



Issue Date: 09 October 2019

**BALCA Case Nos.: 2019-TLC-00081
2019-TLC-00082
2019-TLC-00083**

ETA Case Nos.: H-300-19206-766135
H-300-19218-194715
H-300-19206-529206

In the Matter of:

**TRANSPORT LEASING COMPANY, LLC,
d/b/a TRANSYSTEMS SERVICES,
Employer.**

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Robert McCubbin
H2 Visa Consultants, LLC
Garden Ridge, Texas
For the Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act ("INA"), 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.

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor ("DOL") using the Employment and Training Administration's ("ETA") Form ETA-9142A, Application for Temporary Employment Certification ("Form 9142A"). A Certifying Officer ("CO") in the Office of Foreign Labor Certification ("OFLC") of the DOL's ETA reviews applications for temporary labor certification. Following the CO's denial of an application under 20 C.F.R. § 655.164, an employer may, under 20 C.F.R. § 655.171 request administrative review or a de novo hearing before an Administrative Law Judge ("ALJ") of the decision of the CO. The Chief ALJ will immediately assign an ALJ (which

may be a panel of such persons designated by the Chief ALJ from the Board of Alien Labor Certification Appeals (“BALCA”). The ALJ may affirm, reverse, or modify the CO’s decision.¹

On August 13, 2019, Transport Leasing Company, LLC (“the Employer”) filed a request for expedited administrative review of the Denial Letter issued by the CO in the 2019-TLC-00081 H-2A temporary alien labor certification matter. On September 16, 2019, the Employer filed two requests for expedited administrative review of the Denial Letters issued by the CO in the adjoining companion cases, 2019-TLC-00082 and 2019-TLC-00083, also H-2A temporary alien labor certification matters.

I received the Administrative Files (“AF”) from the ETA on October 2, 2019.² The parties thereafter submitted briefs. 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 AF.

BACKGROUND

The Administrative Files

On July 26, 2019, the Employer filed Form 9142A (“Application”) for cases 2019-TLC-00081 and 2019-TLC-00083.³ The Employer’s Applications requested certification for twenty-five⁴ and five⁵ Heavy and Tractor-Trailer Truck Drivers for the period beginning September 11, 2019 and ending April 15, 2020. On August 3, 2019, the Employer filed a third Application for case 2019-TLC-00082⁶ requesting certification for thirteen Heavy and Tractor-Trailer Truck Drivers for the period beginning September 20, 2019 and ending March 15, 2020.⁷

The Employer is an H-2A Labor Contractor (“H2ALC”) which sought to employ tractor-trailer drivers to haul harvested crops (sugar beets) from fields to designated processing plants.⁸ Employer filed several supporting documents with its Applications, including ETA Forms 790, certificates of liability insurance, maps of the projected driving routes, surety bonds, Farm Labor Contractor Certificates of Registration, Harvest-Hauler/Landowner Agreements, intrastate and interstate clearance order, and Workers’ Compensation coverage for the state of North Dakota and Minnesota.⁹

¹ 20 C.F.R. § 655.171.

² The following abbreviations are used in this Decision: “CB” for Certifying Officer’s brief; “EB” for Employer’s brief; “AF1” refers to administrative file for 2019-TLC-00081 H-2A; “AF2” refers to administrative file for 2019-TLC-00082; and “AF3” refers to administrative file for 2019-TLC-00083.

³ AF1 at 70-83; AF3 at 79-93.

⁴ AF1 at 70.

⁵ AF3 at 79.

⁶ AF2 at 60-72.

⁷ *Id.* at 60.

⁸ AF1 at 70; AF2 at 60; and AF3 at 79.

⁹ AF1 at 41-127; AF2 at 14-109; and AF3 at 20-122.

On August 2, 2019, the CO issued a Notice of Deficiency (“NOD”) concerning 2019-TLC-00081, identifying five deficiencies and the modifications required for each.¹⁰ The Employer filed responses on August 6, 2019, to address those deficiencies.¹¹ On August 13, 2019, the CO issued a NOD concerning 2019-TLC-00082, identifying two deficiencies and the modifications required for each.¹² The Employer filed responses on August 26, 2019, to address those deficiencies.¹³ On August 2, 2019, the CO issued a NOD concerning 2019-TLC-00083, identifying six deficiencies and the modifications required for each.¹⁴ The Employer filed responses on August 14, 2019, to address those deficiencies.¹⁵

On August 8, 2019, the CO issued a Notice of Required Modifications (“NRM”) concerning 2019-TLC-00081.¹⁶ The NRM stated that the Employer’s Application did not meet the criteria for certification because it was not evident that the job opportunity consists of agricultural labor or services.¹⁷ The CO did not issue NRMs concerning 2019-TLC-00082 or 2019-TLC-00083. On August 20, 2019 the CO issued a Notice of Acceptance (“NOA”) concerning the 2019-TLC-00083 request but then realized that the NOA was issued in error.¹⁸ On September 9, 2019, the CO issued a Denial Letter concerning 2019-TLC-00083, but then realized that the “while the denial action was correct, the substance of letter issued was incorrect.”¹⁹ On September 11, 2019, the CO issued a corrected Denial Letter concerning 2019-TLC-00083.²⁰

The NRM set out the definitions of “agricultural labor” (in the Internal Revenue Code (“IRC”), 26 U.S.C. § 3121(g) (the “IRS definition”)) and “agriculture” (in the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 203(f) (the “FLSA definition”)) that, together with logging employment and the pressing of apples for cider on a farm, constitute the definition of agricultural labor or services for purposes of the H-2A program.²¹ The NRM stated that the job duties listed on the Application “are primarily described as the trucking and hauling of crops.”²² It provided: “Additional information is needed in order to confirm that the transportation activities included in this application are, in fact agricultural, in accordance with H2A visa program regulations. The employer has not confirmed that it produced more than one-half of the commodity being transported.”²³ The NRM required the Employer to provide “a written statement describing how its

¹⁰ AF1 at 56-62.

¹¹ *Id.* at 44-55.

¹² AF2 at 48-54.

¹³ *Id.* at 23-46.

¹⁴ AF3 at 65-73.

¹⁵ *Id.* at 31-64.

¹⁶ AF1 at 36-40.

¹⁷ *Id.*

¹⁸ AF3 at 6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ AF1 at 38.

²² *Id.* at 40.

²³ *Id.*

application should properly be considered as agricultural labor or services as those terms are defined for purposes of the H-2A program.”²⁴

The Employer filed a response on August 16, 2019.²⁵ The Employer noted that the IRS definition of “agricultural labor” includes service performed in “connection with the . . . harvesting of sugar beets,” and argued that “harvesting and hauling sugar beet commodities are indistinguishable functions.”²⁶ The Employer rejected the requirement that the employer must produce more than one-half of the commodity being transported per the CO’s interpretation of the IRS definition, because an H2ALC, by definition, does not produce any crops.²⁷ The Employer argues that “the test here is not whether the employer who is an H-2ALC produces more than one-half of the commodity being produced, but rather whether or not the producer that they have contracted with produces over one-half of the commodity being produced.”²⁸ The Employer further noted that the “act of gathering and transporting the commodity is inarguably a part of the harvest under the FLSA definition of “agriculture.”²⁹ The Employer contends that hauling sugar beets “is clearly agricultural in nature, and defined and/or recognized by the IRS, FLSA, 20 CFR 655.103(c)(1)(C) and federal/state hours of service exemptions for perishable agricultural commodities,” and therefore, denying the employer access to the H-2A program on the basis that it is not agricultural work would be a “tragedy.”³⁰

On September 11, 2019, the CO issued Denial Letters concerning 2019-TLC-00081, 00082, and 00083.³¹ The letters stated that the Employer’s Applications for temporary labor certification under the H-2A program were denied, because the Employer did not establish that it is providing agricultural labor or service.³² The CO relied on the reasoning in *In the Matter of ATP Agri-Services Inc.*, 2019-TLC-00050, slip op. (May 17, 2019) (“*ATP Agri-Services*”), where the ALJ found that “truck driving, if not ‘performed by a farmer or on a farm’ does not qualify as agricultural labor for the purposes of certification in the H2A visa program.”³³ The CO reviewed the Employer’s eligibility under both the IRS and FLSA definitions of “agricultural labor,” and found that the Employer’s response established that the farms themselves produce 100% of the commodities being transported, and therefore, the Employer’s transportation activities do not qualify as agricultural labor or services.³⁴

The Employer requested expedited administrative review of 2019-TLC 00081, 00082, and 00083, by letter filed on September 16, 2019.³⁵ The Employer contended

²⁴ *Id.*

²⁵ AF1 at 12-35.

²⁶ *Id.* at 15.

²⁷ *Id.* at 17.

²⁸ *Id.*

²⁹ *Id.* at 19-20.

³⁰ *Id.* at 20-21.

³¹ AF1 at 3-10; AF2 at 4-11; and AF3 at 4-11. A corrected denial letter was issued concerning 2019-TLC-00083.

