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Issue Date: 02 January 2019

CASE NO.: 2019-TLC-00012

OWCP NO.: H-300-18332-901036

In the Matter of:

**OLSON'S GREENHOUSES OF
COLORADO, LLC,**
Employer.

Appearances: William L. Carlson, Ph.D.
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For the Employer

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For the Certifying Officer

Before: Christopher Larsen
Administrative Law Judge

DECISION AND ORDER

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 Act”). The temporary alien labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States temporarily.

On December 13, 2018, Olson’s Greenhouses of Colorado, LLC (“Employer”) filed a request for expedited administrative review of the Notice of Deficiency issued by the Certifying Officer (“CO”) in the above-captioned H2A temporary alien certification application. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on December 27, 2018. Under 20 C.F.R. §

655.171(a), I issue this Decision and Order, based on the written record and the parties' briefs, within five calendar days of my receipt of the AF.

On December 3, 2018, Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 ("Application") (AF pp. 37 *et seq.*). The Application requested certification for five heavy and tractor-trailer truck drivers for the period beginning February 8, 2019, and ending November 4, 2019 (AF p. 37). Ultimately, the CO issued a Notice of Deficiency on December 6, 2018 (AF pp. 8-12), identifying two grounds for his unwillingness to process the application further: first, the application did not include a description of "the extent to which, by percentage, the goods hauled were produced by the employer" (AF p. 12); and, second, the application did not include the address of each location to which the workers would drive and deliver product (*Id.*). Employer contends it produces 100% of the goods to be hauled (AF pp. 4-5), and further contends the delivery destinations are not relevant to the application (AF pp. 6-7). Employer requests remand for further consideration (AF p. 7).

Percentage of Goods Produced by Employer

The first issue is germane to the question of whether the truck drivers will perform "agricultural labor" under the Act. As the CO points out, AF p. 10, the Internal Revenue Code describes "agricultural labor" to include, *inter alia*, services performed

[i]n the employ of the operator of a farm in . . . 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 . . .

(AF, p. 10).

"Farm" includes "nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards" (AF, p. 11). The CO was concerned the drivers might not fall within the appropriate definition of "agricultural labor or services" (AF, pp. 11-12), and accordingly asked Employer to "describe the extent to which, by percentage, the goods hauled were produced by the employer. This explanation must cover the contents hauled during any and all times the workers sought will be driving, e.g., delivery to market as well as return trips" (AF, p. 12).

In its Request for Expedited Administrative Review, Employer avers

Olson's is a nursery operation that plants, cultivates, pots, prunes, irrigates, culls, and harvests its own plants for market.

It packs, labels, and loads the plants it grows and ultimately delivers its plant to merchant wholesalers. It deals exclusively with 100% of its own plant product. The plants hauled in trucks to the merchant wholesalers' locations are 100% produced by Olson's. After delivery and upon the trucks *[sic]* return to the worksite, the trucks are empty, with the exception of a few remnant plants that for some reason or other may have been undeliverable.

(AF pp. 4-5).¹

Why Employer did not simply reply to the CO with this same information I do not know. But in any case it appears to me Employer may well be able to answer the CO's question in a way that supports the application, and I see no harm in giving Employer an opportunity properly to place this information before the CO, and the CO's consideration of it, now. The CO admits as much in his Brief at p. 8.

Specifying Delivery Destinations

Next, relying on 20 C.F.R. section 655.141, subsection (a), the CO notes

In Section Fc of the ETA Form 9142 and in Item 2 of the ETA Form 790, the employer indicates only two worksite locations: 11610 WCR 14 ½, Fort Lupton, CO 80621 and 3211 14th Street, Fort Lupton, CO 80621. Based on the job description provided, the workers will be driving to and from destinations and handling/unloading product. However, the employer did not provide the addresses of the destinations.

Modification Required:

The employer must provide the address of each location where the worker will be driving to and delivering the product and

¹ Employer's frustration with the CO's apparent unwillingness to *infer* this information from Employer's previous applications is evident. Employer notes it "has participated in the H-2A program for five years and during all that time its many applications for nursery workers have not only been approved but the 100% production of its bedding plants has never been questioned" (AF, p. 4). This is understandable; nobody likes to feel he or she is being ignored, or forced to repeat himself unnecessarily. But, in fairness to the CO, he has a job to do here, too, and while Employer may have sought and received permission to hire non-immigrant foreign *nursery workers* in the past, here it seeks, apparently for the first time, to hire *truck drivers*, whose status as "agricultural labor" depends on meeting the standards set out in the Internal Revenue Code. In theory, it might be possible for the CO to take the time to review all of Employer's past applications to see if they answered his question, but, to be blunt about it, that is not the CO's job. It is the Employer's responsibility to submit a complete application *each time* it seeks to hire H-2A workers, because the CO's certification in one instance is irrelevant to any later application. In some cases, therefore, Employers may have to repeat themselves. One hopes Employers will not consider this a personal affront.

give permission to the Chicago NPC to amend the application accordingly.

(AF p. 12).

Employer argues the delivery points are not “worksites.” In Employer’s view, the two worksites it listed “are the only physical locations where the job opportunity begins and ends each day for all the drivers. The two worksites are where the drivers report to work at the beginning of each day and receive their delivery instructions. They are where the drivers return each day. They are where all of Olson’s commodity is harvested and packed and where the commodity is loaded into the semi tractor-trailer trucks for delivery to market. They are the only pick-up locations. The two worksites are where the drivers inspect, clean, and maintain the trucks fit for deliveries” (AF p. 5). Besides, “the delivery points are big box stores where the driver remains for brief periods while product is unloaded, at sporadic intervals. The deliveries are generally planned only hours in advance, very rarely more than 48 hours and usually less than 24 hours, not months. They are impossible to foresee with any degree of precision” (*Id.*).

As discussed above, the Internal Revenue Code defines “agricultural labor” to include the transportation of agricultural products “to market” without further restriction. The CO nevertheless defends his curiosity on this point, “regardless of whether the delivery locations are worksites,” in furtherance of his statutory responsibility to “ensure that workers in corresponding employment receive the same level of wages, benefits, and working conditions as the H-2A workers, and therefore that the employment of H-2A workers does not adversely affect the employment of workers similarly employed” (CO’s Brief, pp. 11). Apparently, the CO wishes to examine the conditions affecting employment of truck drivers at each of the delivery locations. In the limited context of this application, I do not understand why. According to Employer, the truck drivers always begin and end their work day at one of the two permanent worksites it identified in its application. American workers whose employment might be affected by such an operation are, in the first instance, those who would be willing and available to start and end their working day at those same locations. A worker near one of the delivery locations who was unwilling to start or end his or her day at one of the Employer’s locations would offer no benefit to Employer, and is therefore ineligible for the job. Thus, under the facts of this case, there is no justification for the CO to undertake the role of the former Interstate Commerce Commission and to view this application in the context of interstate commerce generally. I can also understand Employer might be concerned that a certification limiting its drivers to specific delivery locations might impair Employer’s ability to serve new customers and grow its business accordingly. The solution, as I see it, is for the CO to condition certification on the drivers’ workdays beginning and ending at one of the two disclosed worksites. This guarantees the drivers will never range more than about half-a-day from one of the two disclosed

worksites, and would limit the effect of hiring those drivers only to those domestic workers who were willing to do the same.

Accordingly, I remand the application to the CO for further consideration consistent with this Decision.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge