



Issue Date: 12 July 2019

BALCA CASE NO.: 2019-TLC-00062

ETA Case No.: H-300-19136-690283

In the Matter of:

BLAS CADENA JR. D/B/A/ CADENA TRUCKING,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification program for temporary agricultural labor or services in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. This program, commonly referred to as the H-2A program, allows employers to hire foreign workers to perform agricultural labor in the United States on a temporary basis.

Cadena Trucking applied for authorization to hire temporary workers under the H-2A program. The Certifying Officer in the Office of Foreign Labor Certification denied the application. Accordingly, Cadena Trucking appealed the decision and requested a *de novo* hearing before an administrative law judge (“ALJ”). The matter is now properly before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to Section 655.171 for review of the Certifying Officer’s denial.¹ Upon a review of the record and the relevant legal authority, the undersigned **AFFIRMS** the determination of the Certifying Officer.

I. Procedural and Factual Background

Cadena Trucking is a Texas trucking company that provides services to farmers and harvesters transporting agricultural commodities from the farm to a storage facility. (Hr’g Tr. ___, Jul 3, 2019²; AF Page 2, 14.) Cadena Trucking submitted an H-2A Application for Temporary Employment Certification with the United States Department of Labor seeking certification for six truck drivers. (AF Page 85-96, 110.) Dora Cadena filed the application, which lists her as an

¹ The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.171. Here, the Chief ALJ designated a single member of the Board to hear this appeal.

² The hearing transcript was not available at the time the undersigned issued this Decision and Order. Accordingly, the undersigned sited to the Hearing Transcript without reference to the page or line number.

owner of the company. (AF Page 86, 93, 95.) The application also lists Blas Cadena as an owner of Cadena Trucking. (AF Page 95, 102.)

The temporary period of employment Cadena Trucking needs the drivers is July 1, 2019, through July 31, 2019. (AF Page 85.) This time period corresponds with the harvest season for the farmers with whom Cadena Trucking contracts to perform the transportation of milo from the farm to the storage facility. (Hr'g Tr.__; AF Page 114, 115.)

The six drivers would work in San Patricio County, Texas. (AF Page 88-89.) The application lists the job duties for the drivers as follows:

Drive a semi-truck, maintenance, service, and make any necessary repairs during harvest season. Employer does not own the crop being hauled, crop will be milo/corn, a combine or buggy will load the truck/trailer at the field you will be telling the buggy driver how to load you. You will take the load to the grain elevator and unload. When done unloading go back to the field and reload. You will keep doing so until the field is done or the farmer says it's the last load of the day.

(AF Page 87.)

The drivers pick up milo at a number of farms owned or operated by M&M Farms and David Klapuch Farms and transport the milo to a storage facility located off the farm. (Hr'g Tr. __; AF Page 36, 38-39, 96, 107, 114, 115.) The milo or other commodity is unprocessed and picked up by the driver right after it is cut in the field. (AF Page 122.) The storage facility where Cadena Trucking transports the milo is located in Taft, Texas approximately 10 to 12 miles from the farms where the milo is loaded onto the trucks. (Hr'g Tr.__.) Cadena Trucking contracts directly with the farmers to provide this service. (Hr'g Tr.__.) The drivers, however, would be employees of Cadena Trucking, not the farmers with whom Cadena Trucking contracts. (AF Page 85-96.)

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency. (AF Page 51-62.) The Notice of Deficiency cited nine separate deficiencies with the application. (AF Page 53-62.) The fourth listed deficiency addressed the issue of agricultural labor or services. (AF Page 55-58.) After setting out the various statutory provisions defining agricultural labor or services, the Notice of Deficiency stated:

The job duties are primarily described as the trucking and hauling of crops. The court *In the Matter of ATP Agri-Services Inc., 2019-TLC -0050 (2019)*, found that truck driving if not "performed by a farmer or on a farm" does not qualify as agricultural labor for the purposes of certification in the H2A visa program.

(AF Page 58.) The Notice of Deficiency directed Cadena Trucking to provide a written statement describing how the company's application could be considered to address agricultural labor or services as defined in the regulations. (AF Page 58.)