³² AF1 at 5; AF2 at 6; and AF3 at 6.

³³ AF1 at 7.

³⁴ AF1 at 10; AF2 at 11; and AF3 at 11.

³⁵ AF1 at 1-2; AF2 at 1; and AF3 at 1-3.

that the denial was incorrect and that the Employer has already demonstrated to the CO that “this case is 100% within the scope of harvesting and agricultural work as defined and/or recognized by the IRS, FLSA, 20 CFR 655.103(c)(l)(C) and federal/state hours of service exemptions for perishable agricultural commodities.”³⁶ Furthermore the Employer refers to the initial NOA of 2019-TLC-00083, and claims that the regulations, 20 CFR 655.140-160, do not allow the CO to “perform the act that it did in denying this case in such an untimely and unorthodox manner.”³⁷

The Employer’s Brief

The AFs were received on October 2, 2019, and both parties filed briefs on October 7, 2019. In its brief, the Employer argued that, in reference to case 2019-TLC-00083, once the CO issued the NOA “there should have been no inquiry into the seasonal or agricultural nature of this business,” and that the CO’s later explanation that the NOA was issued “in error” was in “no way issued in accident.”³⁸ The Employer disputes the CO’s interpretation of *ATP Agri-Services Inc.*, and argues that the work that the employer engages in is performed on a farm, because the sugar beets are located on the farmer’s land.³⁹ The Employer refers to the “signed fixed-site grower contracts” in support of this argument.⁴⁰ The Employer argues that harvesting sugar beets is agricultural labor as defined by the IRC at § 3121(g)(3), because the “hauling of sugar beet commodities during the sugar beet harvest is unquestionably part of the sugar beet harvest and done in ‘connection’ with the harvesting of this particular commodity.”⁴¹ The Employer relies on the ALJ’s reasoning *In the Matter of Lowery Hauling, Inc.*, 2019-TLC-00074, slip op. (Sept. 9, 2019) (“*Lowery Hauling*”), where the ALJ found that “the labor performed as part of employer’s job opportunity is all on continuous chain of functions essential to the ginning process.”⁴² The Employer reads § 3121(g)(4)(A) of the IRC to mean that the H2ALC must be in the “employ of the operator of a farm,” not that the H2ALC is required to be the operator of the farm that produces more than one-half of the commodity.⁴³

The CO’s Brief

The CO argued that the Employer did not establish that its job opportunity meets the definition of agricultural or labor services as defined by 20 C.F.R. § 655.103(c), the IRC, or the FLSA.⁴⁴ First, the CO rebutted the Employer’s assertion that harvesting and hauling are “indistinguishable functions that are done simultaneously,” because harvesting and hauling are two distinct actions and are treated as such in the statutes,

³⁶ AF1 at 2; AF2 at 1; and AF3 at 2.

³⁷ AF3 at 2.

³⁸ EB at 2-3.

³⁹ *Id.* at 3-4.

⁴⁰ *Id.* at 5.

⁴¹ *Id.* at 6.

⁴² *Id.* at 7.

⁴³ *Id.* at 8.

⁴⁴ CB at 2-15.

regulations, and administrative rulings.⁴⁵ The CO argued that the Employer's job opportunity does not meet the definition of "agricultural labor" under the IRC at § 3121(g)(1), because the work of H-2A workers must be done "on a farm."⁴⁶ Furthermore, the CO clarified that agricultural labor "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. 1141(j))" only refers to crude gum and crude gum products, not sugar beets, under the IRC at § 3121(g)(3).⁴⁷ The CO also argued that the Employer's job opportunity does not meet the definition of agricultural labor under the IRC at § 3121(g)(4), because delivering agricultural unmanufactured commodities qualifies as agricultural labor "only if such operator produced more than one-half of the commodity," and the Employer does not grow crops.⁴⁸ The CO further argued that the Employer's job opportunity does not meet the definition of "agriculture" as defined by the FLSA, because the Employer's work does not constitute primary agriculture or secondary agriculture.⁴⁹ Under the FLSA, primary agriculture refers to farming activities that take place on the farm and secondary agriculture requires that the activities be performed "by a farmer, or on a farm."⁵⁰ The CO further argued that the Employer was not entitled to certification based on prior application, or the threat of irreparable harm.⁵¹

DISCUSSION

The scope of review in H-2A cases is set forth in 20 C.F.R. § 655.171(a)⁵²: "Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file 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." The ALJ's decision is the final decision of the Secretary.

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.⁵³ The H-2A regulations define "agricultural labor or services" as follows:

agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* at 8-9.

