

**U.S. Department of Labor**

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**Issue Date: 17 May 2019**

**OALJ Case No.: 2019-TLC-00050**

**ETA Case No.: H-300-19057-416439**

*In the Matter of*

**ATP AGRI-SERVICES INC.,**  
*Employer.*

Appearances: Carly Wilson, Esquire  
Allen Norton & Blue, P.A.  
Tampa, Florida  
*For the Employer*

Hanan Idilbi, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: MONICA MARKLEY  
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 temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On April 25, 2019, ATP Agri-Services, Inc. (“the Employer”) filed a request for expedited administrative review of the Denial Letter issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification matter. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on May 10, 2019. 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

On February 26, 2019, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (“Application”). (AF 52-64). The Employer’s Application requested certification for 20 Heavy and Tractor-Trailer Truck Drivers for the period beginning April 16, 2019 and ending July 31, 2019. (AF 52). The Employer is an H-2A Labor Contractor (“H2ALC”) which sought to employ tractor-trailer truck drivers to haul harvested crops (citrus, celery, and watermelons) from fields and groves to designated processing and packing facilities. (AF 52-53, 58, 61). Employer filed several supporting documents with its Application, including ETA Form 790, a certificate of liability insurance, a lease agreement for 25 vehicles, the anticipated itineraries for hauling of the crops from the fields or groves to the processing and packing facilities, and three of the hauling contracts for which truck drivers were sought. (AF 65-150).

On March 5, 2019, the CO issued a Notice of Deficiency, identifying four deficiencies and the modifications required for each. (AF 41-45). The Employer filed responses on March 6 and March 7, 2019, to address those deficiencies. (AF 35-40, 27-34).

On March 28, 2019, the CO issued a Notice of Required Modifications. (AF 19-23). The Notice 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. The Notice set out the definitions of “agricultural labor” (in the Internal Revenue Code, 26 U.S.C. § 3121(g) (the “IRS definition”)) and “agriculture” (in the Fair Labor Standards Act, 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. The Notice stated that the job duties listed on the Application “are primarily described as the trucking and hauling of crops.” 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.” The Notice required the Employer to provide “a written statement describing how its application should properly be considered as agricultural labor or services as those terms are defined for purposes of the H-2A program.”

The Employer filed a response on March 29, 2019. (AF 17-18). The Employer noted that the IRS definition of “agricultural labor” includes service performed “in 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.” The Employer further noted that the FLSA definition of “agriculture” includes “any practices ... 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.” The Employer stated that its Application showed that the truck drivers would haul crops from fields and groves to designated processing and packing facilities, and the itinerary submitted with its Application “included the physical address of each farm that ATP Agri-Services was going to pick-up the unmanufactured agricultural commodities and the processing/packing facility that they were taking each to.” The Employer argued that the

farmers from whom its drivers would pick up crops were “the actual growers of the agricultural commodities that are being hauled by ATP Agri-Services, in an unmanufactured state, to processing/packing facilities,” as shown by the hauling contracts. The Employer stated its drivers would be “picking up the agricultural commodities at each farm and hauling said commodity, in its unmanufactured state, to processing/packing facilities.” The Employer contended that this established that its Application satisfies the regulations.

On April 19, 2019, the CO issued a Denial Letter. (AF 11-16). The letter stated that the Employer’s Application for temporary labor certification under the H-2A program was denied. It stated that the Employer did not establish that it is providing agricultural labor or services, and the Employer’s response to the Notice of Required Modifications did not show that it produced more than half of the commodity being transported. The CO observed that while the Employer “quoted regulatory language” to indicate that transportation of an agricultural commodity is sufficient on its own to qualify for the H-2A program, “the language is not complete,” and in fact, transportation only qualifies as an agricultural activity if the employer produces more than 50 percent of the commodity being transported. Because the Employer’s response established that the farms themselves produce 100% of the commodities being transported, the Employer’s transportation activities do not qualify as agricultural labor or services.

The Employer requested expedited administrative review by letter filed on April 25, 2019. (AF 1-10). The Employer contended that the denial was based on a “misreading of the law.” It explained that it is an H-2A Labor Contractor that provides services hauling agricultural commodities from central Florida farms to the farms’ designated processing and packaging centers. The Employer noted that the definition of agricultural labor or services for the H-2A program includes both the IRS definition of “agricultural labor” and the FLSA definition of “agriculture,” and argued that the FLSA definition does not require “an employment relationship with the producer of the goods in order to receive H-2A certification, provided the labor performed is incident to or in conjunction with farming.” The Employer further argued that the Supreme Court has recognized that the FLSA definition of “agriculture” encompasses both work performed *by a farmer* and work performed *on a farm*, and thus the CO “is incorrect in the assertion that the employer must be producing more than 50% of the commodity being transported in order for the services to constitute agricultural labor.” Because its Application showed that the requested H-2A workers would be performing actions incidental to farming operations, the Employer asserted that the job duties “fall squarely into the definition of agricultural labor contemplated by the H-2A program,” and the Application should have been certified.

The Administrative File (“AF”) was received on May 10, 2019, and both parties filed briefs on May 15, 2019. In its brief, the Employer argued that an application to employ H-2A workers engaged in the seasonal hauling of agricultural commodities in their unmanufactured states from farms to processing and packing facilities should be certified. Employer’s Brief at 2. Employer contended that the CO’s denial was flawed because it considered only the definition of “agricultural labor” in the Internal Revenue Code, and the Employer’s Application satisfies the definition of “agriculture” in the FLSA. Specifically, the Employer argues that the hauling of raw agricultural commodities is considered agricultural labor in the FLSA provisions exempting such hauling from overtime compensation requirements (29 U.S.C. §213(b)(16)), as

demonstrated in the interpretative regulation at 29 C.F.R. § 780.902. Employer’s Brief at 4-7. The Employer also argued that the denial of its Application “is in direct contradiction to multiple certified H-2A applications” for “virtually identical services,” citing examples involving three other employers. Employer’s Brief at 7-10. In support of this contention, the Employer filed 10 exhibits (114 total pages) consisting of H-2A applications of other employers.

The CO argued that the Employer did not establish that its job opportunity meets the definition of agricultural or labor services. The CO argued that under the IRS definition, the Employer’s job opportunity does not fit the definition of “agricultural labor” because it does not involve performing a service “[i]n the employ of the operator of a farm” where “such operator produced more than one-half of the commodity....” Certifying Officer’s Brief at 3-5. Because the Employer does not operate a farm, its employees do not satisfy this provision. The CO stated that the FLSA definition of “agriculture” recognizes two distinct categories: “primary agriculture,” which is farming itself (including cultivating soil, growing and harvesting crops, and raising animals); and “secondary agriculture,” which includes “any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.” Certifying Officer’s Brief at 5 (quoting 29 C.F.R. § 780.105; 29 U.S.C. § 203(f)). The CO contended that because the Employer’s transportation activities are not performed by a farmer or on a farm, it does not satisfy this definition. Certifying Officer’s Brief at 6. In a motion filed on May 16, 2019, the CO also moved to strike Employer’s exhibits, on grounds that they are not part of the record in this matter, are not related to this matter, and are not analogous to this matter.

## **DISCUSSION**

The scope of review in H-2A cases is set forth in 20 C.F.R. § 655.171(a): “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. *Id.*

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. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). 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 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). 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,<sup>1</sup> the Internal Revenue Code defines "agricultural labor" to include all services performed:

in 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.

26 U.S.C. § 3121(g)(4)(A). Although the Employer's response to the Notice of Required Modifications appears to assert that the job opportunity satisfies this provision (see AF 17: "ATP Agri-Services will be picking up the agricultural commodities at each farm and hauling said commodity, in its unmanufactured state, to processing/packing facilities"<sup>2</sup>), the Employer does not argue that it satisfies the IRS definition in either its request for review (AF 1-3) or its brief.

The Employer's job opportunity does not meet this 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 "are the actual growers of the agricultural commodities that are being hauled by ATP Agri-Services." (AF 17). Because the truck drivers that ATP Agri-Services seeks to employ under the H-2A program will not be "in the employ of the operator of a farm," the Employer's job opportunity transporting agricultural commodities 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,

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<sup>1</sup> 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).

<sup>2</sup> The reference to the agricultural commodities being in their "unmanufactured state" appears in the IRS definition but not in the FLSA definition. The Employer noted that its drivers would be hauling agricultural commodities in their unmanufactured state three times in its short response to the Notice of Required Modifications, in an apparent invocation of the IRS definition.

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.

29 U.S.C. § 203(f). The Employer contends that its job opportunity meets this definition, because the hauling of agricultural commodities from the farm to the processing and packing facilities is “incident to or in conjunction with” farming operations. (AF 1-3; Employer’s Brief at 5-7).

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.” 29 C.F.R. § 780.105. The Employer’s job opportunity hauling products from the farms to the packaging and 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”). *Id.* § 780.105(b).

