**U.S. Department of Labor**

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**Issue Date: 13 February 2019**

OALJ Case No.: 2019-TLC-00034
ETA Case No.: H-300-18339-325016

***In the Matter of:***

**LORANG GRAIN, LLC,**
*Employer.*

Appearance: Garold Dungy, COC Placement Services
Gower, MO
*For the Employer*

Leticia Sierra, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
*For the Certifying Officer*

Before: Sean M. Ramaley
Administrative Law Judge

## DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality 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 January 24, 2019, Garold Dungy of COC Placement Services, on behalf of Lorang Grain, LLC ("the Employer") filed a request for appeal of the Final Determination - Denial issued by the Certifying Officer ("CO") in the above-captioned H-2A temporary alien labor certification application. On February 1, 2019, Employer filed a letter with the undersigned clarifying that its appeal in this matter is a request for expedited administrative review.

The undersigned received the Administrative File ("AF") from the Employment and Training Administration ("ETA") on February 6, 2019. By Order dated February 7, 2019, the parties were granted leave to file briefs on or before February 11, 2019.

Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five calendar days of the receipt of the complete Administrative File.

## STATEMENT OF THE CASE

*The Administrative File*

On December 5, 2018, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 ("Application"). (AF 63-73). The Employer's Application requested certification for seven farmworkers under the SOC occupation title of Agricultural Equipment Operator for the period beginning "2/15/2019" and ending "12/15/2019". (AF 63). Employer indicated the job duties as: "Operate farm equipment, tractors, combine, sprayers, to till soil, plant, cultivate, irrigate, fertilize, & harvest crops. Drives semi-truck to transport product to elevator or storage area. Perform mechanical repair and maintenance. Tend to livestock." *Id*.

The Certifying Officer ("CO") issued a Notice of Deficiency ("NOD") on December 12, 2018, noting the only deficiency as "H-2A Labor Contractor." (AF 53-57). The CO noted discrepancies in the Employer's application which made it unclear whether the Employer was filing as a fixed site employer or an H-2A Labor Contractor ("H-2ALC"). Each of the filing categories have different filing requirements which must be fulfilled in order for the application to be accepted for processing. The CO observed that the Employer had identified itself as an "individual Employer" in Section C of its application, which would indicate it was a fixed site employer. However, Employer submitted an itinerary with the ETA Form 790 (Job Order) which includes other businesses and locations, estimated dates of employment, and the wage to be paid at each location. The CO stated that if the worksites indicated in the itinerary are not owned or operated by the employer then employer must abide by the regulations governing H-2A Labor Contractors.

The CO listed several filing requirements for H-2A labor contractors which had not been fulfilled. The CO requested a modification of the application clarifying Employer's filing status and supplying the requested information. (AF 56). The CO requested the following information, which is required of H-2A labor contractors:

> (1) The name and location of each fixed-site agricultural business to which the H-2A Labor Contractor expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site;
>
> (2) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. sec. 1801 et seq., identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC;

(3) Proof of its ability to discharge financial obligations under the H-2A program by including with the Application for Temporary Employment Certification the original surety bond as required by 29 CFR sec. 501.9;

(4) Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (b)(1) of this section;

(5) Where the fixed-site agricultural business will be providing housing or transportation to the workers, proof that:

(i) All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable housing standards as set forth in 20 CFR sec. 655.122(d) and certified by the SWA; and

(ii) All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable, Federal, State, or local laws and regulations.

(AF 55-56).

The Employer responded to the NOD on December 18, 2018, with information supporting that it was applying as an H-2A labor contractor. Employer provided a copy of an H-2A surety bond and four signed "Confirmation of Work Agreement Between Custom Harvester & Fixed-Site Agricultural Business" contracts, covering the periods of 2/15/19 – 7/1/19, 7/1/19 – 7/15/19, 7/20/19 – 8/15/19, 10/15/19 – 12/1/19 and 12/1/19 – 12/15/19. (AF 49-52). Each agreement signed by a different "fixed site employer" noted the anticipated dates of work, and stated, "LANDOWNER agrees that the HARVESTER will be hired out to perform custom combining activities on its land for the current harvest season. HARVESTER agrees to harvest the LANDOWNERS crops in the appropriate time frames based on crop conditions for the upcoming harvest season." (AF 49 – 52).