Cadena Trucking responded to the Notice of Deficiency. (AF Page 35-49.) In response to deficiency number four, Cadena Trucking responded that:

Blas Cadena Jr. DBA Cadena Trucking is providing a service to U.S. agricultural farmers/custom harvesters during harvest season in picking up their commodity /crops at the farm sites. We are loading the commodity crops at the farm sites unto our trucks/trailers to deliver the commodity/crops to the storage facilities/grain elevators.

(AF Page 36.)

The Office of Foreign Labor Certification denied Cadena Trucking's application on June 12, 2019. (AF Page 4-8.) The Certifying Officer found that Cadena Trucking failed to sufficiently address the Notice of Deficiency. (AF Page 6.) Specifically, the Certifying Officer found that Cadena Trucking failed to establish that it was providing agricultural labor or services as those terms are defined in the regulations. (AF Page 6-8.)

By letter dated June 16, 2019, Cadena Trucking requested a de novo hearing before an administrative law judge. (AF Page 2-3.) Cadena Trucking challenges the denial of its application on the grounds that it is not providing agricultural labor or services. (Id.) In its June 16, 2019, letter, Cadena Trucking indicates that it is a trucking company that only contracts with farms and harvesters to transport crops during harvest season in Texas from the farm to a storage facility located off the farm. (Id.) "The commodity gets loaded onto our equipment truck/trailer . . . at the edge of the field by the combine. We then deliver the commodity to a storage facility, which is not always in close proximity of the farms, storage facilities can be anywhere from 1 to 20 miles from the farm." (AF Page 2.)

The undersigned received the administrative file in this matter on June 27, 2019. Pursuant to 20 C.F.R. § 655.171(b), the undersigned set the hearing in this matter for July 3, 2019. (Notice of Hearing, Jun. 27, 2019.) In its Notice of Hearing, the undersigned instructed the parties that they should be prepared to call any witnesses and introduce any new evidence at the hearing. (Id.)

On July 3, 2019, the undersigned conducted the hearing in this matter by telephone. (Hr'g Tr.____) Attorney Hanan Idilbi appeared on behalf of the Office of the Solicitor. The Certifying Officer appeared and testified at the hearing. Blas Cadena and Dora Cadena appeared on behalf of Blas Cadena Jr. d/b/a Cadena Trucking, and Dora Cadena testified. At the hearing, the undersigned admitted into evidence the administrative file as AF Page 1 to AF Page 122 and admitted the cover letter and the index to the administrative file as AFA, AFB, and AFC. Neither party objected to the admission of these documents into the record. Although both the Certifying Officer and Dora Cadena testified under oath at the hearing, neither party introduced any additional written evidence in the record.

At the hearing, the Certifying Officer testified that Cadena Trucking's application was denied because of the type of work for which Cadena Trucking was seeking workers under the H-2A program was not agricultural labor or services as those terms are defined in the

regulations. (Hr’g Tr.____.) Dora Cadena also testified at the hearing. (Hr’g Tr.____.) Dora Cadena testified that Cadena Trucking is a trucking company that only transports crops from the farm to a storage facility; Cadena Trucking does not own the farm. (Hr’g Tr.____.) Cadena Trucking contracts with the farmer to provide the service of transporting the farmer’s crop from the field to a storage facility. (Hr’g Tr.____.) The storage facility is not located on the farm. (Hr’g Tr.____.) Cadena Trucking does not purchase the crop, does not produce the crop, and does not own the farm where the crop is loaded into the truck for transport. (Hr’g Tr.____.) Cadena Trucking only makes money from the transporting of the crop from field to storage facility. (Hr’g Tr.____.) This transportation is necessary because M&M Farms and David Klapuch Farms do not have grain elevators or storage facilities on their farms to store the crop once the farmer harvests the crop. (Hr’g Tr.____.)

At the conclusion of the hearing, the undersigned closed the record and gave the parties until July 9, 2019, to submit legal briefs if they wanted to further brief the issues before the undersigned. The Office of the Solicitor submitted a brief on behalf of the Certifying Officer. Cadena Trucking did not submit a legal brief. Consistent with the requirements of 20 C.F.R. § 655.171(b)(iii), the undersigned now renders this decision within ten calendar days of the hearing.

