



Issue Date: 10 February 2020

OALJ Case No.: 2020-TLC-00033
ETA Case No.: H-300-19337-176578

In the Matter of:

JLC FARMS, INC.,
Employer.

Appearance: David J. Stefany, Esquire
Allen, Norton & Blue, P.A.
Tampa, Florida
For the Employer

Sarah M. Tunney, Esquire and Susannah Maltz, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Patricia J. Daum
Administrative Law Judge

DECISION AND ORDER REVERSING THE CERTIFYING OFFICER'S DENIAL

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 H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On January 14, 2020, JLC Farms, Inc. ("Employer"), filed a request for a *de novo* administrative hearing pursuant to 20 C.F.R. § 655.171(b) to review the Certifying Officer's (CO) January 8, 2020 Denial determination in regard to Employer's temporary alien agricultural labor certification (H-2A) application. The undersigned received the Administrative File (AF) on January 22, 2020. A telephone conference call with Counsel for the parties was conducted on January 23, 2020, in which the parties agreed to a telephone hearing on this matter which was set for January 29, 2020. On January 23, 2020, an order was issued clarifying filing deadlines and scheduling the January 29, 2020 hearing.

On January 29, 2020, the undersigned conducted a telephonic hearing where all parties were represented by counsel and afforded the opportunity to present witnesses, introduce exhibits, and cross-examine. This decision and order is based on the record consisting of the Administrative File forwarded by the U.S. Department of Labor, Employment and Training Administration (“ETA”), the parties’ exhibits, and the testimony offered at the hearing.¹ Furthermore, this Decision and Order is issued within ten calendar days of the hearing as required by the regulation at 20 C.F.R. §655.171(b)(1)(iii).

BACKGROUND

On December 3, 2019, the Employer as an “association-agent” filed an *H-2A Application for Temporary Employment Certification* including ETA Forms 9142A, 790, 790A and Addendums. AF 98-118. The Employer’s application requested certification for two H-2A workers under the occupational title “Heavy and Tractor Trailer Truck Drivers” for the period beginning January 16, 2020 and ending June 1, 2020. AF 99, 106. The nature of temporary need was listed as seasonal. No statement of temporary need was included with the application. Employer requested waiver of the regulatory time period due to an emergency situation as defined by 20 C.F.R. 655.134.

In the attached emergency justification statement Employer states:

20 CFR 655.134(a) permits an employer to file a petition under the “Emergency Situation” so long as they did not utilize the program in prior years and for other good and substantial cause. JLC Farms has purchased and owns one-hundred percent of the fruit contained in the attached request. For many year, JLC Farms has relied on FLC’s to haul their harvested crops. CNPC has recently denied hauling petitions, thereby causing an emergency for JLC Farms whose harvested crop will rot in the field if not hauled in a timely manner.

On December 9, 2019, the Certifying Officer (CO) issued a Notice of Deficiency (NOD) listing one deficiency in the Employer’s application. AF 87-92. The deficiency noted by the CO was that the job opportunity did not fall within the definition of “agricultural labor or services” in accordance with 20 C.F.R. §655.103(c).

The CO explained that for purposes of the H-2A program pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), agricultural services or labor must meet one of the following criteria:

- 1) agricultural labor as defined and applied in Section 3121(g) of the Internal Revenue Code of 1986 (IRC) found at 26 U.S.C. 3121(g);
- 2) agriculture as defined and applied in Section 3(f) of the Fair Labor Standards Act of 1938 (FLSA) found at 29 U.S.C. 203(f);

¹ References to the Administrative File are designated as “AF,” Employer’s Exhibits as “EX,” Certifying Officer’s Exhibits as “CX” and references to the transcript are designated as TR.

- 3) the pressing of apples for cider on a farm; or
- 4) logging employment.

Specifically, the CO noted the job opportunity described in the Employer's application stated the following:

Must be able to work in groves and fields where crops will be collected and hauled to designated work-sites. The employer may assign the worker to different tasks on any day or multiple task during the same day as to the sole judgment of the employer. Workers may be required to perform work in the fields necessary to fulfill the requirements of hauling and driving duties. Work Environment: Essential Functions and Basic Duties: Drivers will haul harvested crops from fields/groves to designated processing and packing facilities. All Drivers will work only for the employer listed in the ETA 790. The driving and hauling will consist of driving the semi-tractor to the work-sites contained in this application where the employer has purchased and owns 100% of the fruit, attaching the tractor trailer and driving the tractor trailer to the processing or packing facilities identified in the petition. In addition, drivers may be required to place empty trailers in the fields/groves and/or relocate trailers throughout the designated work-sites contained in this petition. Daily job assignments will be made by, and at the sole discretion of, the Company Farm Managers as the progression of the growing season dictates. Workers must perform the assigned work as described in ETA 790, and work at the assigned Company locations. Workers may not switch work at Company locations without specific authorization of the Farm manager. At the direction of the Farm Manager and/or Supervisor workers may be re-assigned to different farm locations within the company at various times of the work day and/or on different days.

AF 91-92.

The CO noted that the Employer had represented that, the driving and hauling will consist of driving the semi-tractor to the work-sites contained in this application where the employer has purchased and owns 100% of the fruit, attaching the tractor trailer and driving the tractor trailer to the processing or packing facilities identified in the petition. *Id.* In this regard, the CO stated that the purchasing of the commodity to be hauled does not render the employer a fixed site grower for purposes of this analysis. The CO determined that the crop hauling duties do not appear to meet the definition of agricultural labor or services as defined by H-2A regulations, citing a Wage and Hour Division Opinion Letter, FLSA2019-5 (Apr. 2, 2019), which is available at: https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_02_05_FLSA.pdf in which packing is classified as secondary agriculture. AF 92. Accordingly the CO determined that additional information is needed from the Association-agent before its application could be processed. *Id.*

The CO stated that a modification of the Employer's application was necessary because the Employer had not established that it is a fixed site grower of the commodity to be hauled. The CO directed the Employer to provide documentation proving that the employer owns or operates all of the groves where the citrus was grown or harvested. AF 92.

The Employer responded to the Notice of Deficiency by letter dated December 12, 2019, enclosing a revised itinerary listing all work-sites owned and controlled by the employer. The Employer stated that it was providing written permission to remove all other groves previously listed on the ETA Form 790 and ETA Form 9142. AF 85-86.

The CO informed Employer on December 18, 2019 that the requested amendments to its application had been made and provided a copy of the amended application to the Employer. AF. 65-84. A second email was sent to Employer on December 19, 2019 confirming that requested amendments to its application had been made with a copy of the amended application. AF 46-64.

In another email dated December 19, 2019, the CO acknowledged Employer's response to the Notice of Deficiency but informed Employer that a deficiency still remained. The CO stated that the Employer had failed to provide the requested documentation demonstrating that it owned or operated the worksites in its application. The CO directed that the employer submit evidence of ownership or a lease agreement for each worksite location. AF 44-45.

The Employer responded by email dated December 19, 2019. AF 20-43. The Employer represented that it owned or controlled the following worksites:

- 5168 Mineral Branch Rd, Zolfo Springs, FL 33890
- 187 S. Barlow Rd, Wauchula, FL 33873
- 3040 Shontag Rd., Wauchula, FL 33873
- Snyder Road, Sebring, FL 33870
- 4416 Fish Branch Rd., Zolfo Springs, FL 33890
- 18655 CR 675 Parrish, FL 34219

Employer represented that it attached contracts between these groves and JLC Farms stating that the citrus was being conveyed from the named grower to JLC Farms, Inc. Three contracts were signed by Jason Carlton as President and Manager of JLC Farms, Inc., while the contract pertaining to the Rutland Grove was signed by Jason Carlton as President of JLC Farms Inc. and Ben Albritton, on behalf of "Rutland 202, a Florida General Partnership."

On January 8, 2020, the CO issued a denial of Employer's H-2A application. AF 8-16. The CO noted that an email was sent to the Employer on December 19, 2019 requesting documentation that supported Employer's claim that it owned or operated the worksites remaining in its application. The CO concluded that Employer's response did not overcome this deficiency. AF 11. The CO reiterated its conclusion that the job opportunity did not qualify as agricultural labor as defined and applied in Section 3121(g) of the Internal Revenue Code of 1986 or as agriculture as defined and applied in Section 3(f) of the Fair Labor Standards Act of 1938 (FLSA). The CO noted that although the Employer had submitted evidence that it owned the fruit it would be hauling this did not render the employer a fixed site grower for purposes of

the analysis under the FLSA definition of agriculture. AF 13. Further, the CO noted that Employer had failed to establish that it is “the operator of the farms” for the time period requested, and that it has “produced more than one-half of the commodity with respect to which such service is performed,” as required under the Internal Revenue definition of agricultural labor. Accordingly the CO determined that the employer has failed to establish that the job opportunity fell within the definition of agricultural labor and therefore its H-2A application was denied. AF 15-16.

On January 14, 2020, Employer timely requested a de novo hearing on the CO’s Denial of its H-2A application. AF 1-7.

EVIDENCE AND ARGUMENT

A de novo hearing in this matter was held on January 29, 2020. The Administrative File (CX 1) was admitted without objection. TR 7. CO Exhibits (CX) 2-4 and Employer Exhibits (EX) 1-2 were admitted without objection. TR 7-8. Employer Exhibits 3-15 were contained in the Administrative file which had previously been admitted. TR 8. A joint stipulation of facts submitted by the parties on January 29, 2020 was also admitted. TR 9.

The Employer called Jason Carlton to testify on behalf of the Employer. Certifying Officer John Rotterman was called to testify on behalf of the Certifying Officer.