On December 31, 2018, the CO issued a Notice of Required Modification. (AF 34-39). The CO noted that an H-2A labor contractor must provide a "copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor ("FLC") Certificate of Registration identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC." *Id.* The CO further noted the regulation at 29 C.F.R. 500.30(g) provides that custom combine operators are exempt from the MSPA. The regulation defines custom combine operators as the following:

> Any custom combine, hay harvesting, or sheep shearing operation. Custom combine, hay harvesting, and sheep shearing operation means the agricultural services and activities involved in combining grain, harvesting hay and shearing sheep which are provided to a farmer on a contract basis by a person who provides the necessary equipment and labor and who specializes on providing such services and activities.

(AF 36).

The CO stated that the Employer's application identified the crop to be harvested as "small grains" but did not provide further details regarding the type of crop. Therefore, the CO concluded that it was not clear whether employer fell within the above noted exemption from the MSPA. Accordingly the CO directed that the employer submit a valid FLC Certificate of Registration with valid transportation authorization, or in the alternative, Employer could provide additional information regarding the specific crops harvested and the type of combine harvesters used, sufficient to establish its eligibility for the MSPA exemption.

In addition, if the Employer fell within the exemption as a custom combine operator, it was also required to meet the requirements of TEGL 16-06 (special procedures pertaining to custom combine operators) which include that "employer must provide at no cost to workers an effective means of communicating with persons capable of responding to the worker's needs in case of an emergency." (AF 37).

The CO further noted that the employer had included "tending to livestock" in its job description. The CO reasoned that if employer is filing as a custom combine owner/operator it was not clear how the workers could tend to livestock while harvesting at the various worksite locations. Accordingly, the CO directed the employer to remove "tending to livestock" from the job description or submit documentation that establishes the activity is normal and accepted among non-H-2A employers who are performing itinerant custom combine harvesting duties. *Id*.

The CO requested that the employer modify its application Form 9142 and give permission to the CO to amend Section C to show the employer is filing as an H-2A labor contractor, as opposed to its identification as a fixed site employer, as noted in the original NOD. The CO also requested a modification to ETA Form 790, pertaining to its proposed housing of the H-2A workers. (AF 38-39).

The Employer replied to the CO's Notice of Required Modification (NRM) on December 31, 2018. The Employer noted that it had previously supplied a copy of its H-2A surety bond. It also confirmed that it would provide, at no cost to the workers, wireless devices such as cell phones to communicate in case of an emergency. In regard to the CO's request that employer remove "tending to livestock" from its job description, Employer responded, "Doing custom harvesting is [a] smaller portion of the job description as can be confirmed by the itinerary. The custom work that is done is close to the employer's home base and the other job descriptions (sic) is still necessary. Livestock is a very small part of the operation and does not have year round needs but minimal job duties still may exist." (AF 29). Employer gave permission to the CO to amend its application to indicate that it is filing as an H-2A labor contractor and to list a camper as part of its housing requirements.

On January 24, 2019, the CO issued a Denial Letter, noting that Employer had provided additional information to support that it was applying as an H-2A labor contractor, however one deficiency still remained. (AF 15-18). The CO noted that in its request for required modifications, it had specifically requested additional information "regarding the specific crops harvested and the type of combine harvesters used, sufficient to establish [Employer's] eligibility for the MSPA exemption." The CO determined that the Employer had failed to provide this

information. The CO therefore concluded, that since the Employer did not provide information required by the MSPA or sufficient information to show it fell under the exemption for the MSPA, its application for seven agricultural equipment operators was denied. (AF 18).

On January 24, 2019, the Employer filed an appeal of the CO's denial by e-mail to the CO expressing its disagreement with the denial and requesting review of the CO's decision. The Employer resubmitted the information previously supplied with its response to the notice of required modifications. Employer also noted some additional factual information which will not be considered in this determination as it is not contained in the administrative file. The Employer noted that the CO had recognized that "employer lists job duties and requirements throughout its application that are commonly found in custom combine applications. Specifically:

- Operate farm equipment such as tractors, combine, and semi-trucks.
- Perform mechanical repair and maintenance.
- Must have or be able to obtain driver's license."

The Employer responded that this was a correct observation by the CO and that this was the basis for its application as an H-2A labor contractor that custom harvests grains. (AF 2).