The Employer’s job opportunity also does not come within the definition of “secondary” agriculture, because it is not performed “by a farmer or on a farm.” 29 U.S.C. § 203(f); 29 C.F.R. § 780.105(c). 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. (AF 107). The itineraries and hauling contracts show that the requested H-2A workers would pick up the commodities at farms in one city, and deliver them to processing and packing facilities in another city.<sup>3</sup> 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. 29 U.S.C. § 203(f) (emphasis added); 29 C.F.R. § 780.105(c). 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. Section 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*

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<sup>3</sup> The citrus from A Duda & Sons would be picked up in Felda, Florida and delivered to Arcadia, Florida. The citrus from Cultrale Farms would be picked up from Venus, Florida and delivered to Auburndale, Florida. The celery from A Duda & Sons would be picked up from Belle Glade, Florida and delivered to Eustis, Florida. The watermelons from Graham Farms Melon would be picked up in Lake Placid and Zolfo Springs, Florida, and delivered to Avon Park, Florida. (AF 107).

*“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).*

29 C.F.R. § 780.134 (emphasis added). Section 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).*

29 C.F.R. § 780.152 (emphasis added). Section 780.154 provides:

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).*

29 C.F.R. § 780.154 (emphasis added). 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 FLSA overtime regulations cited by the Employer do not state otherwise. First, the regulation at 29 C.F.R. § 780.901 merely restates the overtime exemption of 29 U.S.C. § 213(b)(16); it does not make any reference to “agricultural labor” or state that the FLSA considers hauling agricultural commodities to be agricultural labor, as the Employer contends. See Employer’s Brief at 5-6. The statutory provision itself draws a distinction between employees employed in “agriculture” (who are addressed in exemptions in 29 U.S.C. §§ 213(a)(6) and (b)(12)), and employees engaged in “the transportation and preparation for

transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State” (who are addressed in the exemption in § 213(b)(16)).

Second, that distinction is intentional. As explained in 29 C.F.R. § 780.902, the overtime exemption for employees engaged in the transportation of fruits and vegetables from farm to market was added to the FLSA in 1961. The original bill to add this exemption would have done so by amending the definition of agriculture to include the transportation of fruits and vegetables from the farm to the market. The Conference Committee rejected that approach, however, and made the transportation provision its own separate exemption, so that it would not change “the application of the Act to any other employees” or imply any “disagreement . . . with the principles and tests governing the application of the present agricultural exemption as enunciated by the courts.” 29 C.F.R. § 780.902. The principle the Conference Committee wished to preserve, from prior court holdings, was that transportation operations do not come within the agriculture exemption “when performed by employees of persons other than the farmer.” *Id.*

Therefore, contrary to the Employer’s argument, the regulation at 29 C.F.R. § 780.902 does not provide that activities involving transportation of fruits and vegetables from the farm to the market or processing facility “are exempt agricultural activities even when performed by employees of persons other than a farmer.” *See* Employer’s Brief at 6. In fact, the language quoted by Employer on page 6 of its brief, and attributed to 29 C.F.R. § 780.902, does not appear in that regulation at all. That language instead comes from 29 C.F.R. § 780.128, which discusses “secondary” agriculture and reiterates that practices performed by a farmer or on a farm as an incident to or in conjunction with primary farming operations come within the definition of agriculture. Section 780.128 uses the example of threshers of wheat, who perform work *on a farm*. Nothing in Section 780.128 alters the requirement that activities must be performed *by a farmer* or *on a farm* to meet the “secondary” meaning of “agriculture.” Neither Section 780.128 nor Section 780.902 provide that transportation of agricultural goods *off* a farm comes within the definition of “agriculture.” Conversely, Sections 780.134, 780.152, and 780.154 expressly state that transportation activities do not come within the FLSA definition of “agriculture” unless they are performed by a farmer or on a farm. As discussed above, those requirements are not met here, and the Employer’s job opportunity does not come within the FLSA definition of “agriculture.”

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 cannot prevail on its second argument, that other employers have received certification for positions involving transportation of agricultural goods, for three reasons. First, as the CO argued, the parties’ written submissions on administrative review “may not include new evidence.” 20 C.F.R. § 655.171(a). Therefore, Employer’s evidence of the other applications, submitted through its 10 exhibits to its brief, cannot be considered.<sup>4</sup> Additionally, the facts and circumstances of those cases are not before me, and I cannot determine whether the activities involved in those cases would be performed by a farmer or on a farm (to meet the

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<sup>4</sup> The CO’s motion to strike the exhibits is denied as moot.

FLSA definition of agriculture) or in the employ of the operator of a farm (to meet the IRS definition), among other potential issues.<sup>5</sup> Finally, even if the other applications are legally and factually similar, the fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial. *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.

**MONICA MARKLEY**  
Administrative Law Judge

MM/jcb  
Newport News, VA

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<sup>5</sup> In the Motion to Strike, the CO asserted that “at least some of the other certified applications are not analogous to the matter at hand because they either involve labor by a farmer or on a farm.” I do not resolve the dispute over whether the other cases are analogous, because those cases are not before me.