A. Summary of Testimony

Jason Carlton

Jason Carlton testified that he is the president of JLC Farms, a position that he has held for about 20 years. TR 16. His responsibilities in this position are to oversee the day to day operations of JLC Farms. He stated that JLC Farms is primarily a citrus harvest, haul, caretaking operation. TR 17. JLC Farms has a membership in certain agricultural business associations which include Florida Fruit and Vegetable Association and Florida Citrus Mutual. Florida Fruit and Vegetable Association assisted with the current H-2A application. *Id.* JLC Farms currently employs 20 year- round employees. The operations of JLC Farms are primarily seasonal, other than the year-round citrus grove caretaking operation which includes spraying, mowing, irrigating and fertilizing. TR 18. JLC Farms provides these grove caretaking services to the six worksites identified in the current H-2A application, and has provided the services to the six entities since the properties were purchased which ranged between 4 and 15 years ago.² TR 18-19. Carlton testified that JLC owns and maintains equipment to conduct its grove caretaking responsibilities which include tractors, mowers, sprayers, disks (cultivating tools), spreaders, and trucks. TR 19. He stated that only JLC and no other entity conducts the stated caretaking responsibilities on the six citrus grove properties at issue in the current H-2A petition. JLC

² Jason Carlton is a part owner in all of the six groves and is apparently referring to his purchase of these groves as opposed to that of JLC Farms.

Farms is responsible for 100% of the grove caretaking responsibilities for the six worksites in the application. TR 20-21.

Carlton testified that JLC Farms conducts the harvesting activities through another entity which he owns which is Citrus Harvesting, Inc. TR 21. JLC Farms hauls the harvested citrus from the farm to the processor. TR 21-22. He confirmed that the two H-2A employees that JLC Farms seeks to hire through its current H-2A application would haul citrus from the six worksites identified in the revised petition. No other entity performs hauling services to these six citrus grove properties. JLC owns semi-trucks and semi-trailers designed to haul citrus. TR 22.

Equipment used for harvesting includes a specialized hydraulic boom type truck which is called a "goat" or a citrus loader, as well as plastic tubs and ladders. This equipment is owned by JLC Farms as opposed to Citrus Harvesting, Inc. TR 22-23. Carlton confirmed that the only entity which provides equipment or labor to engage in grove care taking responsibilities at the six citrus grove properties is JLC Farms. JLC Farms is also the only entity that owns the harvesting equipment. TR 23.

On cross examination the Solicitor questioned Carlton about Employer's original Form 790 (CX 3) prior to its revisions which limited its application to only six worksites. Carlton confirmed that Employer originally requested workers to haul citrus from 14 locations, but its revised application seeks workers to haul from only the six worksites remaining in its application. TR 25-27. He stated that JLC Farms would have to hire other seasonal workers to haul the citrus from the worksites removed from the petition to the processing facilities, although he admitted they were struggling to hire qualified domestic workers. TR 27. He confirmed that he did not have shared ownership with the other worksites, although JLC Farms had entered into fruit purchase contracts with those groves to purchase their crop. TR 28. He stated that JLC Farms also has contracts to haul citrus from other worksites that were not listed on the original 790, and which it does not have an ownership interest, in either the land or the fruit. He stated that JLC Farms or its shareholders do not have an ownership interest in the land of any of the other groves that are not currently listed in the application. TR 28-29. He testified that there may be about fifteen worksites where JLC has no ownership interest in the land or the fruit, but with whom JLC Farms still contracts to haul citrus. He confirmed that roughly half of JLC's hauling business is done for employers with which it has neither an ownership interest in the land, nor the fruit. TR 30. He stated that JLC Farms also provides a limited amount (less than 1 percent) of interstate hauling services, outside the state of Florida, involving vegetable hauling. TR 30. He also stated that they may haul a load of goods other than citrus or vegetables but it would just be incidental and nothing regular or contracted or continual. TR 31. He confirmed that JLC Farms is registered with the Federal Motor Carrier Safety Administration and has a U.S. Department of Transportation number. TR 31-32.

Carlton testified that approximately 10% of JLC Farms revenue comes from its hauling operation. TR 33. Carlton testified that he and his brother Jake commonly own JLC Farms and also commonly own Citrus Harvesting, Inc. Citrus Harvesting, Inc. is the entity that pays the harvest workers and manages the day to day work tasks of the harvest workers. TR 35. He stated that JLC Farms as an entity does not own a farm, but there is ownership commonality between his brother and himself who own JLC Farms, and who are also at least partial owners of

the six citrus grove properties that are listed as worksites in the current application. TR 36. He testified that the H-2A employees that JLC Farms seeks to hire would not be the employees of any of the six entities that own the six worksites, because these entities do not have employees or equipment, nor are they set up to operate as an employer. TR 36-37. Those entities only have title to the land where the farming is conducted and rely on JLC Farms to operate the farm. *Id.* He testified that the H-2A workers who would be hauling the citrus would have to leave the farm in order to transport the citrus to the processing facilities. TR 37. The distance between the farms and the processing facilities would average about 50 miles. TR 38. Carlton confirmed that JLC Farms owns all of the equipment and provides all of the labor for grove care management that is required for the six properties in its H-2A application. JLC Farms also owns the harvesting equipment but the labor is provided through Citrus Harvesting, Inc. for the harvesting duties. TR 38.