By Order dated February 7, 2019, the parties were granted leave to file briefs by February 11, 2019. Briefs were submitted on behalf of the Employer and the CO, and received on February 11, 2019.

*The Employer's Brief*

In its brief, the Employer primarily restates its position as asserted in its appeal letter. Although the Employer notes some new factual information, this information will not be considered as it was not submitted to the CO and is not contained in the administrative file. Employer also notes that it had listed "small grains" on the ETA Form 790, which, it asserts, is typical for custom harvesters. It also notes that the required itineraries, work agreements, and surety bond were submitted to the CO. Employer confirms its status as an "itinerate employer" and argues that it met the criteria to be processed under the TEGL 16-06 special procedures. Employer further asserts that it should have been exempt from filing an MSPA FLC certificate because it was filing under the special procedures.

*The CO's Brief*

In the CO's brief, the Solicitor argues generally in support of affirming the CO's denial of the Employer's H-2A application. The Solicitor asserts "[f]or the reasons stated in the CO's denial" that the Employer failed to carry its burden to demonstrate that it was entitled to certification. The Solicitor argues that the Employer failed to satisfy the filing requirements for H-2A contractors. In support of her position, the Solicitor raises several arguments related to deficiencies that were not contained in the CO's final denial letter. These arguments will not be summarized or addressed in this decision as they were not listed in the CO's Denial letter as the basis for the denial of the Employer's H-2A application.

In regard to whether Employer meets the criteria for the MSPA exemption the Solicitor argues that the burden is on an employer to prove it is entitled to the custom combine exemption and thus to a waiver of the requirement that it submit an FLC certificate. The Solicitor states, "although Lorang Grain appears to be a custom combiner, it has not laid the proper foundation to claim the exemption." In support of this statement the Solicitor notes the Employer failed to identify the specific crops it harvests or to confirm the type of harvester it uses. The Solicitor next argues that the Employer is not eligible to claim the MSPA exemption because it declined to remove livestock duties from its application which it asserts are "not normally associated with a custom combine operation." As this argument appears to relate to a deficiency which the CO did not list in its final determination this argument will not be addressed further. The Solicitor also asserts that no new evidence may be considered and this administrative review must be limited to information in the administrative file.

## ISSUE

Whether the Employer, an H-2A labor contractor, has met its burden of proving it is eligible for the Migrant and Seasonal Worker Protection Act (MSPA) exemption, as a custom combine operator, pursuant to 29 CFR § 500.30(g).

## SCOPE OF REVIEW

The current case arises from the Employer's request for administrative review in regard to the CO's denial of the Employer's application for temporary alien labor certification under the H-2A program.

Under the applicable regulation at 20 C.F.R. § 655.171(a), in cases where administrative review has been requested, "the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse or modify the CO's decision, or remand to the CO for further action."

## DISCUSSION

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

> (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and
>
> (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In order to receive labor certification, an employer must demonstrate that it has a "temporary" or "seasonal" need for agricultural services. 20 C.F.R. § 655.161.

Section 655.102 of the H-2A regulations provide that OFLC has the authority to establish special procedures for processing H-2A applications, in certain types of cases where it is consistent with "the Secretary's responsibilities under the Immigration and Nationality Act (INA)." *See* 20 C.F.R. §655.102. As noted in the regulation, special procedures are currently in effect for the handling of applications for sheepherders in the Western states, as well as custom combine harvesting crews.

The established special procedures in effect for custom combine operators under the H-2A program are stated in the ETA's Training and Employment Guidance Letter ("TEGL") 16-06. Attachment A to TEGL 16-06 states the following in regard to the filing requirements under the special procedures for H-2A Labor Contractors (H-2ALC):

> The Department is granting a special variance to the application filing procedures for H-2ALCs contained at 20 CFR 655.132(a). Specifically, an employer engaged in multi-state custom combine activities is authorized to file an Application for Temporary Employment Certification covering one or more areas of intended employment based on a definite itinerary. An employer who desires to employ one or more nonimmigrant workers on an itinerary to provide custom combine services to fixed-site farmers/ranchers is, by definition, an H-2ALC. Therefore, the custom combine labor contractor must identify itself as the employer of record on the ETA Form 9142 by completing Section C and marking item C.17 as "H-2A Labor Contractor," and submitting, in addition to the documentation required under 20 CFR 655.130, all other required documentation supporting an H-2ALC application. The only special variance to the requirements at 20 CFR 655.132(b) is the recognized exemption of custom combine activities from the requirements of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) (29 U.S.C. 1901, 1803(a)(30)(E) et seq.).