II. Legal Standard

Where an employer requests a de novo hearing before an administrative law judge, the administrative law judge shall make his or her decision based on both the written administrative file and any new evidence introduced at the hearing. 20 C.F.R. § 655.171. Under the de novo standard of review, the administrative law judge must make an independent determination as to whether the record before the administrative law judge establishes that the employer has demonstrated that it is eligible for temporary labor certification under the H-2A program. Double J Harvesting, Inc., 2019-TLC-00057, at *4 (Jul. 2, 2019) (Morris, ALJ); Desoto Fruit and Harvesting, Inc., 2019-TLC-00032, at *7 (Mar. 1, 2019) (Daly, ALJ). After conducting the hearing, and within ten calendar days, the administrative law judge “must affirm, reverse, or modify, the CO’s determination, or remand to the CO for further action.” 20 C.F.R. § 655.171(b). The decision must specify the reasons for the ALJ’s action. 20 C.F.R. § 655.171(b)(2). In reaching this decision the undersigned has conducted a de novo review of all the evidence of record, including the testimony from the July 3, 2019, hearing.

III. Analysis

The H-2A program allows an employer to temporarily bring nonimmigrant workers into the United States to perform “agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm” 8 U.S.C. § 1101(a)(15)(H).³ In order for the Secretary of Labor to issue a certification, the employer must establish that the temporary workers sought will perform agricultural labor or services. 20 C.F.R. § 655.161(a); Double J Harvesting, 2019-TLC-00057, at *4 (“It is

³ Although not pertinent to this dispute, 20 C.F.R. § 655.103(c) expands the definition of agricultural labor or services to specifically include logging employment.

Employer's burden to show that certification is appropriate."'). Here, the parties dispute whether the six drivers that Cadena Trucking seeks to hire would be engaged in agricultural labor or services.

The pertinent regulations define agricultural labor or services as follows:

(c) Definition of agricultural labor or services. 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 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. For informational purposes, the statutory provisions are listed below.

(1)(i) Agricultural labor for the purpose of paragraph (c) of this section means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) 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;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(iv) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (c)(1)(iv) and (c)(1)(v) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) Agriculture. For purposes of paragraph (c) of this section, agriculture means 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 1141j(g) of title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) agricultural commodities 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. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) Apple pressing for cider. The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g) or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) Logging employment. Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

20 C.F.R. § 655.103(c). Cadena Trucking does not contend that the temporary workers would be involved in pressing apples or logging, and the record is devoid of any such evidence. Accordingly, the truck drivers must satisfy one of the remaining definitions for agricultural labor or services.

1. Section 3121(g) of the Internal Review Code

The regulations incorporate the definition of agricultural labor set forth in Section 3121(g) of the Internal Revenue Code of 1986. 20 C.F.R. § 655.103(c); 26 U.S.C. 3121(g). The definition of agricultural labor contained in Section 3121(g) of the Internal Revenue Code, however, is virtually identical to the definition set forth above and in 20 C.F.R. §§ 655.103(c)(1)(i)(A) – 655.103(c)(ii).

As a threshold matter, the only arguable provision that applies in this case is 20 C.F.R. § 655.103(c)(1)(i)(D) and 26 U.S.C. § 3121(g)(4)(A). There is no evidence in the record that the six drivers would perform services: (1) on a farm in connection with the cultivation of the soil or in connection with raising or harvesting a commodity; (2) in the employment of the owner, tenant, or operator of a farm in connection with the management, conservation, improvement, or maintenance of the farm; (3) in connection with the production or harvesting of a commodity; (4) in the employ of a group of operators of farms in the performance of specified services; or (5) on a farm operated for profit where the service is not in the course of the employer's trade or business. See 20 C.F.R. § 655.103(c)(1)(i) and 26 U.S.C. § 3121(g). The six drivers are not harvesting or producing the milo on a farm and are not employed by the owner, tenant, or operator of a farm or a group of operators of farms.⁴ Rather, the record reflects that farmers or harvesters would load milo into a trailer and the driver would transport the milo from a farm owned and operated by someone other than Cadena Trucking to an off-site storage facility located a number of miles away.

Section 655.103(c)(1)(i)(D) and Section 3121(g)(4)(A), however, provide that agricultural labor includes services performed “[i]n the employ of the operator of a farm in . . .

