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Issue Date: 09 September 2019

OALJ Case No.: 2019-TLC-00074
ETA Case No.: H-300-19196-148991

In the Matter of:

Lowery Hauling, Inc.
Employer.

Appearances:

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For the Certifying Officer

Before: Lystra A. Harris
Administrative Law Judge

DECISION AND ORDER MODIFYING DENIAL OF CERTIFICATION

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

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142A, Application for Temporary Employment Certification ("Form 9142A"). A CO in the Office of Foreign Labor Certification of the Department of Labor's Employment and Training Administration ("ETA") reviews applications for temporary labor certification. Following the CO's denial of an application under 20 C.F.R. § 655.164, 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. 20 C.F.R. § 655.171.

I. PROCEDURAL BACKGROUND

On July 15, 2019, ETA received an application for temporary labor certification from Employer. Employer requested certification for 14 “Farmworkers” for a period of seasonal need from September 10, 2019 through December 15, 2019. AF 457–67.¹ The CO issued a Notice of Deficiency on July 22, 2019, finding that Employer failed to note how its job opportunity should be properly considered agricultural labor or services as those terms are defined for the purposes of the H-2A program. AF 446–51. Specifically, the CO mandated that the Employer answer 1) who owned the cotton that the workers would be harvesting, transporting, and ginning, and 2) what percent of the cotton that the workers would be harvesting, transporting, and ginning was produced by Employer. *Id.* Further, the CO dictated that Employer must “detail how the trucks haul cotton, if there is only one worksite location,” or amend its application to indicate all of the worksite locations, if there were more than one. *Id.*

Employer submitted a Notice of Deficiency response in a letter dated July 23, 2019.² AF 437–45. In this letter, Employer provided answers as to how much cotton they owned, a list of the farmers and cotton fields, and additional details about the tasks to be performed by the workers. *Id.* Employer also submitted an additional Notice of Deficiency response, uploaded to i-Cert on July 30, 2019, containing additional documents, including their certified H-2A applications from previous years. AF 310–436.

On July 30, 2019, the CO issued a Notice of Denial letter. AF 143–49. The CO, in this Notice of Denial, detailed that Employer had failed to show that the job opportunity in its labor certification application qualified as agricultural labor or services. *Id.* The CO provided how Employer’s job opportunity failed to meet either the FLSA definition of agriculture or the IRC definition of agriculture. *Id.* The CO also determined that Employer was acting as an H-2ALC, and that truck driving, if not “performed by a farmer on a farm,” does not qualify as agricultural labor for the purpose of certification in the H-2A visa program.³ *Id.*

On August 1, 2019, Employer engaged in e-mail correspondence requesting further information about the Notice of Denial. AF 140–42. In a letter dated August 5, 2019,⁴ Employer, through counsel, requested an expedited *de novo* hearing before the Office of Administrative Law Judges (“OALJ”). AF 30–139. In a letter dated August 6, 2019,⁵ Employer, through counsel, submitted an Amended Request for Expedited De Novo Hearing. AF 1–29.

On August 19, 2019, the CO uploaded the AF. The undersigned issued an Order on August 20, 2019 scheduling a telephonic hearing for 10:00 A.M on August 28, 2019. On August

¹ Citations to the Appeal File will be abbreviated with an “AF” followed by the page number. The Appeal File was admitted at the August 28, 2019 telephonic hearing as JX 1. This Decision uses the following abbreviations: “AX” refers to Administrator’s Exhibits; “EX” refers to Employer’s Exhibits; “ALJX” refers to Administrative Law Judge Exhibits.

² This Notice of Deficiency response was uploaded to i-Cert on July 25, 2019.

³ The CO, in her Notice of Denial Letter, cited to an ALJ decision, *In the Matter of ATP Agri-Services Inc.*, 2019-TLC-0050 (2019). The Decision and Order and previous Appeal File for this case was included in the Appeal File for the matter at hand. See AF 150–309.

⁴ This letter was received on August 6, 2019.

⁵ This letter was received on August 7, 2019.

22, 2019, the undersigned issued a Notice of Telephonic Hearing and Pre-Hearing Order, rescheduling the telephonic hearing for 11:00 A.M. on August 28, 2019.⁶

At the telephonic hearing, the following exhibits were admitted: JX 1–11, EX 1–9, 11,⁷ and ALJX 1.⁸ Tr. at 29, 33, 35, 45, 108. The following individuals testified at hearing: William Harrison Ashley⁹ (Ginner Vice President, National Cotton Council), John A. Lowery (Vice President of Employer), Dr. Thomas Valco (Expert Witness), John F. Phillips III (President of Silver Creek Gin Co. and Cotton Farmer), Amelia Capri Lowery (Owner of Employer), and Lynette Wills (the CO in this matter).

The undersigned set the deadline for the parties to e-mail their closing briefs to be at 4:00 P.M. on August 30, 2019. Tr. at 204. The parties timely filed their briefs.¹⁰

II. PARTIES' CLOSING BRIEFS

Employer asserts that its proposed job opportunity constitutes “agricultural labor and services” under 26 U.S.C. § 3121(g)(3) and 20 C.F.R. § 655.103(c). Employer contends that the labor services which the job opportunity would provide are both 1) in connection with the harvesting of cotton and 2) in connection with the ginning of cotton. It argues that the Internal Revenue Service (“IRS”) has historically taken a more broad approach with respect to the scope of what was considered “in connection” with the ginning of cotton. Employer further asserts that it has relied on the H-2A program every year since 2000, and, until this year, it had been granted H-2A certification. Employer raises concern about an apparent change in policy with which the CO reviews H-2A applications.¹¹

The CO takes the position that Employer’s job opportunity has not met the requirements to be “agricultural labor and services” under 26 U.S.C. § 3121(g)(3) and 20 C.F.R. § 655.103(c). The CO asserts that 26 U.S.C. § 3121(g)(3) does not relate to the harvesting of cotton because reading that section as relating to the harvesting of anything more than crude gum would be superfluous in light of 26 U.S.C. § 3121(g)(1). She also argues that the scope of what is

⁶ August 28, 2019 was the earliest date that the undersigned provided for the telephonic hearing. In the Notice of Docketing and Pre-Hearing order, the undersigned provided that if the date was not workable to the parties, the undersigned directed the parties to file a joint statement providing at least three alternative dates. A conference call was held on August 22, 2019 during which the parties confirmed their availability for the hearing at this time and date.