TEGL 16-06, Attachment A, II. B.

The Employer bears the burden of establishing that its application is entitled to special procedures. *See Greenbank, Inc.*, 2013-TLC-00035 (July 22, 2013). In the instant case, the Employer's application requests temporary labor certification for seven farmworkers under the SOC occupation title of Agricultural Equipment Operators, with a start date of February 15, 2019, and an end date of December15, 2019, on the basis of a seasonal need. (AF 63). Job duties were listed as, "Operate farm equipment, tractors, combine, sprayers, to till soil, plant, cultivate, irrigate, fertilize, & harvest crops. Drives semi-truck to transport product to elevator or storage area. Perform mechanical repair and maintenance. Tend to livestock." (AF 65).

The Employer in this case originally filed as an individual employer (fixed site employer). *See* AF 64 (ETA 9142A, Section C., No. 17). However, in the December 12, 2018 Notice of Deficiency, the CO noted discrepancies in the Employer's application which made it unclear whether the Employer was filing as a fixed site employer or an H-2A Labor contractor ("H-2ALC"). The CO observed that the Employer had identified itself as an "individual Employer" in Section C of its application, which would indicate it was a fixed site employer;

however, the Employer also submitted an itinerary with the ETA Form 790 (Job Order), which includes other businesses and locations, estimated dates of employment, and the wage to be paid at each location. The CO stated that if the worksites indicated in the itinerary are not owned or operated by the Employer, then the Employer must abide by the regulations governing H-2A Labor Contractors. The CO therefore requested specific information required by H-2A labor contractors.

The Employer responded to the NOD with information supporting that it was applying as an H-2A labor contractor. The Employer provided a copy of an H-2A surety bond and four signed "Confirmation of Work Agreement Between Custom Harvester & Fixed-Site Agricultural Business" contracts, covering the periods of 2/15/19 – 7/1/19, 7/1/19 – 7/15/19, 7/20/19 – 8/15/19, 10/15/19 – 12/1/19 and 12/1/19 – 12/15/19. (AF 49-52). Each agreement, signed by a different "fixed site employer," noted the anticipated dates of work and stated, "LANDOWNER agrees that the HARVESTER will be hired out to perform <u>custom combining activities</u> on its land for the current harvest season. HARVESTER agrees to harvest the LANDOWNERS crops in the appropriate time frames based on crop conditions for the upcoming harvest season." (AF 49 – 52) (<u>emphasis added</u>).

Based on that newly submitted information, the CO issued a Notice of Required Modification ("NRM") requesting additional documentation that would be required of an H-2A labor contractor, as well as permission to amend the application (Form 9142) to show that Employer was applying as an H-2A labor contractor. (AF 34-39). In the NRM, the CO requested that the Employer submit modifications for deficiencies numbered 1 – 4, which included information as to whether it fell within the MSPA exemption for custom combine operators and other information required under TEGL 16-06 (special procedures for custom combine operators). The Employer responded to the request for modifications, agreeing to the requested amendments to its application, and apparently providing acceptable responses to deficiencies numbered 2 – 4, as none of these deficiencies were included in the CO's final denial.

In regard to deficiency number 1 (the only deficiency cited in the Final Denial), the CO noted that the Employer would have to provide a copy of the MSPA Farm Labor Contractor Certificate of Registration, as required by the MSPA, or, in the alternative, the Employer could provide additional information regarding the specific crops harvested and the type of combine harvesters used, sufficient to establish its eligibility for the MSPA exemption.

The CO quoted the provision of the MSPA exemption for custom combine operations, which the MSPA defines as:

> Any custom combine, hay harvesting, or sheep shearing operation. Custom combine, hay harvesting, and sheep shearing operation means the agricultural services and activities involved in combining grain, harvesting hay and shearing sheep which are provided to a farmer on a contract basis by a person who provides the necessary equipment and labor and who specializes on providing such services and activities.