⁴ The regulations define the term “operator of a farm” to mean “an owner, tenant, or other person, in possession of a farm and engaged in the operation of such farm.” 26 C.F.R. § 31.3121(g)-1(e)(2). Cadena Trucking is not the owner, tenant, or other person in possession of a farm and is not engaged in the operation of such a farm. Cadena Trucking is a trucking company.

delivering to storage . . .” any commodity in its unmanufactured state whether the “operator produced more than one-half of the commodity with respect to which such service is performed. . . .” 20 C.F.R. § 655.103(c)(1)(i)(D); 26 U.S.C. § 3121(g)(4)(A). While the record reflects that Cadena Trucking’s six drivers would deliver to storage a commodity in its unmanufactured state to storage, the six drivers are not in the employ of the operator of a farm. Cadena Trucking does not operate a farm. Rather, Cadena Trucking is a trucking company that contracts with farmers – M&M Farms and David Klapuch Farms - to deliver milo from the field to a storage facility located off the farm. Because the six drivers are not employed by the operator of a farm, the services transporting the milo to the storage facility do not constitute agricultural services under Section 655.103(c)(1)(i)(D) and Section 3121(g)(4)(A). While the undersigned can understand how this result might appear arbitrary to Cadena Trucking, the language of Section 655.103(c)(1)(i)(D) and Section 3121(g)(4)(A) is clear. The six drivers are not performing agricultural labor or services as those terms are defined in the regulations and statutes.

Other ALJs have recently reached the same conclusion in addressing the issue of whether drivers employed by entities other than the operator of a farm are performing agricultural labor or services when they transport a commodity from the field to a storage or packing facility. See Double J Harvesting, 2019-TLC-00057, at *5 (labor contractor transporting watermelons to a packing facility located 20-30 minutes from the farm was not performing agricultural labor); ATP Agri-Services Inc., 2019-TLC-00050, at *5 (May 17, 2019) (Markley, ALJ) (truck drivers hauling crops from the field to processing and packing facilities were not performing agricultural labor where they were not employed by the operator of a farm). Thus, while M&M Farms and David Klapuch Farms might be able to employ the truck drivers under the H-2A program since they are the operators of farms, Cadena Trucking may not. 26 U.S.C. § 3121(g)(4)(A); see also I.R.S. Priv. Ltr. Rul. 5405102970A (May 10, 1954). The labor that that the six truck drivers would perform for Cadena Trucking does not meet the definition of agricultural labor or services set forth in the Internal Revenue Code.

2. Section 3(f) of the Fair Labor Standards Act

The regulations also incorporate the definition of agriculture set forth in the Fair Labor Standards Act. 29 U.S.C. § 203(f); 20 C.F.R. § 655.103(c)(2). This definition of agriculture incorporates both a primary and secondary definition of farming. Holly Farms Corp. v. NLRB, 517 U.S. 392, 398, 116 S. Ct. 1396, 1401 (1996); Bayside Enter., Inc. v. NLRB, 429 U.S. 298, 300, 97 S. Ct. 576, 579 (1977); Sanderson Farms Inc. v. NLRB, 335 F.3d 445, 449 (5th Cir. 2003); Wirtz v. Osceola Farms Co., 372 F.2d 584, 587 (5th Cir. 1967). Primary farming includes: “the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, fur-bearing animals, or poultry” 29 U.S.C. § 203(f); Holly Farms, 517 U.S. at 398, 116 S. Ct. at 1401. Secondary farming has a broader meaning. Holly Farms, 517 U.S. at 398, 116 S. Ct. at 1401; Osceola Farms, 372 F.2d at 587. Secondary farming 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.” 29 U.S.C. § 203(f); Holly Farms, 517 U.S. at 398, 116 S. Ct. at 1401.

As an initial matter, Cadena Trucking's six drivers would not perform work that falls within the primary definition of farming. As discussed in detail above, the six drivers would drive a truck from the milo field to a storage facility located off the farm. These employees of Cadena Trucking would be hauling an agricultural commodity from the farm to a third party storage facility. The employees are not engaged in cultivating or tilling the soil and are not producing, cultivating, growing, or harvesting the milo they are transporting. The drivers are also not involved in dairying or the raising of livestock, bees, fur-bearing animals, or poultry.