⁴⁸ *Id.* at 12.

⁴⁹ *Id.* at 12-13.

⁵⁰ CB at 14.

⁵¹ CB at 15-16.

⁵² 20 C.F.R. § 655.171(a).

⁵³ 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

employment. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition.⁵⁴

The sole issue in this case is whether the Employer's job opportunity for truck drivers comes within the definition of "agricultural labor or services," so as to qualify for the H-2A program. There is no claim that the truck drivers would be engaged in the pressing of apples for cider or logging employment. The issue in dispute is whether the job opportunity meets either the IRS definition of "agricultural labor" in 26 U.S.C. § 3121(g), or the FLSA definition of "agriculture" in 29 U.S.C. § 203(f). As the regulation states and the Employer emphasizes, the job opportunity only needs to meet one of the definitions to qualify as agricultural labor or services.

As relevant here,⁵⁵ the Internal Revenue Code defines "agricultural labor" to include all services performed:

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), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes; in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to 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.⁵⁶

The Employer asserts that the job opportunity satisfies this provision because hauling produce is in connection with the . . . harvesting of sugar beets.⁵⁷ Furthermore, the Employer asserts that the IRC requirement that the employer produce more than one-half of the commodity for transportation is a misunderstanding of the regulations because it is the operator who produces the agricultural commodity and the H2ALC contractor who hauls the produce, both of which are involved in a harvesting activity.⁵⁸

The undersigned finds that the Employer's job opportunity does not meet the IRC's definition. The Employer did not establish, and does not contend, that it is an operator of a farm. To the contrary, it recognizes that the farmers and growers with whom it has hauling contracts produce 100% of the sugar beet commodities being

⁵⁴ 20 C.F.R. § 655.103(c).

⁵⁵ The definition of "agricultural labor" also includes several other types of activities not implicated here, such as cultivating the soil, producing and harvesting the commodity, raising and caring for the animals, and maintaining farm tools and equipment. See 26 U.S.C. § 3121(g).

⁵⁶ 26 U.S.C. § 3121(g)(3)-(4)(A).

⁵⁷ AF1 at 15; EB at 6.

⁵⁸ AF1 at 17; EB at 8.

hauled.⁵⁹ Furthermore, as the CO points out, “agricultural commodity” is defined at 12 U.S.C. § 1141j(f) as crude gum and products of crude gum, therefore, “in connection with the production or harvesting” does not apply to sugar beets.⁶⁰ Because the truck drivers that the Employer seeks to employ under the H-2A program will not be employed by the operator of a farm, the Employer’s job opportunity transporting sugar beets does not satisfy the definition of agricultural labor in 26 U.S.C. § 3121(g).

The FLSA defines “agriculture” 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.⁶¹

The Employer’s response to the NRM asserts that the job opportunity satisfies this provision, because “you cannot disconnect the harvesting of a commodity from the transporting that takes place with that commodity during said harvesting.”⁶² The Employer argues that the “harvest cannot be performed, completed or brought in without the act of hauling the sugar beet commodity utilizing agricultural trucks during the harvest period.”⁶³

As set forth in federal regulations and the CO’s brief, the FLSA definition of “agriculture” recognizes “two distinct 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.”⁶⁴ The undersigned finds that the Employer’s job opportunity hauling products from the farms to the processing facilities does not come within the definition of “primary” agriculture, because it does not involve farming (e.g., “cultivation and tillage of the soil, dairying the production, cultivation, growing and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals or poultry”).⁶⁵

The undersigned also finds that the Employer’s job opportunity also does not come within the definition of “secondary” agriculture, because it is not performed “by a

⁵⁹ AF1 at 17; EB at 8.

⁶⁰ CB at 8-9.

⁶¹ 29 U.S.C. § 203(f).

⁶² AF1 at 20.

⁶³ EB at 6.

⁶⁴ 29 C.F.R. § 780.105; CB at 13-15.

⁶⁵ 29 C.F.R. § 780.105(b).

farmer or on a farm.”⁶⁶ As discussed above, the Employer is not a farmer, and the truck drivers it seeks to employ would not be farmers. The hauling is not performed “on a farm,” as demonstrated by the itineraries filed by Employer with its Application and the projected map routes submitted as supporting documentation.⁶⁷ The itineraries and maps show that the requested H-2A workers would pick up the commodities at farms and deliver them to processing facilities anywhere from 19.9 to 126 miles away.⁶⁸ It is not enough that the activity be “an incident to or in conjunction with” farming operations; to qualify as “agriculture” under the secondary meaning in the FLSA definition, such incidental activities must be performed “by a farmer or on a farm as an incident to or in conjunction with” primary farming operations.⁶⁹ Because the Employer’s job opportunity does not involve primary farming operations, and will not be performed by a farmer or on a farm as required under the secondary meaning, it does not come within the FLSA’s definition of “agriculture.”