On redirect Carlton clarified that by entering into fruit purchase contracts, JLC Farms and its clients gain an advantage in negotiating better prices for the sale of the fruit to the processing plants. TR 39. He also confirmed that the H-2A workers that JLC Farms seeks to employ would only be hauling the citrus harvested from the six properties in the revised petition to the first point of process. TR 40. Carlton estimated that its business revenue derived from hauling from the groves where JLC Farms has no ownership interest, in either the land or the fruit, is less than 10 percent. TR 40. In the prior year eight H-2A drivers were used to haul for the properties where JLC had no ownership interest. These H-2A drivers were employed by Citrus Harvesting Inc. JLC Farms employs about 13 seasonal drivers in total. TR 41-43.

John Rotterman

John Rotterman testified that he is a certifying officer (CO) and has held this position since December of 2009. He confirmed that he was the certifying officer who reviewed the Employer's H-2A application. TR 43-44. He testified generally to the criteria for certification in the H-2A program noting that an employer must demonstrate that the labor will be agricultural labor or services, that it will be performed on a temporary or seasonal basis, as well as other requirements found in the applicable federal regulations, including timeliness, wage assurances, recruitment etc. TR 44.

The Solicitor questioned Rotterman about the original H-2A application of JLC Farms. TR 45-47. Rotterman stated, based on the original application submitted, he determined that employer had not shown it was a fixed site employer on the basis that it had purchased the fruit which it would be hauling. TR 47. He testified that purchasing the fruit is not sufficient for an employer to be considered a fixed site employer, noting that an H-2A labor contractor is not the farmer for purposes of the IRC or the FLSA definitions. TR 47-48. Therefore a Notice of Deficiency was issued. TR 48. In response to the Notice of Deficiency the employer removed a number of groves from the application. TR 49. Rotterman determined that the application was still deficient and requested additional information. He ultimately denied the application finding that the employer had not established that it was the fixed-site grower, nor that it was eligible as a labor contractor seeking to hire agricultural labor. TR 50.

On cross examination Rotterman stated that he focused not so much on the owners of the revised list of groves, but rather on his understanding that “the workers were not going to be employed by the farmer.” TR 52. He testified that if the six groves “were properly viewed as owners or operators, then [they could hire H-2A workers to haul their citrus].” TR 52-53. Rotterman attempted to clarify his position:

The H-2A program deals with two different types of employers. Either fixed-site employers or H-2A labor contractors. If an employer is an H-2A labor contractor that means that that entity does not own or operate the land. Then there’s a more narrow set of duties that they are able to source under the regulation as compared to a fixed-site employer.

TR 53-54.

He also testified that “operations is a term of art in the regulation” and that it is determined based on a very fact specific analysis. TR 55. He stated, “It would be my position that operation is defined more broadly than simply harvesting or caretaking.” *Id.* Rotterman responded “No” to the question of whether one would need to own the land “in order to operate as a fixed site employer.” *Id.*

Rotterman noted, “JLC Farms as a corporation does not own or operate the land. They are providing services to an entity that does.” TR 56. Rotterman testified that he did not formulate an idea of who operated those groves, but concluded, “it was apparent that it wasn’t the filer, and that whatever shared ownership may have been present between the entities did not make the filer an operator.” He added that his conclusion was made in consultation with counsel as to where operation might begin as a legal concept. *Id.* Rotterman further elaborated on how in general he would address the question of whether an employer is an “operator.” He stated:

So the way the regulation is written, it says owned or operate. And that elevates operation to something close to ownership. That is, that the operator is acting in a great many capacities, whether that’s exposure to risk, labor, farm management, crop management, as a farmer would. Whenever one of these scenarios comes up, we do bring counsel in as soon as we are aware that that’s an issue to make sure that we are conducting the analysis correctly.

TR 57.

Rotterman also pointed out that more regulatory requirements are placed upon H-2A labor contractors. *Id.* He further stated that the term “operation extends to essentially acting as though they were the farmer.” TR 58.

C. Argument of the Parties

At the close of the telephonic hearing the parties were granted leave to file written closing briefs on or before February 4, 2020. Both parties filed timely post hearing briefs.

1. *The Employer*

In its brief the Employer argues that farm operators are “fixed site employers” and thus can utilize the H-2A program to conduct agricultural labor or services on their farm properties. Employer asserts that JLC Farms is the sole operator of the fixed-site citrus grove properties where the drivers would perform the work and all of the six grove properties are fixed-site locations in which JLC Farms’ shareholders have an ownership interest.

Employer argues that the CO’s position that JLC Farms is an H-2A contractor is incorrect as matter of fact and law as JLC is the exclusive operator of the citrus grove properties listed in its revised work itinerary and thus is the *de facto* “farmer” of these properties for purposes of the H-2A program. Employer states that the undisputed evidence confirms that since each of these six farms were purchased, all farming activities performed on any of these six citrus grove properties were conducted by employees of JLC Farms except for the harvesting of the fruit, which is conducted by employees of Citrus Harvesting, an affiliated company of JLC Farms, under the direction of JLC Farms and using equipment owned by JLC Farms.

Employer asserts that under the FLSA definition of agriculture JLC Farms is the “farmer” of the citrus grove properties which its shareholders directly or indirectly own. Employer notes that the shareholders of JLC have an ownership interest in the land as opposed to the entity, JLC Farms, directly owning the land. However, Employer states that the CO conceded that JLC Farms does not have to own the land on which agricultural practices are performed in order to be deemed the “farmer” for purposes of the agricultural labor analysis. Employer states JLC Farms directly or indirectly performs all farming operations necessary for producing a successful citrus crop from the six properties. JLC Farms argues that it is not only a farmer, but the *only* farmer. Employer notes that all employees performing any agricultural service on these citrus grove properties are employed by JLC Farms and/or are using JLC Farms’ equipment.

Employer notes that under the FLSA regulations the term “farmer” is an occupational title, and to qualify for this title, the employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a “farmer” is engaged in. 29 C.F. R. §780.130. Employer notes that JLC Farms and its employees exclusively conduct all grove caretaking activities on these properties to care for and maintain the citrus groves, to maximize the yield of fruit cultivated from each property to harvest and haul the citrus fruit and to sell the harvested fruit for the best price obtainable.³ Employer notes that Jason Carlton testified:

So, these [six] groves have no employees. They rely on JLC Farms and Citrus Harvesting to perform all of the tasks that would be required to be performed for such an endeavor.

³ Employer also cites Wage-Hour Opinions for the position that the Department of Labor has long opined that grove care contractors are considered “farmers” as opposed to farm labor contractors, since they perform all farming operations for fruit grove owners required prior to harvest. Wage-Hour Opinion No. 1070 (April 8, 1970) (confirming that employees engaged in such tasks as cultivation, fertilization, pruning and spraying of citrus groves are engaged in primary “agriculture” under the FLSA); Wage-Hour Opinion No. 1575 (April 23, 1984) (confirming treatment of grove care operators as “agricultural employers” exempt from registration requirements of farm labor contractors under the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”).

TR 37.

For the same reasons noted above, the Employer argues that JLC Farms is the sole operator of the farms/groves for purposes of the IRC definition of “agricultural labor or services” and in addition 100% of the fruit being hauled by these H-2a drivers will come from these farming operations. Accordingly Employer asserts that the job opportunity in its H-2A application satisfies both the IRC and the FLSA definitions of agricultural labor.

2. *The Certifying Officer*

The Solicitor submitted a closing brief on behalf of the CO urging that I affirm the CO’s denial of JLC Farm’s H-2A application because JLC had failed to prove that it is the “owner or operator” of the farms sites as required under the IRC definition of agricultural labor, or that it is a “farmer” as required by the FLSA definition of agriculture.

The Solicitor argues initially that the Employer has failed to prove that it is a “fixed site employer,” arguing essentially that Employer is an H-2A labor contractor because it has failed to prove that it “owns or operates” a farm as required under the regulations to be considered a fixed site employer.

The Solicitor states the record does not show that JLC Farms owns any of the six groves from which JLC Farms’ employees would haul citrus under the current application. She asserts that the ownership interest of Jason Carlton in the six corporate entities is insufficient to constitute ownership by JLC Farms. In this regard she argues that the common ownership of Jason Carlton in all entities should not be considered an “integrated family owned agricultural enterprise” as proposed by the Employer, who has cited the case of *Ares v. Manuel Diaz Farms, Inc.*, 318 F.3d 1054 (11th Cir. 2003) for this proposition. She attempts to distinguish this case from the current situation on several bases including that both Manuel Diaz Farms and the related landscaping company were both owned solely by Manuel Diaz as opposed to the differently titled entities in the current case.

The Solicitor also argues that JLC Farms has failed to prove that it is the operator of the six groves in its application on the basis that it performs grove care management services and hauling at the grove. She argues that a fixed site operator maintains “full control” of a farm citing *Patout Equipment Co.*, 2015-TLC-00063 (Aug. 17, 2015) (finding that an employer was not an operator, but rather an H-2ALC where it did not have “full control over the farm but rather [was] limited in operation to the harvesting and hauling process”). She argues that JLC Farms’ work is limited to grove care management and hauling and to the extent that the groves themselves do not have employees, they contract with entities like JLC Farms and Citrus Harvesting to perform the work. Thus she argues this is insufficient to establish JLC Farms is a fixed site operator. She states this is evidenced by the fact that Citrus Harvesting does not contract with JLC Farms to do harvesting work, it contracts with the grove owners. (Although this is alleged by the Solicitor there is no support in the record that this is the case.)

The Solicitor further maintains that the fruit purchase contracts do not establish or support that the grove owners have relinquished management control to JLC Farms, arguing in part that the grove owners have the power to convey the land if they wish.

In addition, the Solicitor argues that the fact JLC Farms engages in activities at various locations, and not just one fixed location, and that JLC Farms also performs the same services for groves that it removed from the application, following the issuance of the Notice of Deficiency, contradicts its claim that it is a fixed site employer.

The Solicitor argues generally that the facts of this case do not support that JLC Farms is the “farmer” under the FLSA or the “owner or operator” under the IRC and accordingly urges affirmance of the CO’s denial of Employer’s H-2A application on this basis.

ISSUE

Whether the Employer has met its burden of establishing that its need for agricultural services or labor as stated in its current H-2A application falls within the definition of agricultural labor as defined and applied in Section 3121(g) of the Internal Revenue Code of 1986 or as agriculture as defined and applied in Section 3(f) of the Fair Labor Standards Act of 1938 (FLSA) as required under 20 C.F.R. § 655.103(c).

SCOPE OF REVIEW

The current case arises from the Employer’s request for a de novo hearing in regard to the CO’s denial of the Employer’s H-2A application. The regulation pertaining to appeals of the CO’s determinations in H-2A labor certification matters states, in cases where a de novo hearing has been requested, that the procedures in 29 C.F.R. Part 18 apply and that the ALJ will schedule a hearing within 5 business days after receipt of the administrative file, if the employer so requests. 20 C.F.R. §655.171(b)(ii).

In pertinent part, the regulations further provide that after a de novo hearing “the ALJ must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken...The Decision of the ALJ is the final decision of the Secretary.” 20 C.F.R. §655.171(b)(2).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2A claims, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. Where a request for de novo hearing is made the Tribunal must “independently determine if the employer has established eligibility for temporary labor certification.” *David Stock*, 2016-TLC-0040 (May 6, 2016).

DISCUSSION

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and
- (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

The H-2A regulations define agricultural labor or services as any of the following:

- 1) Agricultural labor as defined and applied in Section 3121(g) of the Internal Revenue Code of 1986 (IRC) at 26 U.S.C. §3121 (g);
- 2) Agriculture as defined and applied in Section 3 (f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. §203(f);
- 3) The pressing of apples for cider on a farm;
- 4) Logging employment.

In the instant case Employer requests two H-2A workers to haul harvested citrus from fields/groves to designated processing and packing facilities. Employer does not assert that its job opportunity involves the pressing of apples for cider, or logging employment. Accordingly, it is Employer's burden to prove that the job opportunity falls within the definition of agricultural labor, as stated in the Internal Revenue Code (IRC), or agriculture, as defined in the Fair Labor Standards Act (FLSA). 20 C.F.R. §655.161(a).

As noted by the CO in the Notice of Deficiency, the FLSA definition of agriculture provides that:

[A]griculture 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.

29 U.S.C. 203(f)

As explained in federal regulations the FLSA definition of agriculture recognizes two 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 (explaining the application of 29 U.S.C. § 203(f)).

The work of a driver in transporting an agricultural product covered by Section 203(f) of the FLSA is properly considered secondary farming and not primary farming. *See Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 300, 97 S. Ct. 576, 579 (1977). In *Bayside Enterprises* the United State Supreme Court explained:

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”

4429 U.S. at 300-01, 97 S. Ct at 579.

As the job opportunity in this case involves hauling citrus off the farm to the processor, this work involves secondary agriculture and the Employer would need to show it was the “farmer” in order for the FLSA definition to apply.

Under the IRC definition, agricultural labor 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.

20 C.F.R. §655.103(c).

Thus under the IRC definition of agricultural labor, as would be pertinent to this case, under Section D above, the Employer would have to prove that it is the “operator of [the] farm... in handling, packing, packaging, processing... or delivering to storage” and that “such operator produced more than one-half of the commodity with respect to which such service is performed.”

The CO determined that although Employer had represented that it had purchased the fruit the requested H-2A workers would be hauling, this would not render the Employer a fixed site grower for purposes of the agricultural labor analysis. The CO directed that the Employer demonstrate that it owns or operates all of the groves where the citrus was grown and harvested.

In response to the CO’s request for modification of the application Employer revised its list of job sites to six groves which it asserted that it owned and operated. The Employer also offered documentation including certain contracts between the six groves and JLC Farms, which appeared to show some commonality of ownership between all entities, which were owned at least in part by Jason Carlton. The CO in its final determination concluded that the Employer’s response to the Notice of Deficiency had failed to present sufficient documentation that the Employer was the operator of the six worksites.

It should be noted that under the H-2A regulations, “[a]n occupation included in either statutory definition [FLSA or IRC] is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition.” 20 C.F.R. §655.103(c). Thus an Employer may establish that its job opportunity falls within either the FLSA definition of agriculture, or the IRC definition of agricultural labor, but need not prove that it meets both definitions, although as a practical matter the two have considerable overlap.

At the hearing in this case, Employer presented the testimony of Jason Carlton relative to the issue of whether JLC Farms, Inc. is the “farmer” for purposes of the FLSA definition of agriculture or the “owner or operator” of the six groves that are contained in its amended application for purposes of the IRC definition of agricultural labor.

Jason Carlton testified that he is the president of JLC Farms which he owns with his brother, Jake Carlton. TR 16, 35, 36. The record shows that he is also the president of all of the entities that own the six worksites in the applications and is a partial owner of all six worksites consisting of 5168 Mineral Branch Rd. Zolfo Springs FL, 187 S. Barlow Rd. Wauchula FL, 3040 Shontag Rd. Wauchula FL, Snyder Rd, Sebring FL, 4416 Fish Branch Rd, Zolfo Springs FL and 18655 CR 675, Parrish FL. AF 20-43, TR 35, 36. *See also* Joint Stip. 1, 7-10.

Carlton testified that JLC Farms provides year-round grove caretaking services to the six worksites identified in the current H-2A application, and has provided these services to the six groves since the properties were purchased which ranged between 4 and 15 years ago.⁴ He noted that the normal grove caretaking is year-round and includes spraying mowing, irrigating, and fertilizing. TR 18-19. Carlton testified that JLC owns and maintains equipment to conduct its grove caretaking responsibilities which include tractors, mowers, sprayers, disks (cultivating tools), spreaders, and trucks. TR 19. He stated that only JLC and no other entity conducts the stated caretaking responsibilities on the six citrus grove properties at issue in the current H-2A petition. JLC Farms is responsible for 100% of the grove caretaking responsibilities for the six worksites in the application. TR 20-21.

Carlton confirmed that the only entity which provides equipment or labor to engage in grove care taking responsibilities at the six citrus grove properties is JLC Farms. JLC Farms is also the only entity that owns the harvesting equipment. TR 23. Carlton also pointed out that the six grove properties, in which he shares ownership, and which are the designated worksites in the current H-2A application, have no employees nor do they own equipment, nor are they set up to operate as an employer. TR 36-37.

The undersigned finds that the facts as presented in the record and in the uncontroverted testimony of Jason Carlton support that JLC Farms is the operator of the six worksites currently in the H-2A application. JLC performs all of the necessary agricultural procedures to produce the citrus grown on these farms. There is no other entity that could arguably be the operator of the farm. Even assuming that the corporate entities that own the six worksites are independent of JLC Farms (although this is not clear in light of the commonality of ownership between JLC Farms and the record title holders) the title holding entities have no employees and own no agricultural equipment. Thus there is no evidence in the record that these entities actually operate the citrus groves even though they hold title to the land. TR 36-37.

As noted by both the Employer and the Solicitor in their briefs, under the FLSA regulations, the term “farmer” is an occupational title, and to qualify for this title, the employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a

⁴ Jason Carlton is a part owner in all of the six groves and is apparently referring to his purchase of these groves as opposed to that of JLC Farms. However, his testimony that, “We’ve maintained these properties ever since they were purchased by us,” lends support to the position that JLC and the entities holding title, the Carlton Group etc. were operated as an integrated family owned enterprise, as proposed by Employer in its January 13, 2020 request for de novo hearing in this matter. See AF 1.

“farmer” is engaged in. 29 C.F. R. §780.130.⁵ JLC Farms and its employees exclusively conduct all grove caretaking activities on these properties (including spraying, mowing, irrigating and fertilizing) necessary to care for and maintain the citrus groves. There can be very little debate that the grove caretaking and management operations exclusively performed by JLC Farms and its employees would be those performed by the individual ordinarily regarded as a “farmer.” The only alternative would be to conclude, albeit unreasonable, that there is no farmer who produces citrus on these six groves.

The Solicitor argues extensively in her brief that the title holding entities have all managerial and decision making control over the operation of the citrus groves and hold the risk of loss. There is no evidence in the record which establishes these assertions. The Solicitor looks to the provisions of the “fruit purchase contracts” and apparently assumes that these represent the sole and exclusive terms of agreement between JLC Farms and the title holders of the six worksites. There is no evidence in the record to support this claim. Carlton testified that JLC Farms enters into fruit purchase agreements with multiple citrus growers in order to gain an advantage in negotiating better prices for the sale of the fruit to the processing plants. TR 39. The relationship between the entities where JLC Farms has no ownership interest in the land, performs no grove caretaking responsibilities, and merely enters into a fruit purchase agreement is clearly different than the relationship JLC Farms has with the six groves which are the subject of its current H-2A application.

The undersigned finds, consistent with the CO’s position in the final denial letter, that the fruit purchase agreements do not establish that the Employer is an owner or operator for purposes of the IRC definition of agricultural labor (nor a farmer under the FLSA). The Employer also concedes this point in its brief.⁶

However, the Employer’s status as the operator and “farmer” of the six farms/groves in the H-2A application is established by the testimony of Jason Carlton. As noted above, Carlton testified that JLC Farms provides year-round grove caretaking services to the six worksites identified in the current H-2A application, and has provided these services to the six groves since the properties were purchased which ranged between 4 and 15 years ago. TR 18-19. Carlton testified that JLC owns and maintains equipment to conduct its grove caretaking responsibilities which include tractors, mowers, sprayers, disks (cultivating tools), spreaders, and trucks. TR 19. He stated that only JLC and no other entity conducts the stated caretaking responsibilities on the six citrus grove properties at issue in the current H-2A petition. JLC Farms is responsible for 100% of the grove caretaking responsibilities for the six worksites in the application. TR 20-21.

The pertinent provision of the IRC definition of agricultural labor provides as follows:

⁵ 29 C.F.R. §780.130 states, “Among other things, a practice must be performed by a farmer or on a farm in order to come within the secondary portion of the definition of ‘agriculture.’ No precise lines can be drawn which will serve to delimit the term ‘farmer’ in all cases. Essentially, however, the term is an occupational title and the employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a ‘farmer’ is engaged in order to qualify for the title. If this test is met, it is immaterial for what purpose he engages in farming or whether farming is his sole occupation...”

⁶ See Employer’s brief at 14-15.

(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;

Thus in order for the hauling services, which are the subject of the current H-2A application, to fall within the IRC definition of agricultural labor, Employer must prove not only that it is the operator of a farm but also that it produces “more than one-half of the commodity with respect to which such service is performed.” Carlton testified that only JLC and no other entity conducts the stated caretaking responsibilities on the six citrus grove properties at issue in the current H-2A petition. He stated that JLC Farms is responsible for 100% of the grove caretaking responsibilities for the six worksites in the application. TR 20-21. Thus this testimony supports that the Employer produces 100% of the commodity with respect to which the hauling services will be performed by the two requested H-2A workers.

Accordingly for the foregoing reasons the undersigned finds that Employer has met its burden of proving that the job opportunity contained in its H-2A application falls within the IRC definition of agricultural labor.

Although Employer has established that it is the operator of the farm in relation to the six farm/grove sites contained in its current H-2A application as amended, it should be noted that the relationship of JLC Farms to the other groves to which it provides hauling services would be consistent with that of a farm labor contractor. Carlton testified that the eight groves that were removed from its application were properties that it did not have an ownership interest in, and for the most part, did not provide grove caretaking and maintenance responsibilities.⁷ As noted by Carlton, JLC Farms entered into fruit purchase agreements with these groves and provided hauling services between the groves and the processing plant. Testimony also supports that JLC Farms had a farm labor contractor relationship with approximately fifteen other groves in which it had no ownership interest in either the groves or the fruit, but merely provided hauling services on a contract basis.

Recent BALCA decisions support that drivers employed by entities other than the operator of a farm, in hauling agricultural commodities to a processor, are acting as farm labor contractors and do not fall within the definition of providing agricultural labor as defined by the IRC because the farm labor contractor does not own or operate the farm, nor are the drivers engaged in secondary agriculture as defined by the FLSA as they are not employed by the farmer. *See Double J Harvesting*, 2019-TLC-00057 (Jul 2, 2019) (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 (May 17, 2019)(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); *Blas Cadena Jr. DBA Cadena Trucking*, 2019-TLC-00062 (Jul 12, 2019).

⁷ Carlton testified that JLC Farms may provide some services to two of these groves but did not provide all grove caretaking responsibilities as it does in relation to the six worksites in the current application.

JLC Farms stands in a different relationship to the six groves contained in its application, where it has proven that it is in fact the operator, than it does with the other groves where it is performing the work of a farm labor contractor. Consequently, JLC Farms may use the H-2A program to source its seasonal or temporary labor need for drivers to haul citrus to a first point of processing, in the current application while it is not entitled to use the H-2A program for similar labor needs as a farm labor contractor. During his testimony Carlton confirmed that Employer originally requested workers to haul citrus from 14 locations, but its revised application seeks workers to haul from only the six worksites remaining in its application. TR 25-27. He stated that he understood JLC Farms would have to hire other seasonal workers to haul the citrus from the worksites removed from the current H-2A application. TR 27. See also Joint Stipulation 12 which states “JLC Farms also entered into Fruit Purchase Contracts with citrus growers in which its shareholders do not have an ownership interest. However, the H-2A workers for which JLC Farms seeks temporary labor certification would not perform hauling services from the properties of these other citrus growers.”

CONCLUSION

For the reasons stated above, I find that that Employer has met its burden of proving that the job opportunity for two drivers to haul harvested citrus from the six worksites contained in its H-2A application meets the definition of agricultural labor under the regulatory definition. I have based my decision on my review of the administrative file, as well as the evidence, testimony, and argument presented at the January 29, 2020 hearing, and closing briefs. Therefore, the CO’s denial of the Employer’s application for temporary labor certification for two H-2A workers under the occupational title “Heavy and Tractor Trailer Truck Drivers” for the period beginning January 16, 2020 and ending June 1, 2020 is reversed

ORDER

Accordingly, for the foregoing reasons, the CO’s denial of this H-2A application, is **REVERSED**, and this matter is **REMANDED** to the CO for additional processing including regulatory recruitment.

PATRICIA J. DAUM
Administrative Law Judge