

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 September 2020

OALJ Case No.: 2020-TLC-00105
2020-TLC-00106

ETA Case No.: H-300-20154-619874
H-300-20192-708734

In the Matter of:

**STATEWIDE HARVESTING & HAULING,
LLC,**

Employer.

Appearances: DAVID J. STEFANY, Esquire
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For the Employer

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For the Certifying Officer, John Rotterman

Before: Christopher Larsen
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This consolidated 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 H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis, if the Secre-

tary of Labor first certifies (a) there are not sufficient domestic workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services in question; and (b) the employment of foreign workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. section 1188, subsection (a).

In this case, Statewide Harvesting & Hauling, LLC (“Employer”), requests *de novo* administrative hearings, under 20 C.F.R. § 655.171(b), to review the Certifying Officer’s (“CO”) denials of two temporary alien agricultural labor certification (“H-2A”) applications. In the first application, 2020-TLC-00105, Employer seeks authority to hire 20 Farmworkers and Laborers, Crop, to work in Haines City, Florida, from August 3, 2020, to May 31, 2021 (AF1, p. 8475).¹ In the second, 2020-TLC-00106, Employer seeks authority to hire 80 Farmworkers and Laborers, Crop, to work in Haines City, Florida, from August 31, 2020, to May 31, 2021 (AF1, p. 16767).² After receiving the Administrative Files from the Employment and Training Administration (“ETA”), I conducted a telephonic hearing on August 31, 2020.³ At the hearing, Employer called three witnesses to testify: its President, Adam Pate; its Controller, Michael Ingram; and Michael Marsh, President and CEO of the National Council of Agricultural Employers (“NCAE”). The CO called no witnesses. Employer offered Employer’s Exhibits (“EX”) 1-14, which were admitted into evidence. The CO relied on the two administrative files.

On September 1, 2020, both parties filed post-hearing briefs.⁴

This decision and order is based on the record consisting of the two administrative files, the parties’ exhibits, the testimony offered at the hearing, and the arguments advanced in the parties’ briefs. Furthermore, this decision and order is issued within ten calendar days of the hearing as required under 20 C.F.R. § 655.171(b)(1)(iii).

¹ The administrative file in 2020-TLC-00105 runs to 28,460 pages, and I refer to it in this Decision as “AF1.” The administrative file in 2020-TLC-00106 runs to 20,464 pages, and, where necessary, I refer to it in this Decision as “AF2.” I will follow the CO’s lead, as set forth in footnote 1 on page 1 of his post-hearing brief, and rely primarily on AF1 in this decision, inasmuch as it “includes all the applicable documentation for Case 2020-TLC-00106” (CO’s Brief, p. 1, fn. 1).

² The CO filed an unopposed Motion to Consolidate the two cases for hearing. I granted that Motion by Order issued August 26, 2020.

³ An ALJ must conduct a hearing within five business days after receipt of the AF. 20 C.F.R. § 655.171(b)(1)(ii).

⁴ Additionally, Employer filed a Motion to Strike on September 2, 2020, seeking to strike sections of the CO’s post-hearing brief. The CO’s reply, filed the same day, clarified confusion arising largely from typographical error. I deny the Motion to Strike.

STATEMENT OF THE CASE

The issue in this case is deceptively simple. In both applications, Employer sought to hire temporary H-2A workers to fill a “seasonal” need. Under the applicable regulation,

. . . employment is of a seasonal nature where it is tied to a certain time of the year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 C.F.R. section 655.103, subsection (d). As the CO correctly points out, the burden is on Employer to establish its eligibility for a labor certification. 8 U.S.C. section 1361. As the CO tells it,

The CO denied both applications based on Employer’s admissions that it: (1) employed no farm laborers outside the stated periods of need, and (2) employed only temporary H-2A farm laborers during its stated periods of need. AF 28-30, 8634-8637.⁵ In the denials, the CO cited to a statement provided by Statewide confirming “[a]ll employees working as Farmworkers and Laborers were employed in the category of temporary employment and there were not any workers employed under the category of fulltime permanent as Farmworkers and Laborers.” AF 30, 8636. Therefore, the CO concluded Statewide failed to demonstrate a temporary or seasonal need as required by 20 C.F.R. § 655.103(d) based on the following explanation:

[T]he employer’s payroll records should show some workers in the job opportunity employed outside the period in which it asserts a need for “labor levels far above those necessary for ongoing operations.” However, the employer does not employ any Farmworkers and Laborers outside of the asserted seasonal period. The only Farmworker and Laborer workforce utilized is that of the temporary workers during the timeframes reflected in the employer’s application filings. Therefore, the employer appears to be using the H-2A program to satisfy the labor needs of its ongoing operations, instead of as a means to

⁵ As he does throughout his brief, the CO here refers to “AF1.”

augment an existing workforce as required by the regulations.
AF 30, 8367.