⁷ EX 10, the report of William Harrison Ashley, was excluded at hearing. Tr. at 37.

⁸ At hearing, the undersigned reserved ruling on AX1 (attestation by Rickey Lowery regarding H-2ALC status) but did not rule on it at hearing. Tr. at 39. AX 1 has not been admitted into evidence and therefore has not been considered in this decision.

⁹ Mr. Ashley testified for the limited purpose of identifying EX 2, a video that he created. Tr. at 36–37.

¹⁰ Employer’s counsel submitted a Motion to Submit Statutory Texts of Agricultural Marketing Act of 1929 and 1931 Amendment to That Act Which Counsel for the Department of Labor and It Refer in Briefing on September 4, 2019. Counsel for the CO submitted a Motion to Strike on September 4, 2019, noting that the record of a hearing closes when the hearing concludes, unless a judge directs otherwise. Employer’s counsel submitted a Response on September 4, 2019 to the CO’s Motion to Strike, stating that Employer was submitting the texts as law, rather than as evidence. The undersigned only gave the parties leave to submit closing briefs post-hearing. The statutory texts referenced in Employer’s Motion were available by means other than submission by Employer’s counsel. Employer’s Motion is therefore denied.

¹¹ Employer does not address its concern over the change in policy directly in its Brief, though Employer’s counsel alludes to this being a concern relating to the prior certifications at hearing. Tr. at 15.

considered “in connection” with the ginning of cotton is narrow. Further, it is the CO’s position that even if the undersigned does find that Employer’s job opportunity constitutes agricultural labor, the application still should be denied because Employer failed to fulfill the requirements to file as an H-2A Labor Contractor (“H-2ALC”). The CO additionally argues that the prior certifications of Employer’s H-2A applications were not relevant, as Employer must establish that each application it files is eligible for certification. She noted that there had been no change in policy, but instead, a change of circumstances, as it was discovered that the past certifications contained inaccurate information.

III. FACTUAL BACKGROUND

a. Stipulations of Fact

The parties provided the following stipulations of fact in ALJX 1:

- 1) On July 15, 2019, the OFLC’s Chicago National Processing Center received Lowery Hauling Inc.’s H-2A application for 14 workers, which was assigned the case number H-300-19196-148991. AF 143, 457.
- 2) The period of need for the workers that Lowery requested in its application was 9/10/19 through 12/15/19. AF 457.
- 3) The application described, in part, the following job duties and requirements: “Haul raw cotton to gin.” AF 459.
- 4) On July 22, 2019, the OFLC’s Chicago National Processing Center sent Lowery a Notice of Deficiency. AF 446–451.
- 5) On July 30, 2019, the OFLC’s Chicago National Processing Center issued a denial letter denying Lowery’s H-2A application for case number H-300-19196-148991. AF 143–149.
- 6) John A. Lowery is not currently registered as a Migrant and Seasonal Agricultural Worker Protection Act Farm Labor Contractor Employee;
- 7) Lowery Hauling, Inc. has prepared an application for Migrant and Seasonal Agricultural Worker Protection Act Farm Labor Contractor Certificate of Registration;
- 8) John A. Lowery has prepared an application for Migrant and Seasonal Agricultural Worker Protection Farm Labor Contractor Employee Certificate of Registration;
- 9) The name of the gin located at 150 Holly Bluff Gin Road, Holly Bluff, MS is Silver Creek Gin Co.; and
- 10) Lowery Hauling Inc. does not own, operate, rent, or lease a farm.

ALJX 1. Given the evidence of record, the undersigned finds that these stipulations are reasonable.

b. Findings of Fact

The salient facts of this case are not in dispute.

Employer provides services to haul the raw cotton of local farmers in Yazoo, Mississippi to the gin.¹² AF 457–67. Employer’s workers go to the cotton fields of the farmers they service. Tr. at 72, 115–16. The workers go out into the field to find the cotton modules, look at the gin tag, and do the necessary paperwork of taking down the location of the module and the gin tag number. Tr. at 75–76. If the cotton is badly damaged by moisture, it is marked and separated from the rest of the cotton. Tr. at 77–78. The workers then load the modules that have not been separated onto the truck and drive them to the gin. Tr. at 79.

At the gin, the modules typically go to the staging area. *Id.* At the staging area, there could be cotton from between 4 to 6 different producers. Tr. at 80. The modules are separated out by producer. EX 4; Tr. at 80–81. In the staging area, the modules are tagged and the initials of the producer are on the front so that one can clearly see who the cotton belongs to. Tr. at 81. The worker who is driving the truck tells the individual at the gin feeder when they are switching producers. Tr. at 84. This makes the gin operator aware of which producer’s cotton is being ginned and ensures that all the cotton from a producer is ginned together. *Id.* The worker also feeds the cotton modules onto the module feeder at the gin. Tr. at 82, 116.

IV. DOES EMPLOYER’S JOB OPPORTUNITY CONSTITUTE “AGRICULTURAL LABOR OR SERVICES” FOR THE PURPOSES OF THE H-2A PROGRAM?

It is Employer’s burden to show that certification is appropriate. 20 C.F.R. § 655.161(a); *see Garrison Bay Honey, LLC*, 2011-TLC-00054 at 4 (Dec. 2, 2011). The applicant bears the burden of proving compliance with all applicable regulatory requirements to achieve certification. 8 U.S.C. § 1361. Employer has requested a de novo hearing under 20 C.F.R. § 655.171(b); accordingly, the undersigned must “independently determine if the employer has established eligibility for temporary labor certification.” *In the Matter of David Stock*, 2016-TLC-00040 (May 6, 2016).

