reviewed above, the packing duties contained in the Employer’s Application does not involve performing a service “[i]n the employ of the operator of a farm,” and therefore, fails to satisfy the IRC’s definition of agricultural labor. Additionally, since the packing duties are incidental activities to primary farming activities and do not occur on a farm and are not performed by a farmer, the duties fail to satisfy the FLSA’s definition of agriculture. Therefore, because the Employer’s Application contains duties that do not constitute agricultural labor or services as defined under 20 C.F.R. § 655.103(c), the CO correctly denied the Employer’s Application.\textsuperscript{23}

ORDER

In light of the foregoing, the Certifying Officer’s decision is AFFIRMED.

PETER B. SILVAIN, JR.
Administrative Law Judge

\textsuperscript{21} See 29 C.F.R. §§ 780.152-780.155; see also 29 C.F.R. §§ 780.105(b), (c).
\textsuperscript{22} In its response to the NRM and NOD, the Employer identified Stephen Sexton, Island Coast Farms as the farmer serviced under the harvesting contract and stated that the “packing workers [] will be employed by [the Employer].” (AF 15, 24-25, 56).
\textsuperscript{23} See Carlson Orchards, Inc., 2004-TLC-00009 (July 23, 2004)(holding that an H-2A application was properly denied where the duties of the workers contained both agricultural and nonagricultural components).