CO's Brief, pp. 1-2. For its part, Employer contends "the CO's interpretation of 20 C.F.R. § 655.103(d) is inconsistent with Congress's intent in creating the H-2A program to *benefit and help* American farmers and contractors find qualified temporary or seasonal labor to help their agricultural operations" (emphasis in original), citing the Department of Labor's initial H-2A Employer Handbook, 53 Fed. Reg. 22099 (June 10, 1988) (ETA Handbook No. 398):

The H-2A program and the implementing regulations are primarily constructed for the use of employers who own and/or operate a fixed-site establishment and who are seeking workers from out of the area to come to that fixed site. However, there is nothing in the statute or the regulations to preclude an employer who does not fit into this category from utilizing the program. Therefore, bona fide registered farm labor contractors may be eligible to apply for and receive H-2A certifications.

In Employer's view, the regulations allow it to hire H-2A workers to serve fixed-site employers, and not simply to augment its own domestic workforce, which in any case it does not have. Employer's Brief, pp. 13-14.

As set forth below, I conclude the CO's interpretation of "labor levels far beyond those necessary for ongoing operations," as applied to an H-2A labor contractor, is incorrect, because it is inconsistent with the definitions set forth in 20 C.F.R. section 655.103, subsection (b). The two subsections, (b) and (d), must be read in tandem.

SCOPE OF REVIEW

The current consolidated case arises from Employer's request for *de novo* hearings on the CO's denial of Employer's applications for temporary alien labor certification within the H-2A program.

When an employer requests a *de novo* hearing, neither the Immigration and Nationality Act nor the regulations applicable to H-2A claims identify a specific standard of review guiding an administrative law judge's review of the CO's determination.⁶ The administrative law judge (ALJ) may apply "a hybrid approach" re-

⁶ Before the current regulations became effective on March 15, 2010, the regulatory standard of review was "legal sufficiency." 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted "legal sufficiency" to imply an "arbitrary and capricious" standard of review. *See J and V Farms, LLC*, 2015-TLC-00022, slip.op at 3, n. 1 (Mar. 4, 2016) (citing *Bolton Springs Farm*, 2008-TLC-00028, slip.op. at 6 (May 16, 2008)). But the earlier regulations did not define "legal sufficiency." *See id.*; 20

viewing the evidence *de novo* while reviewing the CO's decision for an abuse of discretion. *Greenbank, Inc.*, 2013-TLC-00035 slip op. at p. 4, fn. 9 (July 22, 2013). Ultimately, however, the ALJ must independently determine whether the record establishes employer eligibility for the H-2A program. *David Stock*, 2016-TLC-00040 (May 6, 2016) (because the employer sought a *de novo* hearing the ALJ "must independently determine if the employer has established eligibility for temporary labor certification").

Additionally, the ALJ bases his or her determination on both the written administrative file and any new evidence introduced by the parties at the hearing. 20 C.F.R. § 655.171.

Finally, following a *de novo* hearing, "the ALJ may affirm, reverse, or modify the CO's determination, or remand to the CO for further action" and the decision "must specify the reason for the action taken." 20 C.F.R. § 655.171(b)(2). In reaching this decision, I have conducted a *de novo* review of all the evidence of record, including the testimony from, and exhibits received during, the August 31, 2020 hearing, and the briefs of the parties.

DISCUSSION

A. Seasonal Need

As set forth above, under 20 C.F.R. section 655.103, subsection (d),

. . . employment is of a seasonal nature where it is tied to a certain time of the year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

The dispute between the CO and the Employer in this case is whether, in these two applications, Employer's need for H-2A workers "requires labor levels far above those necessary for ongoing operations." For the CO, the answer is readily apparent. Employer itself does not have a year-round need for Farmworkers and Laborers – in fact, except for H-2A workers, Employer does not even employ any Farmworkers and Laborers. Because Employer has no "ongoing operations" involving Farmworkers and Laborers, it cannot have, in the CO's view, any "seasonal"

C.F.R. § 655.112(a) (2008). The current regulations omit the reference to "legal sufficiency" and do not address the deference, if any, BALCA should give to the Certifying Officer's decision. *See* 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations' silence leave the question open, and required BALCA judges to determine an appropriate standard of review.

need for temporary workers.⁷ Employer, on the other hand, contends it would no longer be a labor contractor if it were required to maintain its own permanent workforce of Farmworkers and Laborers.

To properly interpret subsection (d) of 20 C.F.R. section 655.103, I must consider the regulation in its entirety.

Under 20 C.F.R. section 655.103, subsection (b), an “employer” is generally any person or entity 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 (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment; and (3) has a valid Federal Employer Identification Number. The regulation imposes these three requirements on every employer.

But the regulation also recognizes different kinds of employers. Under 20 C.F.R. section 655.103, subsection (b), a “fixed-site employer” is “[a]ny person engaged in agriculture who meets the definition of an employer . . . who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed.” An “agricultural association” is “[a]ny nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law.” And an “H-2A labor contractor (H-2ALC),” by contrast, is defined by what it is *not*: “Any person who meets the definition of 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” under 8 U.S.C. section 1188, 29 C.F.R. Part 501, or 29 C.F.R. Part 655, Subpart B.

Under these definitions, a person or entity may qualify as an “employer” if it “has an employer relationship with respect to an H-2A worker *or* a worker in corresponding employment” (emphasis added). An “employer” is not required to have an employer relationship with *both* H-2A workers *and* workers in corresponding employers, but may meet this definition by means of a single employer relationship with a single H-2A worker. What is more, H-2A labor contractors, unlike fixed-site employers, need not be “engaged in agriculture,” and need not own or operate facili-

⁷ In support of this argument, the CO cites *Ag-Mart Produce, Inc.*, 2020-TLC-0018 (Jan. 10, 2020); *FARM-OP, Inc.*, 2017-TLC-00021 (July 7, 2017); *Lodoen Cattle Co.*, 2011-TLC-00109 (Jan. 7, 2011); *Mapleview Dairy, LLC*, 2020-TLC-00013 (Dec. 4, 2019); *Frost Wines, LLC*, 2019-TLC-00042; and *Little Wicomico Oyster, LLC*, 2018-TLC-00029 (Nov. 1, 2018). All of these cases involve fixed-site employers, rather than labor contractors. Unlike labor contractors, fixed-site employers must be “engaged in agriculture” and must own or operate facilities “where agricultural activities are performed.” 20 C.F.R. § 655.103, subsection (b).

ties “where agricultural activities are performed.” Thus, these definitions do not require an H-2A labor contractor to perform agricultural operations as part of its “ongoing activities.” By contrast, a fixed-site employer, who must be “engaged in agriculture,” and who must own or operate a facility “where agricultural activities are performed,” will virtually always have some number of domestic employees engaged in farm labor at all times.

The CO cites only one case involving a labor contractor, *LVJ Pimental Resources, LLC*, 2020-TLC-00104 (Aug. 25, 2020), to suggest the relevant “ongoing operations” of a labor contractor, for purposes of showing seasonal need, must be agricultural in nature. I respectfully disagree with the Administrative Law Judge’s conclusion in that case for three reasons. First, the ALJ did not refer to the regulatory definitions of “employer,” “fixed-site employer,” and “H-2A Labor Contractor” in subsection (b) of 20 C.F.R. section 655.103 when deciding the matter. Because he did not, he appears not to have considered the regulation as a whole when construing subsection (d). I conclude section 655.103, read as a coherent whole, recognizes a distinction between the “ongoing operations” of a fixed-site employer (who must be “engaged in agriculture” and must own or operate a facility “where agricultural activities are performed”) and those of an H-2A labor contractor, who is in the business of supplying labor to fixed-site employers. Second, the Administrative Law Judge found the labor contractor in that case had submitted only “conclusory statements of need” and had failed to show “its need for 60 Farm Workers and Laborers is ‘tied to a certain time of year by an event or pattern,’” quite apart from the contractor’s alleged failure to demonstrate a need for labor levels far above those necessary for ongoing operations. Third, the Administrative Law Judge decided the *LVJ Pimental* case on expedited administrative review, while I have had the benefit of a *de novo* hearing with additional evidence and testimony.

Thus, I conclude the CO may not refuse to certify either of the consolidated applications before me on the grounds that Employer has not demonstrated a need for “labor levels far above those necessary for ongoing operations.” For purposes of these consolidated applications, I find Employer has shown a seasonal need for labor levels far beyond those necessary for its own ongoing operations as a labor contractor. I express no opinion with respect to any other potential basis for denial of certification.

B. Labor Contractors

My interpretation of subsections (b) and (d) of 20 C.F.R. section 655.103 is consistent with other expressions of policy allowing labor contractors to participate in the H-2A program, notwithstanding the potential for abuse. In 2010, the Department observed

Because the Department’s enforcement experience shows agricultural labor contractors have lower compliance rates than

fixed-site agricultural employers, additional obligations are required for them. This requires a definition that distinguishes each type of employer.

75 Fed. Reg. 6886 (February 12, 2010). The Department simultaneously adopted filing requirements for labor contractors in 20 C.F.R. section 655.132 (“H-2A labor contractor (H-2ALC) filing requirements”), noting

The Department believes that the proposed regulations provide sufficient protections to address these commenters’ concerns [about labor contractor abuse of the program], and no additional restrictions or forms or licensing requirements are necessary at this time. The proposed protections, including the requirements to submit proof of the H-2ALCs’ work contracts, will help eliminate these egregious abuses . . .

75 Fed. Reg. 6919 (February 12, 2010). Additionally, when the Department published the most recent revision of Section 655.103(d) in 2010, it commented

The Department has decided to retain the language of the NPRM [regarding Section 655.103(d)] which was not intended to create any substantive change in how the Department administers the program. If additional clarification is needed in the future, we will provide such clarification through the use of guidance memoranda, bulletins, special procedures (as applicable) and other guidance documentation.

75 Fed. Reg. 6890 (February 12, 2010). These authorities militate against any new interpretation of 20 C.F.R. section 655.103, subsection (d), which substantively changes the eligibility of labor contractors to hire H-2A workers.

ORDER

The CO’s August 13, 2020, Final Determination denying certification is reversed. For purposes of these consolidated applications, Employer has established a seasonal need for “labor levels far above those necessary for ongoing operations.” I

remand these applications to the CO for further processing consistent with this Decision and Order.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge