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Issue Date: 01 April 2020

OALJ Case No.: 2020-TLC-00052
ETA Case No.: H-300-20032-291543

In the Matter of:

FRESH HARVEST, INC.,
Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Rebecca A. Nielsen, Esq.
Sarah M. Tunney, Esq.
For the Certifying Officer

Christopher J. Schulte, Esq.
For the Employer

Before: Peter B. Silvain, Jr.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges (“OALJ”). 20 C.F.R. § 655.171.

STATEMENT OF THE CASE

On February 14, 2020, Fresh Harvest, Inc. (“the Employer”) filed the following documents with the CO: (1) Form ETA 9142A, *H-2A Application for Temporary Employment Certification* (“Application”); (2) Appendix A to Form ETA 9142A; (3) ETA Form 790,

Agricultural Clearance Order; and (4) Attachments to Form ETA 790. (AF 605-635).¹ The Employer is an H-2A Labor Contractor (“H-2ALC”)² that provides agricultural labor service to fixed-site growers.³ (AF 552-572, 639-650). The Employer’s Application sought certification for fifty field workers: vegetable/harvest workers,⁴ from April 1, 2020 until November 15, 2020, based on an alleged seasonal need during that period. (AF 605, 613). In pertinent part, the job opportunity for which the Employer sought H-2A certification included off-farm “truck driver” duties.

(AF 621). The Employer provided the following description of such responsibilities:

TRUCK DRIVER SPECIFICATIONS: Truck drivers deliver harvested crops packed and loaded in bins and cartons. The truck driving activities are performed directly in connection with and as an integral part of the harvest and farming operations. The truck drivers must be available to perform each of the crop activities described in this job order and will perform various activities throughout the work week:

1. Employee may drive Class 8 over the road Commercial trucks with a GVW (Gross Vehicle Weight) capacity of 80,000 GVW
2. In connection with the harvest and farming operations, employee picks up loaded trailers filled with bins in the fields and transports/hauls the plant’s refrigeration storage site-cooling facility (initial point of distribution).

(AF 634). The Employer noted in its application that “[t]ruck driving activities constitute less than 10% of the total duties performed[.]” (*Id.*).

By letter dated February 21, 2020, the CO issued a Notice of Deficiency (“NOD”). (AF 572-580). The NOD outlined three deficiencies, including that the Employer failed to establish that the job opportunity qualifies as “agricultural labor or services” for purposes of the H-2A program.⁵ (AF 575). The CO informed the Employer that, in accordance with 20 C.F.R. § 655.142, the Employer could submit a modified application within five business days from the date the Employer received the NOD. (AF 573).

¹ “AF” is an abbreviation for the Administrative File.

² An H-2ALC is “[a]ny 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 subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.” 20 C.F.R. § 655.103.

³ The regulations define a “fixed-site employer,” in relevant part, as any person engaged in agriculture “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.” 20 C.F.R. § 655.103(b).

⁴ SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” and code 45-2092.00. (AF 611).

⁵ The other deficiencies, which the Employer later cured, included the Employer’s failure to provide work contracts for each fixed-site grower, and its failure to provide an itinerary that lists the name and location of each fixed-site to which the H-2ALC expects to provide H-2A workers, the expected beginning and end dates when the H-2ALC will be providing the workers to each site, and a description of the crops and activities the workers are expected to perform at such site. (AF 579, 580).

On February 25, 2020, the Employer submitted a response to the CO's NOD. (AF 109-114). In its letter, the Employer stated that the truck driving activities constituted less than ten percent of the total duties performed and that the remaining ninety percent of the "job duties covered by this application are unquestionably 'primarily' agricultural labor." (AF 111). The Employer argued that, pursuant to an a preliminary injunction and limited remand in the separate case *Everglades Harvesting & Hauling v. Scalia*, issued by United States District Court Judge Richard J. Leon on December 16, 2019, that the Department was bound by Judge Leon's preliminary finding that as long as so long as work is "primarily" agricultural, it qualifies for H-2A employment. The Employer asserted that, as it was uncontroverted that the job opportunity contained in its application contained ninety percent purely "agricultural duties" and only ten percent truck driving, that its Application qualifies for the H-2A program under Judge Leon's test, and therefore, must be certified. (AF 110-111).⁶

On March 13, 2020, the CO denied the Employer's Application. (AF 15-23). The CO found that the Employer's response failed to demonstrate that the truck driver duties were agricultural in nature. In particular, the CO noted that the Employer's description of these duties failed to satisfy the definition of "agricultural labor or services" under 20 C.F.R. § 655.103(c). (*Id.*).

In a letter dated March 16, 2020, the Employer appealed the CO's decision and requested a *de novo* hearing. (AF 2-6). This matter was assigned to me on March 18, 2020. The same day, I issued a Notice of Docketing, acknowledging the Employer's appeal. Thereafter, I held a conference call with the parties for scheduling purposes. During the call, the parties agreed that the case appeared to involve a purely legal question, with both parties agreeing on the material facts involved. I granted, without objection from the Department of Labor, the Employer's request to withdraw its original request for a *de novo* hearing and, instead, seek expedited administrative review. On March 25, 2020, I issued an Order Setting Briefing Schedule permitting the parties to file briefs within two business days after receipt of the Administrative File. The same day, the OALJ received the Administrative File from the CO. In cases involving expedited administrative review, the Administrative Law Judge has five business days after receiving the Administrative File to issue a decision based on the written record.⁷ On March 27, 2020, the Solicitor filed a brief on behalf of the CO, urging the undersigned to affirm the CO's decision to deny the Employer's Application for temporary labor certification. Thereafter, the Employer submitted a brief arguing in pertinent part, that pursuant to the terms of the preliminary injunction in *Everglades*, its application should be certified because its job opportunity involves predominately agricultural duties.

DISCUSSION AND APPLICABLE LAW

The Employer bears the burden to establish that it is eligible for temporary labor certification. *See e.g. Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *see also Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015). When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding administrative

⁶ F. Supp. 3d, 2019 WL 6841948 (D.D.C. Dec. 16, 2019). As discussed herein, Judge Leon expressly limited the scope of his Preliminary Injunction to a set of cases which does *not* include the instant case.

⁷ 20 C.F.R. § 655.171(a).

law judge (“ALJ”) may only render a decision “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.” Accordingly, an employer may not present an argument or refer to any evidence that was not part of the record when the case was pending before the CO. For purposes of the H-2A visa program, “agricultural labor or services” is defined 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.⁸

After careful consideration of Judge Leon’s preliminary injunction and remand in *Everglades*, I find that, pursuant to the Order’s express language, the court’s direction regarding the reconsideration of the enumerated cases do not apply to this Employer’s application. While it is absolutely within Judge Leon’s authority to have granted a broader Order binding the Department to his interpretation in all on-going and future cases, he explicitly directed that the relief granted in the preliminary injunction be narrowly tailored. (AF 722). Particularly, the court ordered the CO in those cases to “treat hauling incident to harvesting that occurs on the site of a farm (or farms) as ‘agricultural labor or services’” in “qualifying H-2A applications.” (AF 726). The court defined “qualifying H-2A applications” as those applications **filed with the Department before October 31, 2019**. (AF 725) (emphasis added). As previously set out, the application in the instant case was filed by the Employer on February 14, 2020. Because the Court expressly limited the applications its order impacted, I am constrained to limit my consideration to the evidence and arguments submitted to the CO in this case as well as the relevant precedent included in prior administrative cases interpreting “agricultural labor or services” under 20 C.F.R. § 655.103(c).⁹

As discussed above, the CO’s critical issue with the Employer’s job description is the transportation of agricultural commodities to off-farm locations. According to the CO, the truck driver duties outlined by the Employer do not constitute “agricultural labor or services” under 20 C.F.R. § 655.103(c). For this reason, the CO contends that it was justified in denying the Employer’s Application as the job contained nonagricultural duties, thereby rendering the entire job opportunity ineligible for temporary labor certification.

In this case, the Employer does not allege that its harvesting workers would engage in pressing apples or logging employment. Thus, for the Employer’s Application to be approved, the truck driver duties must qualify as “agricultural labor or services” as defined by either

⁸ 20 C.F.R. § 655.103(c).

⁹ See *Double J Harvesting, Inc.*, 2019-TLC-00057, at 6 (July 2, 2019) (“Since Employer’s requested truck drivers would spend at least 40% of their time performing labor that would not constitute ‘agricultural labor or services’ as defined under 20 C.F.R. § 655.103(c), the CO correctly denied Employer’s application”); *Carlson Orchards, Inc.*, 2004-TLC-00009 (July 23, 2004) (holding that an employer’s H-2A application was properly denied where the duties of the workers included both agricultural and nonagricultural components); see also 8 U.S.C. § 1101(a)(15)(ii)(a) (limiting H-2a eligibility to “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, of a temporary seasonal nature”).

“agricultural labor” under the Internal Revenue Code (“IRC”) or “agriculture” under the Fair Labor Standards Act (“FLSA”).¹⁰ As explained below, I find that such truck driving activities described in the Employer’s job opportunity do not fall within the scope of either definition.

1. “Agricultural Labor” under Section 3121(g) of the IRC¹¹

Section 3121(g) of the IRC defines “agricultural labor,” in relevant part,¹² as services performed “on a farm, in the employ of the operator of a farm... delivering to storage or to market or to 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 services is performed.”¹³ The regulations provide that an “operator of a farm” is an “owner, tenant, or other person, in possession of a farm and engaged in the operation of such farm.”¹⁴

The Employer described the job opportunity for field workers as including off-farm truck driver duties, such as hauling crops to a storage site-cooling facility. (AF 11-12,). The Employer conceded that approximately ten percent of the work contemplated on its H-2A Application would occur off of a farm. (*Employer’s Brief* at 1-2; AF 2-3, AF 634). For purposes of the IRC, if workers have to leave the farm in order to make deliveries, they are not performing services “on a farm.”¹⁵ Moreover, the Employer did not establish that it is an operator of a farm on which more than one-half of the commodities harvested were produced. To the contrary, the Employer has specifically identified itself as a labor contractor that provides labor service to growers.¹⁶ (AF 605, 639-50). As the Employer is not a farmer, but a labor contractor, its workers would not be “in the employ of the operator of a farm.” Consequently, the transportation services performed by its workers cannot constitute “agricultural labor” under the IRC.¹⁷ Accordingly, I find that the truck driver duties described in the Employer’s job opportunity do not fall within the statutory definition of “agricultural labor” under the IRC and therefore, do not qualify as “agricultural labor or services” pursuant to this avenue.

¹⁰ 20 C.F.R. § 655.103(c).

¹¹ 26 U.S.C. § 3121(g).

¹² The definition of “agricultural labor” also includes several other types activities not implicated here, such as cultivating the soil, raising and harvesting the commodity, and maintaining a farm. *See* 26 U.S.C. § 3121(g).

¹³ 20 C.F.R. § 655.102(c)(1)(D).

¹⁴ 26 C.F.R. § 31.3121(g)-1(e)(2).

¹⁵ *See Blas Cadena Jr.*, 2019-TLC-00062 (July 12, 2019) (holding that a labor contractor’s job opportunity that included transportation to an off-site facility did not meet the IRC’s definition of agricultural labor).

¹⁶ The Employer appears to argue that, because fixed-site growers own and operate the delivery locations, the truck driving activities take place “on a farm” for H-2A purposes. (*Employer’s Brief* at 11). However, the relevant inquiry is not whether the delivery locations are “farms,” but rather, whether the Employer is a “farmer” such that delivery services constitute “agricultural labor,” as defined by the IRC.

¹⁷ *See, e.g., ATP Agri-Services, Inc.*, 2019-TLC 00050 (May 17, 2019) (holding that a labor contractor’s job opportunity did not meet the IRC’s definition of agricultural labor because the contractor’s H-2A workers would not be “in the employ of the operator of a farm”); *see also* Rev. Rul. 56-35, 1956-1 C.B. 453 (1956) (holding that services performed by a partnership’s employees were not “in the employ of the operator of a farm” and, therefore, the “services performed in the employ of the partnership, a custom operator, in handling and packing the lettuce, hauling it to the cooling plant ... do not constitute ‘agricultural labor’”).

2. “Agriculture” under Section 3(f) of the FLSA¹⁸

The Employer may still demonstrate that the truck driving duties of its workers qualify as “agricultural labor or services” by showing that such activities fall within the FLSA’s definition of “agriculture.”¹⁹ The FLSA’s definition of “agriculture” recognizes “two distinct branches” of agriculture: (1) primary agriculture and (2) secondary agriculture.²⁰ Primary agriculture refers to “farming in all its branches.”²¹ Included in this definition is the “growing and harvesting of any agricultural or horticultural commodities”²² whether performed by employees of a farmer or a third party.²³ Meanwhile, secondary agriculture is defined as “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.”²⁴ Practices such as delivery or transportation are included in the secondary type of agriculture so long employees of a farmer perform the services.²⁵ Thus, it follows that, when performed by the workers of a labor contractor, transportation and delivery activities do not fall within the meaning of “agriculture,” as defined by the FLSA.

Based on the foregoing rules, I find that the workers’ duties of “weeding, trimming, and harvesting work” are encompassed in the definition of “primary” agriculture. (*Employer’s Brief*, at 3). The regulations specifically include vegetables within the definition of “agriculture or horticulture commodities,” and the harvesting workers’ responsibilities of picking, weeding, and trimming on the farms falls under the statutory definition. (*Id.*).

The question remains, however, whether the truck driving activities outlined in the Employer’s Application are included in this definition. In this case, the Employer is an agricultural labor contractor and has identified itself as the sole employer of the H-2A workers sought. (AF 552-671, 639-650). Thus, as a labor contractor, the workers would be its employees, not the employees of the farmers, or fixed-site growers. Nevertheless, the Employer contends that the transportation of commodities from the fields to off-site storage areas by its workers qualifies as “secondary” agriculture because it is incidental to “its” farming operations. However, “work performed by a labor contractor is not work performed ‘by a farmer’ but for farmers.”²⁶ The Employer is not a farmer. Accordingly, despite being incidental to farming operations, the transportation duties of its workers do not constitute “secondary” agriculture. Therefore, I find that the truck driver duties enumerated in the Employer’s Application do not fall within the definition of “agriculture” under Section 3(f) of the FLSA.

¹⁸ Located at 29 U.S.C. 203(f).

¹⁹ 20 C.F.R. § 655.103(c).

²⁰ 29 U.S.C. § 203(f); *see also* 29 C.F.R. § 780.105.

²¹ 29 C.F.R. § 780.105.

²² “Agricultural or horticultural commodities” include “[g]rains, forage crops, fruits, vegetables, nuts, sugar crops, fiber crops, tobacco, and nursery products.” 29 C.F.R. § 780.112.

²³ 29 C.F.R. § 780.105(b).

²⁴ 29 U.S.C. 203(f); *see also* 29 C.F.R. § 780.105 (*emphasis added*).

²⁵ *See* 29 C.F.R. § 780.152.

²⁶ 29 C.F.R. § 780.133.

3. “Employer” of H-2A Workers

Additionally, the Employer asserts that, because it is a joint employer under unrelated California state law, the H-2A workers sought should be considered employees of both the Employer and the fixed-site growers.²⁷ However, as explained below, the California state law definitions of “employer” and “employee” have no effect on what constitutes an employer-employee relationship for purposes of H-2A certification.

Unless a statute dictates otherwise, when Congress uses the term “employee,” it intends to describe the conventional master-servant relationship as understood by the common law doctrine of agency.²⁸ Because Congress did not define “employer” and “employee” in the INA, the common law definition of those terms govern whether an entity is an H-2A employer or joint employer.²⁹ Thus, to the extent other statutory definitions differ from the common law, they do not apply in the H-2A context.³⁰ Accordingly, I find that the definition of “joint employers” under section 2810.3(b) of the California Labor Code is neither applicable nor relevant to determining whether an entity is an “employer” of H-2A workers.³¹

CONCLUSION

As analyzed above, the truck driver duties contained in the Employer’s Application do not qualify as “agricultural labor or services” under 20 C.F.R. § 655.103(c). In particular, its workers are not “in the employ of the operator of a farm,” and, therefore, truck driving activities fail to satisfy the IRC’s definition of “agricultural labor.” Moreover, as transportation and delivery services are incidental to the primary farming operations and are not performed by a

²⁷ The CO contends that, pursuant to 20 C.F.R. § 655.171, the undersigned cannot consider this argument on administrative review because it was not presented to the CO prior to appeal. (*Certifying Officer’s Brief* at 13). However, this argument was first raised by the Employer in its response to the NOD and, thus, is not a “new issue,” as defined by 20 C.F.R. § 655.171. (AF 111, n. 1). Therefore, I find that this argument was properly presented to CO and part of the record prior to the Employer’s appeal request.

²⁸ *Nationwide Mut. Ins. Co. v. Dardem*, 503 U.S. 318, 322-23 (1992) (holding that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms).

²⁹ See 20 C.F.R. § 655.103(b); see also *Temporary Agricultural Employment of H-2A nonimmigrants in the United States*, 84 Fed. Reg. 36,168-01, 36,174 (July 26, 2019) (“Controlling judicial and administrative decisions provide that to the extent a federal statute does not define the term employer, the common law of agency governs whether an entity is an employer”).

³⁰ 84 Fed. Reg. at 36,174-75 (“The Department additionally notes that the current H-2A program definitions of employer and joint employment, as well as those the Department proposes herein, are different from the definitions of ‘employer,’ ‘employee,’ and ‘employ’ in the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA) and the definition of ‘employ’ in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.* (MSPA). Thus, the statutory definitions in the FLSA and MSPA that determine the existence of an employment relationship or joint employer status neither apply nor are relevant to the determination of whether an entity is an H-2A employer or joint employer”).

³¹ Additionally, as persuasively argued by the CO, the explicit language used in the contracts involved in this case specifically disclaim any joint employment relationship between the parties (i.e. see AF 639-650). These contracts state that “[Fresh Harvest] is an independent contractor and no joint employer relationship may result from Grower’s use of [Fresh Harvest’s] H-2A workers.” (*Id.*).

farmer or on a farm, they fail to satisfy the FLSA's definition of agriculture. Therefore, because the Employer has not shown that the truck driver duties included in its job opportunity constitute "agricultural labor or services," it has failed to meet the requirements of 20 C.F.R. § 655.103(c). Accordingly, I find that the CO properly denied certification.

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**.

PETER B. SILVAIN, JR.
Administrative Law Judge