29 C.F.R. 500.30(g).

The Employer responded to this deficiency in its December 31, 2018 response by stating, "Employer provided items [pursuant to] 20 CFR 655.122(f)" and also stating "TEGL 16-06 – Multi State Custom Combine." A reasonable interpretation of the Employer's response confirms that it was applying under the TEGL 16-06 special procedures for custom combine operators, and it believed its submission provided the requested information, as required under 20 CFR 655.122(f) (which pertains specifically to the contents of job orders). (AF 74 -83)(Employer's job order [Form 790] and attachments).

The CO's final decision denying Employer's application lists only Deficiency 1 as the basis for its denial, finding that the Employer "failed to either provide valid FLC Certificates of Registration [as required by the MSPA] or additional information to establish if it met the requirements of MSPA at 29 CFR 500.30(g)" pertaining to the exemption from the MSPA for custom combine operators, and therefore its application for seven Agricultural Equipment Operators was denied. (AF 17).

The CO again cited and quoted the above noted provision of the MSPA at 29 C.F.R. §500.30(g), which exempts custom combine operators as defined by the regulation. As the CO cites no other regulation or official OFLC policy statement to support its denial, the issue to be addressed is whether Employer supplied, as requested by the CO, "information regarding the specific crops harvested and the type of combine harvesters used, sufficient to establish [Employer's] eligibility for the MSPA exemption."

In regard to the CO's request for information regarding the "specific crops harvested", it must be noted that the applicable regulation does not specify that the exemption for custom combine operations only applies to a certain type of grain; rather, it pertains to the "agricultural services and activities involved in <u>combining grain</u>, harvesting hay and shearing sheep." 29 C.F.R. §500.30(g)(<u>emphasis added</u>). In the Final Denial, the CO acknowledges that "Item 17 of [Employer's] ETA Form 790 identifies the crop to be harvested as small grains but did not provide further details regarding the type of crop." As the regulation only specifies <u>grain</u>, the CO's requirement that more specific information must be given, in addition to the Employer's representation that identifies small grains as the crop to be harvested, is not consistent with the MSPA regulation at issue.

Accordingly, I find that Employer has provided sufficient information regarding the type of crop to be harvested to establish its eligibility for the MSPA exemption.

Likewise, the CO's denial determination for Employer's failure to provide information regarding the "type of combine harvesters used," cannot be justified on the basis of non-compliance with the regulation at 29 C.F.R. §500.30(g). No such requirement regarding "type of combine harvester" is found in the regulation, which states that it applies to "[a]ny custom combine, hay harvesting, or sheep shearing operation" and further notes that "[c]ustom combine, hay harvesting, and sheep shearing operation means the agricultural services and activities involved in combining grain, harvesting hay and shearing sheep which are provided to a farmer on a contract basis by a person who provides the necessary equipment and labor and who specializes on providing such services and activities." 29 C.F.R. §500.30(g).

The CO acknowledged in its denial letter that "employer lists job duties and requirements throughout its application that are commonly found in custom combine applications. Specifically:

- Operate farm equipment such as tractors, combine and semi-trucks
- Perform mechanical repair and maintenance.
- Must have or be able to obtain driver's license.

(AF 18).

Further support for the Employer's custom combine operation is found in the four signed "Confirmation of Work Agreement & Fixed-Site Agricultural Business" contracts submitted by the Employer in response to the original NOD in this case. (AF 49-52). Each agreement signed by a different "fixed site employer" noted the anticipated dates of work and stated, "LANDOWNER agrees that the HARVESTER will be hired out to perform custom combining activities on its land for the current harvest season. HARVESTER agrees to harvest the LANDOWNERS crops in the appropriate time frames based on crop conditions for the upcoming harvest season". (AF 49-52)(emphasis added).

## CONCLUSION

The Employer's responses to the CO's Notice of Deficiency and Notice of Required Modification should have been made with greater clarity and precision. Nonetheless, after reviewing the administrative file, and in particular, the Employer's submissions and responses in the administrative file, the undersigned finds that Employer has provided sufficient information to meet its burden of establishing that it falls under the MSPA exemption for custom combine operators.

## ORDER

Accordingly, for the foregoing reasons, the CO's denial of the Employer's application filed under the special procedures for custom combine operators for Employer's failure to prove that it is eligible for the MSPA exemption pertaining to custom combine operators at 29 C.F.R. §500.30(g), is **REVERSED** and this matter is **REMANDED** to the CO for additional processing.

SEAN M. RAMALEY
Administrative Law Judge