The work of a driver in transporting an agriculture product covered by Section 203(f) is properly considered pursuant to the definition of secondary farming, not primary farming. Bayside Enter., 429 U.S. at 300-01, 97 S. Ct. at 579; Sanderson Farms, 335 F.3d at 449. As the United States Supreme Court explained in Bayside Enterprise:

This statutory definition includes farming in both a primary and a secondary sense. The raising of poultry is primary farming, but hauling products to and from a farm is not primary farming. Such hauling may, however, be secondary farming if it is work performed "by a farmer or on a farm as an incident to or in conjunction with such farming operations"

429 U.S. at 300-01, 97 S. Ct. at 579; see also Sanderson Farms, 335 F.3d at 449. Accordingly, the driving activities of the six workers can only constitute agricultural labor pursuant to the definition in the Fair Labor Standards Act if the activity falls under the secondary meaning of farming.

The regulations further define the role of delivery to storage of a commodity in the context of secondary farming. 29 C.F.R. § 780.152. 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). Such employees would not be engaged in agriculture in any workweek when they delivered commodities of other farmers, however, because such deliveries would not be performed as an incident to or in conjunction with "such" farming operations, as explained previously. If the "delivery" trip is within section 3(f) the necessary return trip to the farm is also included.

29 C.F.R. § 780.152. Thus, under certain circumstances the transportation to storage of an agricultural commodity could constitute agricultural labor. As both Section 203(f) and Section 780.152 make clear, however, the activities of transporting a commodity to storage only

constitute agricultural labor when the activities are performed by the farmer or where the transportation occurs without leaving the farm. 29 C.F.R. § 780.152; 29 U.S.C. § 203(f).

The status of the drivers is determined by the nature of the work that the drivers perform for their employer. Bayside Enter. 429 U.S. at 303, 97 S. Ct. at 579. Cadena trucking employs the drivers, not the farms where the drivers are picking up the milo for transport to the storage facility. Thus, the work of the drivers in transporting the milo to storage is not work performed by a farmer. See id.; Holly Farms, 517 U.S. at 400-01, S. Ct. 1402; Sanderson Farms, 335 F.3d at 1500-51. Moreover, the record is clear that the drivers are transporting the milo from the farm to a storage facility located off the farm. Because Cadena Trucking is a contract labor company that contracts with farmers to provide transportation services of agricultural commodities from a farmer's field to an offsite storage facility, the activities of the drivers employed by Cadena Trucking do not constitute agricultural labor or services under the definition of agriculture set forth in the Fair Labor Standards Act. Other administrative law judges have recently reached similar conclusions. See e.g., Double J Harvesting, 2019-TLC-00057, at *5-6; ATP Agri-Services, 2019-TLC-00050, at *5-8. Again, while a farmer might be able to employ the drivers to transport the milo from the farm to the storage facility under the H-2A program, Cadena Trucking – as a trucking company – may not do so. Because the job responsibilities of the six truck drivers do not constitute work performing agricultural labor or services as those terms are defined in the relevant regulations and statutes, the Certifying Officer properly denied the application of Cadena Trucking for temporary agricultural laborers under the H-2A program.⁵

IV. Conclusion

The undersigned **AFFIRMS** the Certifying Officer's denial of the application for H-2A temporary labor certification filed by Cadena Trucking and Blas and Dora Cadena.

SO ORDERED.

STEWART F. ALFORD
Administrative Law Judge

⁵ At the hearing, Dora Cadena attempted to question the Certifying Officer as to whether the Office of Foreign Labor Certification had granted applications for drivers in the past for other employers under the H-2A program. Whether the Office of Foreign Labor Certification did or did not grant the application of another employer is not pertinent to the issue before the undersigned. This was the first application under the H-2A program by Cadena Trucking (Hr'g Tr.____), and there is no issue as to whether it relied on past grants of applications it filed. The question for the undersigned is whether, based on a de novo review of the entire record, the application of Cadena Trucking satisfies the criteria necessary under the H-SA program. Under the plain language of the statute and regulations the application fails to satisfy this criteria because the workers are not engaged in agricultural labor or services.