The H-2A non-immigrant visa program covers foreign workers “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined in section 3121(g) of title 26, section 203(f) of title 29...of a temporary or seasonal nature[.]” 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

“Agricultural Labor or Services,” as it is defined for the purposes of the H-2A program, is codified at 20 C.F.R. § 655.103(c):

For the purposes of this subpart, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and

¹² The gin that Employer hauls to is Silver Creek Gin, located in Holly Bluff, Mississippi. Tr. at 70, 141.

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

20 C.F.R. § 655.103(c)(1) details the statutory provision of 26 U.S.C. § 3121(g), the IRC definition, while 20 C.F.R. § 655.103(c)(2) details 29 U.S.C. § 203(f), the FLSA definition. Notably, 20 C.F.R. § 655.103(c) provides that “agricultural labor or services” can be defined by either the IRC definition *or* the FLSA definition.

Employer does not argue that its workers would be engaged in the pressing of apples or logging employment. Employer further does not make an argument with respect to the FLSA definition, even though the CO noted that Employer did not meet the FLSA definition in her Notice of Denial. *See* AF 148. Thus, for Employer’s application to be approved, the duties of its required workers must constitute “agricultural labor or services” by fitting within the definitions of “agricultural labor at 26 U.S.C. § 3121(g).

a. APPLICABILITY OF THE IRC DEFINITION

As relevant here,¹³ the IRC defines “agricultural labor” to include all services performed—

(3) 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;

26 U.S.C. § 3121(g).

The implementing regulations for 26 U.S.C. § 3121(g) can be found at 26 C.F.R. § 31.3121(g)-1(d). This regulation reads as follows:

Services performed by an employee in the employ of any person in connection with any of the following operations constitute agricultural labor without regard to the place where such services are performed:

(1) The ginning of cotton;

¹³ The definition of “agricultural labor” also includes several other types of services. *See* 26 U.S.C. § 3121(g)(1)–(2), (4)–(5). Employer has not argued that the duties of its workers would fall under any of these other sections and solely makes an argument that the duties of the workers fall under 26 U.S.C. § 3121(g)(3). While 26 U.S.C. § 3121(g)(4) was the basis upon which the CO found that Employer’s job opportunity did not constitute “agricultural labor,” Employer did not affirmatively argue that the employment opportunity would qualify under 26 U.S.C. § 3121(g)(4). *See* AF 6. Thus, the sole prong of 26 U.S.C. § 3121(g) under which this job opportunity is to be analyzed is 26 U.S.C. § 3121(g)(3).

(2) The operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying or storing water for farming purposes; or

(3) The production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided such processing is carried on by the original producer of such crude gum.

26 C.F.R. § 31.3121(g)-1(d).

While the CO is correct in her statement that these implementing regulations can provide further clarification to the relevant provision of the IRC (*See* CO Br. at 4), 20 C.F.R. § 655.103(c) specifically defines “agricultural labor or services,” in relevant part, as “applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g),” not through the implementing regulations of that provision. It must be construed that the intent was to give full effect and meaning to the language of the IRC in defining “agricultural labor or services,” especially where the IRC and its implementing regulations differ. If the implementing regulations were meant to be controlling for the purposes of 20 C.F.R. § 655.103(c), it would have been defined in those terms instead.

While the CO argues that 26 U.S.C. § 3121(g)(1) makes the production or harvesting of any commodity other than gum superfluous, there remain differences between 26 U.S.C. § 3121(g)(1) and 26 U.S.C. § 3121(g)(3) that distinguish these provisions from each other. First, 26 U.S.C. § 3121(g)(1) requires that the work be done “[o]n a farm, in the employ of any person,” where 26 U.S.C. § 3121(g)(3) has no such requirement. 26 U.S.C. § 3121(g)(1), while narrowed by its requirement that the work is “[o]n a farm, in the employ of any person,” is also simultaneously broader in that it is “in connection with raising or harvesting any agricultural or horticultural commodity” or “in connection with cultivating the soil.” The language following this gives specific reference to tasks relating to animals that extend beyond the agricultural product they produce. 26 U.S.C. § 3121(g)(3), meanwhile, specifically defines “agricultural commodity” under the definition of section 15(g) of the Agricultural Marketing Act, as amended¹⁴ (12 U.S.C. 1141(j)), which, as discussed below, while ambiguous and broad, has its own specific context and interpretation. The CO cites the prospect that, “[w]henver possible, however, we should favor an interpretation that gives meaning to each statutory provision,” to support that in 26 U.S.C. § 3121(g)(3), “production or harvesting” only applies to gum. *Life Techn. Corp. v. Promego Corp.*, 137 S. Ct. 734, 740 (2017). By the same token, however, 26 U.S.C. § 3121(g)(3)’s specific and distinct reference to section 15(g) of the Agricultural

¹⁴ Employer, in its brief, noted that in the Agricultural Marketing Act of 1929, “[c]otton is listed twice as a ‘commodity.’” Emp. Br. at 13. Cotton is not explicitly listed as a commodity in this version of an Act, but it is mentioned twice in ways that infer that cotton is a commodity. *See* Agricultural Marketing Act of 1929, Pub L. 10, 71st Cong., 1st Sess. (June 15, 1929), 46 Stat. 11, 19. In the “Advisory Commodity Committees” section, the “Cotton Advisory Committee” was provided as an example after the Act stated that “[e]ach advisory committee shall be designated by the name of the commodity it represents.” *Id.* Cotton is also referenced in the “Miscellaneous Provisions” section, the same section that 26 U.S.C. § 3121(g) cites to within the Agricultural Marketing Act. Here, cotton is referenced in terms of a prohibition of the publishing of any prediction with respect to cotton prices. These references are no longer included in the amended version of the Agricultural Marketing Act.

Marketing Act, as amended (12 U.S.C. 1141(j)), along with the more narrow criteria of 26 U.S.C. § 3121(g)(1) be done “[o]n a farm, in the employ of any person,” gives meaning and distinction to 26 U.S.C. § 3121(g)(3) from 26 U.S.C. § 3121(g)(1). It is thus not superfluous to interpret these provisions this way, even though there may be services that could fall under both definitions.

The language of 26 U.S.C. § 3121(g)(3) creates three distinct prongs, under any of which 26 U.S.C. § 3121(g)(3) can be satisfied. This is signaled by the commas distinguishing the three parts of 26 U.S.C. § 3121(g)(3) from one another, and “or” being the conjunction that connects the three elements of 26 U.S.C. § 3121(g)(3). Breaking apart the three elements of 26 U.S.C. § 3121(g)(3) yields the following:

- 1) All services performed “in connection with the production or harvesting of any commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j)”
- 2) All services performed “in connection with the ginning of cotton”
- 3) All services performed “in connection with the maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes”

The third prong of 26 U.S.C. § 3121(g)(3) is inapplicable, as Employer’s operation is unrelated to the “maintenance of ditches, canals, reservoirs, or waterways.”

For the first prong, it is necessary to look to what the amended Agricultural Marketing Act includes as a “commodity.” While “commodity” is not defined within this section on its own, the section defines “agricultural commodity” to include, “in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine and gum rosin, as defined in section 92 of title 7.” 12 U.S.C. § 1141j(f).

While this definition notably focuses on gum and its byproducts, the definition also includes the language “in addition to other agricultural commodities.” Defining “agricultural commodities” to include “other agricultural commodities” is ambiguous on its face. 12 U.S.C. § 1141 declares the policy of Congress to be “to promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products...” 12 U.S.C. § 1141(a). The phrase “agricultural commodities and their food products” provides more clarity as to what is contemplated by “other agricultural commodities” as included in the definition of “agricultural commodity” under 12 U.S.C. § 1141j(f).

It is clear that “other agricultural commodities” is intended to contemplate a broader class of commodities beyond just gum and related products, as gum does not yield any “food products.” It is thus reasonable to interpret gum as a specific example that the Agricultural Marketing Act wanted to delineate as being included as an “agricultural commodity,” especially when gum may not be what one thinks of when considering the common usage of what an

“agricultural commodity” is. *I.C.C. v. Milk Producers Marketing Co.*¹⁵ also supports a more broad interpretation of what an “agricultural commodity” is under the Agricultural Marketing Act. In *Milk Producers*, the court found that the Agricultural Marketing Act was a remedial statute and “must be liberally construed to effectuate its purpose.” 405 F.2d at 641.¹⁶

To find what the statute more broadly contemplated beyond gum in including “other agricultural commodities” in the definition of “agricultural commodity,” it is relevant to look to both the ordinary and reasonable understanding of the words “agricultural” and “commodity.” A commodity, in its most general terms, is an “economic good.” The modifier “agriculture” implies that an economic good must be agricultural in nature to be considered an “agricultural commodity.” Additionally, Title 7, Agriculture, of the United State Code¹⁷ also defines “agricultural commodity” and specifically includes cotton.¹⁸ Interpreting the Agricultural Marketing Act’s definition broadly, the undersigned finds that an “agricultural commodity,” under the Agricultural Marketing Act, includes in its definition of “other agricultural commodities” a broad class of agricultural economic goods. Employer’s job opportunity involves cotton as the agricultural product in question. *See* AF 459. As cotton is a product of agriculture that is sold on the market, and is included within the Title 7 definition of “agricultural commodity,” the undersigned finds it reasonable to conclude that cotton is included in the American Marketing Act’s definition of “agricultural commodity” found at 12 U.S.C. § 1141j(f).

In finding that cotton constitutes an “agricultural commodity” under 12 U.S.C. § 1141j(f), the question then turns on if Employer’s job opportunity is a service performed “in connection with the production or harvesting of” cotton. 26 U.S.C. § 3121(g)(3). The “or” positioned between “production” and “harvesting” distinguishes both of these words from one another and indicates that they are separate elements under which that part of the definition can be met. The placement of “production” before “harvesting” further suggests that “production” is intended to denote the part of the process that comes before the separate component of “harvesting.” “Production,” by its plain meaning, relates to creation, which, in terms of agricultural commodities, can be interpreted as being the process by which the commodities are grown or

¹⁵ *I.C.C. v. Milk Producers Marketing Co.*, 405 F.2d 639 (10th Cir. 1969).

¹⁶ While the court in *Milk Producers* was specifically discussing the application and construction of 12 U.S.C. § 1141j(a), this language still lends support in determining the intent and purpose of the Agricultural Marketing Act as a whole. *See also I.C.C. v. Jamestown Farmers Union Federated Co-op. Transp. Ass’n*, 151 F.2d 403, 405 (8th Cir. 1945) (supporting the contention that the Agricultural Marketing Act, as a remedial statute, is to be liberally construed).

¹⁷ While the Agricultural Marketing Act and Title 7, Agriculture, are different Titles of the United States Code, they are still part of the same larger text and can bear meaning upon each other through the whole-text canon. *See Matter of Lopez*, 897 F.3d 663, 670, FN 5 (“Indeed, under the whole-text canon, we ought to ‘consider the entire text, in view of its structure and of the physical and logical relation of its many parts.’ ‘Context is a primary determinant of meaning’ and ‘[t]he entirety of the document...provides the context for each of its parts.’” (Internal citations omitted)). Title 7 relates to the Agricultural Marketing Act in that, like the Agricultural Marketing Act itself, Title 7 pertains to agriculture.