The federal regulations bear this out. 29 C.F.R. § 780.134 provides:

If a practice is not performed by a farmer, it must, among other things, be performed “on a farm” to come within the secondary meaning of “agriculture” in section 3(f). Any practice which cannot be performed on a farm, such as “delivery to market,” is necessarily excluded, therefore, when performed by someone other than a farmer (*see Farmers Reservoir Co. v. McComb*, 337 U.S. 755; *Chapman v. Durkin*, 214 F. 2d 360, cert. denied 348 U.S. 897; *Fort Mason Fruit Co. v. Durkin*, 214 F. 2d 363, cert. denied 348 U.S. 897).⁷⁰

In addition, 29 C.F.R. § 780.152 provides:

Employment in “secondary” agriculture, under section 3(f), includes employment in “delivery to storage or to market or to carriers for transportation to market” when performed by a farmer as an incident to or in conjunction with his own farming operations. To the extent that such deliveries may be accomplished without leaving the farm where the commodities delivered are grown, the exemption extends also to employees of someone other than the farmer who raised them if they are performing such deliveries for the farmer. However, normally such deliveries require travel off the farm, and where this is the case, only employees of a farmer engaged in making them can come within section 3(f).⁷¹

And 29 C.F.R. § 780.154 provides:

⁶⁶ 29 U.S.C. § 203(f); 29 C.F.R. § 780.105(c).

⁶⁷ AF1 at 91, 108-27; AF2 at 94-95; AF3 at 92.

⁶⁸ *Id.*

⁶⁹ 29 U.S.C. § 203(f); 29 C.F.R. § 780.105(c).

⁷⁰ 29 C.F.R. § 780.134.

⁷¹ 29 C.F.R. § 780.152.

The term “delivery * * * to market” includes taking agricultural or horticultural commodities ... to market. It ordinarily refers to the initial journey of the farmer’s products from the farm to the market. The market referred to is the farmer’s market which normally means the distributing agency, cooperative marketing agency, wholesaler or processor to which the farmer delivers his products. Delivery to market ends with the delivery of the commodities at the receiving platform of such a farmer’s market (*Mitchell v. Budd*, 350 U.S. 473). When the delivery involves travel off the farm (which would normally be the case) the delivery must be performed by the employees employed by the farmer in order to constitute an agricultural practice. Delivery by an independent contractor for the farmer or a group of farmers or by a “bird-dog” operator who has purchased the commodities on the farm from the farmer is not an agricultural practice (see *Chapman v. Durkin*, 214 F. 2d 360, cert. denied 348 U.S. 897; *Fort Mason Fruit Co. v. Durkin*, 214 F. 2d 363, cert. denied 348 U.S. 897).⁷²

Thus, as demonstrated by the plain language of the statute and the regulations, the Employer’s job opportunity hauling agricultural commodities from the farm to processing and packing facilities located elsewhere does not come within the FLSA’s definition of “agriculture.”

The Employer attempts to liken its case to *Lowery Hauling* where the ALJ found that under the IRC, harvesting, transporting, and ginning cotton was considered “agricultural labor” and qualified H-2A program certification. This decision does not apply here because the Employer transports sugar beets, not cotton, and 26 U.S.C. § 3121(g)(3) specifically includes the “ginning of cotton” within its definition of “agricultural labor.” Rather, the ALJ’s reasoning in *ATP Agri-Services Inc.* applies because in that matter, the Employer sought tractor-trailer truck drivers to haul harvested citrus, celery, and watermelon crops from fields and groves to designated processing and packing facilities under the H-2A program, which was denied because those activities did not meet the definition of “agricultural labor.” Therefore, because the Employer’s job opportunity does not come within any of the definitions of “agricultural labor or services” included in the H-2A program, the CO properly denied certification.

The Employer’s argument that, since Transport Leasing Company, LLC⁷³ has received H-2A certifications in the past, it is now entitled to certification, is unpersuasive and rejected because even though the CO may have approved similar applications in the past, is not grounds for reversal of the denial.⁷⁴

⁷² 29 C.F.R. § 780.154.

⁷³ AF1 at 13 (H-300-18220-373228).

⁷⁴ See *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”).

ORDER

For the foregoing reasons, 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.

JENNIFER WHANG
Administrative Law Judge