¹⁸ “Agricultural commodity is defined in Title 7 as follows: “wheat, cotton, flax, corn, dry beans, oats, barley, rye, tobacco, rice, peanuts, soybeans, sugar beets, sugar cane, tomatoes, grain sorghum, sunflowers, raisins, oranges, sweet corn, dry peas, freezing and canning peas, forage, apples, grapes, potatoes, timber and forests, nursery crops, citrus, and other fruits and vegetables, nuts, tame hay, native grass, hemp, aquacultural species (including, but not limited to, any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant propagated or reared in a controlled or selected environment), or any other agricultural commodity, excluding stored grain, determined by the Board, or any one or more of such commodities, as the context may indicate.” 7 U.S.C. § 1518 (emphasis added).

raised. “Harvesting,” while not defined in Title 26, is defined in the Code of Federal Regulations under 21 C.F.R. § 1.328. This definition supports “harvesting” being a process after “production” wherein the agricultural commodities are removed from where they were grown or raised.¹⁹

While Title 21’s definition limits “harvesting” to commodities that will be prepared for use as food, it is reasonable to expect that 26 U.S.C. § 3121(g)(3)’s definition of “harvesting” was intended to be broader in what could be “harvested,” given that the definition of “agricultural commodity” itself includes gum, a nonedible good. Embedded in Title 21’s definition of “harvesting,” and by extension the process that occurs before “harvesting,” which, by the interpretation of this statute would be “production,” is that the activities occur on a farm, which would not apply to 26 U.S.C. § 3121(g)(3), as it purposefully does not include language requiring any connection to being on a farm, unlike the other parts of 26 U.S.C. § 3121(g).²⁰ Additionally, the subsequent clause of 26 U.S.C. § 3121(g)(3) specifically delineates “all services performed “in connection with the ginning of cotton,” which, to avoid duplicity, would imply that the ginning of cotton is not included in the process of “harvesting.” In the context of the “production” and “harvesting” of cotton as an agricultural commodity, it is reasonable to conclude that the “production” of cotton is its planting and growth, and the “harvesting” of cotton is the removal of the cotton from its stock and placed in the field until it is transported to the gin.

“In connection with” is a broad phrase that, by its plain meaning, through its placement in the clause, infers related and supporting processes involved in “production” or “harvesting.” As noted above, “in connection with the ginning of cotton,” is delineated as a separate prong of 26 U.S.C. § 3121(g)(3) that, to avoid duplicity, would not be included in the prior clause, “in connection with the production or harvesting of any commodity...” Thus, where the ginning process begins, the “connection with” “production or harvesting” ends. This language, in effect, creates and distinguishes the steps of the agricultural process from production and harvesting, both contained in the first clause, to the ginning of cotton, in the second clause. This additional clause, with respect to the “ginning of cotton,” differentiates the agricultural process of cotton from that of other commodities that would be included as “agricultural commodities” in the prior clause of 26 U.S.C. § 3121(g)(3). While the inquiry of other agricultural commodities would end after deciding if the service was connected to either “production,” as the first step, or “harvesting,” as the second step, the inquiry for cotton, specifically, is allowed to continue into the subsequent step after harvesting, ginning. The way the statute is written, in which the parts of the process written into the statute in the order they occur in the product’s timeline, “in connection with” can also be construed to account for a more broad class of work necessary to the ginning process in between the stage of “harvesting” in the prior clause, separated by a

¹⁹ “Harvesting applies to farms and farm mixed-type facilities and means activities that are traditionally performed on farms for the purpose of removing raw agricultural commodities, or on processed foods created by drying/dehydrating a raw agricultural commodity without additional manufacturing/processing, on a farm. Harvesting does not include activities that transform a raw agricultural commodity into a processed food as defined in section 201(gg) of the Federal Food, Drug, and Cosmetic Act. Examples of harvesting include cutting (or otherwise separating) the edible portion of the raw agricultural commodity from the crop plant and removing or trimming part of the raw agricultural commodity (e.g. foliage, husks, root, or stems). Examples of harvesting include cooling, field coring, filtering, gathering, hulling, shelling, sifting, threshing, trimming of outer leaves of, and washing raw agricultural commodities grown on a farm.” 21 C.F.R. § 1.328.

²⁰ See Notes 13 *supra*.

comma, and the stage of physical “ginning” in the clause that follows the language of “in connection with.”

The Revenue Rulings that have been made with respect to this clause and their history provide further support that essential work in between the harvest and the physical ginning process were contemplated in the language “in connection with ginning.”

The first Revenue Ruling occurred, with respect to this clause, in 1940. This Ruling took a more narrow approach to what was “in connection with the ginning of cotton.” See 1940-2 C.B. 253 (US) 2950 WL 72101 (revoked in 1946). It was revoked in 1946 after the issuance of a Court of Appeals decision, *Birmingham v. Rucker’s Imperial Breeding Farm Inc.*, 152 F.2d 837 (8th Cir. 1994),²¹ and a subsequent revenue ruling was issued in response to this decision. In this 1946 Revenue Ruling, the Bureau adopted the position that “in connection with the ginning of cotton” included all services essential to the operation of a cotton gin.²² 1946-2 C.B. 148 (US), 1946 WL 63270. The 1954 Revenue Ruling supported this position, but defined the end of the ginning process, the point at which it ceases to constitute “agricultural labor,” as when the cotton is separated into “two separate commodities, lint and seed.”²³ Rev. Rul. 54-460 (IRS RRU), 1954-2 C.B. 353, 1954 WL 8517.

²¹ “This is not a case in which the plain language of a statute produces absurd or futile results or is clearly at variance with the policy of the legislation. The statutory language is therefore the most persuasive evidence of legislative intent. Statutes are not to be nullified where unambiguous language calls for a logical and sensible results (sic). We have not overlooked the contentions of the appellant that the District Court’s construction of the statutory language is out of line with the Bureau of Internal Revenue’s interpretation of the meaning of the words ‘services performed * * * in connection with the ginning of cotton, and with the opinion of the State District Court of Wapello County, Iowa, holding that executives and office employees of the taxpayer were not performing ‘agricultural labor’ within the meaning of the Iowa Unemployment Compensation Act, which contains the same definition of ‘agricultural labor’ as is here involved. Since we are of the opinion that the construction placed upon the statute by the trial court is in harmony with the intent of Congress and the plain meaning of the statutory language, it is unnecessary to discuss these contentions.” *Birmingham*, 152 F.2d at 840–41 (internal citations omitted).

²² “Thus, not only services performed in the actual ginning of cotton, including supervisory services, but also all services essential to the operation of a cotton ginning establishment, such as clerical, repair, etc., services performed after December 31, 1939, constitute “agricultural labor” within the meaning of sections 1426(h)(3) and 1607(i)(3) of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, respectively.” 1946-2 C.B. 148 (US), 1946 WL 63270.

²³ “Moreover, by the use of the phrase ‘in connection with’ the statute brings within the exception certain services not performed in the physical ginning of cotton but nevertheless essential thereto, such as supervisory, clerical, administrative, maintenance, and repair services, and such services have also been held to constitute ‘agricultural labor.’ However, since the ginning of cotton is a specific operation, the phrase may not be extended to include any and all business activities in which the operator of a ginning establishment might find it desirable or profitable to engage as, for example, the sale of fertilizer, farm seeds, farm equipment and supplies, or other extraneous ventures. Accordingly, it is held that after the ginning process has been completed, that is, performed in connection with further delinting operations conducted by a commercial cotton gin operator for the purpose of producing the seed to be sold for planting do not constitute ‘agricultural labor’ for Federal employment tax purposes.” Rev. Rul. 54-460 (IRS RRU), 1954-2 C.B. 353, 1954 WL 8517 (internal citations omitted).

The position taken in the 1946 Revenue Ruling was reiterated²⁴ by the 1970 Revenue Ruling, which states as follows:

“The term ‘in connection with the ginning of cotton’ includes all services essential to the operation of a cotton gin. Thus, not only services performed in the actual ginning of cotton, including supervisory services, but also all services essential to the operation of a cotton gin establishment, such as supervisory, clerical, administrative, maintenance, and repair services are ‘agricultural labor’ within the meaning of chapter 21 and 23 of the Code.”

Rev. Rul. 70-207 (IRS RRU), 1970-1 C.B. 208, 1970 WL 20871.

It is thus reasonable to interpret 26 U.S.C. § 3121(g)(3) as distinguishing cotton as a specific commodity intended to be contemplated under the statute for work done at the “production” phrase, the “harvesting” phase, and “ginning” phase. The statutory construction and Revenue Rulings²⁵ further support that “in connection with the ginning of cotton” was intended to cover the essential processes to prepare the harvested cotton to be physically ginned.

Employer has not, based on the evidence of record, established that its job opportunity is related to the “production” or “harvesting” stages of cotton. The job opportunity, in Employer’s initial application, stated that the primary duty of the workers was to “haul raw cotton to gin,” with no mention of any of the tasks that would be included in the “harvesting” stage. *See* AF 457–481. Mr. Phillips testified that the primary service provided by Lowery Hauling was to transport seed cotton, once it had been harvested from each individual producer, to the gin. Tr. at 115–116. Additionally, prior ALJ decisions²⁶ and a 1956 Revenue Ruling²⁷ support a finding that hauling or transporting a crop is not considered “production” or “harvesting.”²⁸

²⁴ By 1970, the IRC Code numbering had changed, and the “purpose” of this 1970 Revenue Ruling was to “update and restate, under the current statute and regulations, the position set forth in Mim. 6056, C.B. 1946-2, 148.” Rev. Rul. 70-207 (IRS RRU), 1970-1 C.B. 208, 1970 WL 20871.

²⁵ It must be noted that there is a Private Letter Ruling from 1954 that takes a more narrow approach to the clause, “in connection with the ginning of cotton,” stating that “...we believe the ginning operation begins when the cotton is received and ends when the bale is tagged as it leaves the press.” I.R.S. Priv. Ltr. Rul. 5404214090A (Apr. 21, 1954), 1954 WL 9548. IRS Private Letter Rulings, however, do not have precedential effect. *See* IRS, Understanding IRS Guidance, a Brief Primer, <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> (last visited Sep. 9, 2019). This Private Letter Ruling pertained to the specific facts of a taxpayer’s case relating to whether “wages for gin repair work done during the off season” was “in connection with the ginning of cotton.” I.R.S. Priv. Ltr. Rul. 5404214090A (Apr. 21, 1954), 1954 WL 9548. Also, further, there is ambiguity in what is intended by the cotton being “received,” as it could mean received post-harvest, rather than received at the gin. This Private Letter Ruling is thus minimally probative in interpreting the clause at hand.

²⁶ Three recent ALJ decisions have involved the hauling or transporting of agricultural crops. *See ATP Agri-Services, Inc.*, 2019-TLC-00050 (May 17, 2019); *Double J Harvesting, Inc.*, 2019-TLC-00057 (July 2, 2019); *Blas Caldenda Jr.*, 2019-TLC-00062 (July 12, 2019). None of these cases directly or fully addressed the interpretation of 26 U.S.C. § 3121(g)(3), with the basis of interpretation for these cases all being under 26 U.S.C. § 3121(g)(4). All three cases did, however, include text or a footnote stating that 26 U.S.C. § 3121(g)(3) was inapplicable. *See ATP Agri-Services* at 2, 5, FN 1 (Where prospective workers were to haul citrus, celery, and watermelons, ALJ Monica Markley found: “The definition of ‘agricultural labor’ also includes several other types of activities not implicated here, such as...producing and harvesting the commodity.”); *Double J Harvesting* at 3–5, FN 5 (Where prospective workers were to haul watermelons, ALJ Scott R. Morris found: “The definition of ‘agricultural labor’ also includes several other types of services, such as...producing and harvesting agricultural commodities...Employer has not argued that the duties of its truck drivers would fall under any of these categories, and the undersigned finds that they would not.”), *Blas Caldenda* at 2, 7 (Where prospective workers were to haul crops, specifically milo, ALJ

Employer's job opportunity is not "production" or "harvesting." It does, though, specifically involve cotton as a crop, so the question turns to whether it is "in connection with the ginning of cotton," as interpreted above.

After modules have been harvested, they are loaded using a "loader" onto a specialized flatbed trailer. Tr. at 61, 68, 70; EX 1, EX 2(d). Mr. Lowery testified that these loaders could only be bought in a few places, and he had customized his loaders. Tr. at 69; EX 1. Mr. Phillips averred that farmers lack the capability to economically transport round cotton modules without the machinery that Employer's workers use. Tr. at 117-18; *see also* Tr. at 123-24. Mr. Ashley testified that the flatbed trailers utilized in the transport process have made transportation of modules across greater distances possible. Tr. at 62-63. He stated that this ability to transport the cotton across greater distances has led to more consolidation in the cotton industry.²⁹ *Id.* The modules, after being picked up, are then taken to the gin. Tr. at 61. Mr. Lowery averred that his H-2A laborers operate the flatbed trailers "from the fields, where the cotton has been planted and picked to the gin, where it's being ginned. Where the ginning process starts." Tr. at 72. He stated that in addition to using the flatbed trucks, his workers use module trucks. Tr. at 72-73; EX 1.

Mr. Lowery testified that in addition to picking up the cotton in the field, his H-2A workers inspect the field, inspect the gin tags, and ensure that the cotton is for the farmer that they are hauling for. Tr. at 74-75; EX 3. The workers do paperwork based on the information on the gin tag. Tr. at 75. They also determine if there is any cotton that has been damaged by weather and separate it. Tr. at 77-78.

Once the modules are loaded onto the flatbed trailer, they are taken to the gin, where they are unloaded and put in the staging area. Tr. at 70, 99, 118; EX 2(c); EX 4. Mr. Lowery testified that his workers put the cotton into blocks at the gin, mark them to ensure that they are separated by producer, and ensure that they do not "mix them all up." Tr. at 81; *see also* Tr. at 118. Mr. Phillips averred that Employer was the only one with the capacity to keep the modules "separate and distinct until they're ginned." Tr. at 120. Mr. Lowery testified that the paperwork that the workers do in the field ensure that when the cotton is put onto the feeder, because the workers "write the producer's name, the location, the farm number, and even which feeder it went on." *Id.* He further testified that the module trucks roll the cotton into the gin itself, for the actual ginning process, and the H-2A workers load the cotton modules onto the feeders. Tr. at 82; *see also* Tr. at 102, 118. Mr. Lowery stated that the H-2A workers also paint the initials of a producer on the front so it can clearly be discerned whose cotton it is, in addition to telling the ginner when they are switching producers to ensure that all the cotton from the same producer is

Stewart F. Alford found: "There is no evidence in the record that the six drivers would perform services... (3) in connection with the production or harvesting of a commodity.")

²⁷ *See* Rev. Rul. 56-35 (IRS RRU), 1956-1 C.B. 453, 1956 WL 11125.

²⁸ Employer, in its brief, references three cases that support a finding that "hauling" was part of harvesting: *Stuart v. Kleck*, 129 F.2d 400 (9th Cir. 1942), *Fosgate v. United States*, 125 F.2d 775 (5th Cir. 1942), and *Lake Region Packing Ass'n v. United States*, 146 F.2d 157 (5th Cir. 1944). Notably, however, these cases all involve questions as to what constitutes "agricultural labor" under the pre-1939 Act, not the version of the Act in question in this matter.

²⁹ "Through the years, we've seen a precipitous decline in the number of gins as the ability to haul seed cotton to gins has become greater." Tr. at 63. Dr. Valco also testified that over time, the cotton process became more mechanized. Tr. at 110.

ginned together. Tr. at 84. Dr. Valco testified that cotton is not in its marketable form until the ginning process is complete. Tr. at 98, 101. Mr. Phillips averred that while without Employer's workers, the cotton would be harvested, he did not know how the cotton could be ginned absent such a process. Tr. at 124.

As demonstrated above, the testimony and evidence of record demonstrate that the labor performed as part of employer's job opportunity is all one continuous chain of functions essential to the ginning process. The cotton could not make it from the field to the gin without the workers transporting the modules with their specialized trucks, nor could it be properly loaded and identified at the gin to undergo the ginning process without the workers doing the paperwork in the field and performing their duties at the gin itself.³⁰ The totality of the work that these workers do, from identification of the cotton in the field to the physical ginning of the cotton, all ensures that the ginning process occurs properly. The workers are thus performing essential functions to the process of ginning that would be encompassed in the definition of "in connection with ginning," as interpreted above. Additionally, even if the transporting of the cotton to the gin, assuming arguendo, fell short of being "in connection with ginning," the workers also are doing work involved in the physical ginning process—specifically, loading the modules into the module feeder at the gin and informing the ginner when they are switching producers. Accordingly, the undersigned finds that Employer has established that its employment opportunity is "agricultural labor" as defined under 26 U.S.C. § 3121(g)(3).

V. MUST EMPLOYER FILE AS AN H-2ALC?

An additional issue raised by the CO was that Employer had failed to properly register as a H-2ALC and was, instead, registered improperly as a Fixed-Site Employer. In her original Notice of Deficiency, the CO did not address this issue. *See* AF 446–51. In the Notice of Denial letter, the CO wrote the following with respect to the issue:

"In its response to the [Notice of Deficiency] the employer states, '[w]e do not produce any cotton.' While the employer has described itself in Section C. 17 of the ETA Form 9142 as an individual employer, it has been determined that the employer is acting as an H-2A Labor Contractor (H-2ALC) as it has contracted with fixed site cotton producers to haul their cotton to the gin."

AF 147.

Under the regulations, an H-2A Labor Contractor (H-2ALC) is defined as follows:

³⁰ Mr. Lowery provided testimony that the "ginning process" begins at the gin ("You can only haul cotton from the gin to the field, and then you can pick the cotton up from the staging area at the gin and put it on the actual feeder, where the ginning process starts."). Tr. at 73. Mr. Ashley testified that once the modules are placed on the module bed floor, "that gets into the ginning process." Tr. at 61–62. Dr. Valco testified that the "ginning process would take place" after the cotton was transported to the gin. Tr. at 98. The CO pointed this out with respect to the testimony of Mr. Ashley and Dr. Valco in her brief as these two witnesses "cutting against" Employer's argument. Emp. Br. at 11. The relevant language and phrase being interpreted, however is "in connection with ginning," and there is no requirement that work must be part of the "ginning process" to be "in connection with ginning."

“Any person who meets the definition of an employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.”

20 C.F.R. § 655.103.

Under the regulations, a Fixed-site Employer is defined as follows:

“Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart, who owns and operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 C.F.R. part 501, or this subpart as incident to or in conjunction with the owner’s or operator’s own agricultural operation.”

Id.

“Employer,” for the purposes of this section, is defined as a person, firm, corporation or other association or organization that:

- (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;
- (2) Has an employer relationship with respect to H-2A employees or related U.S. workers under this subpart; and
- (3) Possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).

Id.

Employer meets the definition of “employer” under the regulations,³¹ but it has stipulated that it does not own a farm, and it has not presented evidence that it owns any of the other fixed-sites necessary to qualify as a fixed-site employer.³² *See* ALJX 1. On its application, however, Employer noted that there was only one worksite and checked

³¹ *See* AF 457–81. The CO also conceded in her brief that Employer was an “employer.” CO Br. at 13.

³² Employer, at hearing, through counsel, recognized that they needed to register as a farm labor contractor, and partially conceded to being an H-2A labor contractor. *See* Tr. at 24–26. (Employer’s Counsel: “Your honor, and we’d like to get on the record and stipulate on that. Your honor is aware of the record. These folks did not know their company needed to be, in the eyes of the Department of Labor, registered as a farm labor contractor entity, or that they as employees and officers of the company needed to be registered as farm labor contractor employees. They are fully committed—they have now both filed individual farm labor contractor registration applications, that we believe are complete, and the one for the corporation was filed just as quickly as it could be last Thursday. The undersigned: “So, Ms. Pointer, is it fair to say that the Employer concedes that it is an H-2A labor contractor or that it is one at the time of its labor certification application at issue in this matter?” Employer’s counsel: “It is at least arguably a farm labor contractor entity, and so they are absolutely committed that they will act as a farm labor contractor entity and employees in good faith and full compliance with the requirements.”)

“no” when asked if work would be performed at multiple work sites. The CO would thus have not been able to discern the fact that Employer was acting as an H-2ALC before issuing her Notice of Deficiency.

Based on the evidence of record and the Employer’s own concession at hearing, the Employer was seeking to act H-2ALC. The H-2ALC filing requirements for labor certification differ from those for a Fixed-Site Employer. In addition to the assurances and obligations required of an H-2A employer, an H-2ALC must also meet the regulatory requirements of 20 C.F.R. § 655.132. The record does not establish that Employer has fully complied with what is required of an H-2ALC employer. Employer does not dispute this and provided documentary evidence to demonstrate that it has taken steps to meet such requirements since submitting the labor certification application at issue in this matter. JX 2; JX 3; JX 4; EX 11.

The undersigned finds the CO’s argument persuasive that remanding Employer’s labor certification application at issue for conversion to a different type of application than originally submitted would allow for the circumvention of proper H-2ALC filing procedures. Based on the testimony of Employer’s own witness, the labor certification application at issue in this matter contained false information with respect to who owned, controlled, or leased the work site. *See* Tr. at 144–49. Employer should not be rewarded for supplying the CO with false information by being allowed to simply amend an improper Fixed-Site Employer application rather than going through the full and proper H-2ALC filing procedure.

Employer’s 19 prior applications being certified is not a persuasive reason to circumvent the regulatory requirements of 20 C.F.R. § 655.132. As the CO properly cited in her brief, an employer must establish that *each* application that it files is eligible for certification. *See* Co Br. at 18; *ATP Agri-Services, Inc.* 2019-TLC-00050 at 9 (May 17, 2019) (“[T]he fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial.”); *Double J Harvesting, Inc.*, 2019-TLC-0005 at 6–7 (July 2, 2019) (same); *Wickstrum Harvesting, Inc.*, 2018-TLC-00018 at 8 (May 3, 2018) (finding that the certification of prior applications “is irrelevant to the present proceeding”); *Titus Works*, 2018-TLN-00045 at 7 (“[T]he fact that previous Applications were approved is irrelevant.”); *AC Sweepers*, 2017-TLN-00012 at 8 (Jan. 11, 2017) (“Employer also argued that its application should be certified because its previous application was certified on the same basis. However, prior certification does not guarantee future certification.”); *Newsham Hybrids (USA), Inc.*, 1998-TLC-00011 at 5 (May 29, 1998) (“Employer’s reference to certification of a prior identical application is irrelevant to the application at bench.”).

The undersigned finds that Employer was required to file its labor certification as an H-2ALC but failed to do so: it is not excused in this matter because of previous approvals of past certifications.

VI. CONCLUSION

Based on the evidence presented at hearing, Employer has established that its job opportunity constituted “agricultural labor or services” under 26 U.S.C. § 3121(g)(3) and 20 C.F.R. § 655.103(c) but failed to meet the filing requirements for an H-2ALC under 20 C.F.R. § 655.132.

The Employer's application must be denied on the grounds that it has failed to meet the requirements for an H-2ALC and not on the basis outlined in the CO's Notice of Denial.

VII. ORDER

The CO's denial of Employer's application is hereby Modified to be a denial based on Employer's failure to submit its labor certification application as an H-2ALC and comply with proper H-2ALC filing procedures.

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey