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Issue Date: 16 April 2020

OALJ Case No.: 2020-TLC-00061
ETA Case No.: H-300-20059-361974

In the Matter of:

PORTER AVIATION,
Employer.

Certifying Officer: Lynette Wills
Chicago National Processing Center

Appearances: Robert McCubbin
H2 Visa Consultants, LLC
Garden Ridge, Texas
For the Employer

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Washington, D.C.
For the Certifying Officer

Before: John P. Sellers, III
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. 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 28, 2020, Porter Aviation ("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; (4) Attachments to Form ETA 790; and (5) and an Emergency Filing – Waiver Request. (Administrative File "AF" 29-58.) The Employer is an "agricultural chemical/fertilizer custom spray application spray business" that provides "aerial and ground crop spraying services to local" and "regional crop producers." (AF 47.) The Employer sought certification for one agricultural chemical/fertilizer mixer[1] from April 15, 2020 until November 15, 2020, based on an alleged seasonal need during that period. (AF 37, 47.) In pertinent part, the job opportunity for which the Employer sought H-2A workers included off-farm agricultural chemical/fertilizer mixing and airplane care. (AF 37.) The Employer provided the following description of such responsibilities:

> Unload trucks delivering agricultural chemicals and fertilizers. Mix chemicals and/or fertilizers to proper proportions as instructed. Load agricultural spraying equipment such as aircraft and ground sprayers with agricultural chemicals/fertilizers and water. Service airplane and ground sprayers between loads. Maintain a clean and organized hangar/grounds and repair agricultural spraying equipment as necessary. Perform basic farming duties for the production of the employers own corn and soybean commodities, such as operating farming equipment to plant or harvest crops, servicing equipment and shop work.

(AF 37.)

In its Application and supporting documentation, the Employer noted that it is "not a farming operation," does not "own and/or control" the land on which the fertilizer is sprayed, and does not require workers to perform work directly upon producers' fields. (AF 47.) Rather, the Employer asserted that the work to be performed would consist of loading, unloading, and mixing agricultural chemicals and fertilizers at the Employer's own facilities. (*Id.*) The Employer listed Hillsboro Municipal Airport as the worksite address on ETA Form 790. (AF 38.) The Employer does not identify itself as a labor contractor because the workers would work exclusively for the Employer, rather than requiring workers to perform work directly on the producers' land. (AF 47.)

By letter dated March 6, 2020, the CO issued a Notice of Deficiency ("NOD"). (AF 17-23.) The NOD outlined two deficiencies in the Employer's Application, including that the Employer failed to establish that the job opportunity qualifies as "agricultural labor or services" for purposes of the H-2A program. (AF 22.) The CO informed the Employer that, in accordance

[1] SOC (O*Net/OES) occupation title "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" and code 45-2092.02. (AF 30.)

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 18.)

On March 19, 2020, the Employer submitted a response to the CO's NOD. (AF 13-16.) In its letter, the Employer first noted that the municipal airport listed on its Application is a secondary worksite address; the primary worksite address is a farming operation owned and operated by the Employer. (AF 14.) The Employer stated that the workday would begin and end at the Employer's farming operation, but "most" of the workday would be spent at the airport hangar. (*Id.*) The Employer further stated that eighty percent of the work would be performed at the airport hangar, with only twenty percent at the Employer's farming operation address. (*Id.*) Specifically, the loading, unloading, and mixing of the agricultural chemicals/fertilizer as well as the servicing and reloading of airplanes would occur at the airplane hangar. (*Id.*) The Employer stated that the H-2A worker would not load or unload fertilizer directly on any farmer's lands. (*Id.*) The Employer further alleged that it is "a small farming operation in itself," and workers will perform "duties in order to produce corn and soybeans directly" on its land. (AF 16.) Thus, the Employer alleged that it "is also a farmer" and the work will be "performed directly 'on a farm,'" under the regulatory definition of agricultural labor. (*Id*.)

On March 30, 2020, the CO denied the Employer's Application. (AF 6-12.) The CO found that the Employer's response failed to demonstrate that the agricultural chemical/fertilizer mixing, loading, and unloading duties were agricultural in nature. In particular, the CO noted that the Employer's description of the duties failed to satisfy the definition of "agricultural labor or services" under 20 C.F.R. § 655.103(c).

In a letter dated April 4, 2020, the Employer appealed the CO's decision and requested expedited administrative review before OALJ. (AF 2-4.) This matter was assigned to me on April 6, 2020. On April 8, 2020, I issued a Notice of Docketing and Order Setting Briefing Schedule, acknowledging the Employer's appeal and giving the parties three business days after receipt of the Administrative File to file briefs. On April 9, 2020, I 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. 20 C.F.R. § 655.171(a). On April 14, 2020, counsel for the CO ("the Solicitor") filed a brief, urging the undersigned to affirm the CO's decision to deny the Employer's Application for temporary labor certification. The Employer did not file a brief.

DISCUSSION AND APPLICABLE LAW

The Employer bears the burden to establish eligibility 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 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.

20 C.F.R. § 655.103(c).

The CO found that the Employer's job description does not meet the definition of agricultural labor or services defined by the H-2A regulations. According to the CO, the agricultural chemicals/fertilizer mixer duties outlined by the Employer do not constitute "agricultural labor or services" under 20 C.F.R. § 655.103(c). As the Employer's job opportunity contained nonagricultural duties, thereby rendering the entire job opportunity ineligible for temporary labor certification, the CO denied the Employer's Application

In this case, the Employer does not allege that its H-2A worker would engage in pressing apples or logging employment. Thus, for the Employer's Application to be approved, the agricultural chemicals/fertilizer mixer duties must qualify as "agricultural labor or services" as defined by either "agricultural labor" under the Internal Revenue Code ("IRC") or "agriculture" under the Fair Labor Standards Act ("FLSA"). 20 C.F.R. § 655.103(c). As explained below, I find that the agricultural chemicals/fertilizer mixer duties 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 IRC

Section 3121(g) of the IRC defines "agricultural labor," in relevant part, 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." 20 C.F.R. § 655.102(c)(1)(D). 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." 6 C.F.R. § 31.3121(g)-1(e)(2).

Under this definition, the job opportunity in the Employer's Application is not "agricultural labor" because it does not involve performing a service "[i]n the employ of the operator of a farm." 26 U.S.C. § 3121(g). In its attachments to Form ETA 790, the Employer stated that it is "not a farming operation," does not "own and/or control" the land on which the fertilizer is sprayed, and does not require workers to perform work directly upon producers' fields. (AF 47.) In contrast, in response to the CO's NOD, the Employer alleged that it was a "small farming operation." (AF 16.) I find that the Employer's initial assertion that it is not a farm conflicts with its later assertion that it is a farming operation.

Moreover, although the Employer stated that the H-2A worker's workday would begin and end at its own "farming operation," it conceded that approximately eighty percent of the

work would occur off a farm, specifically at the Employer's airplane hangar. (AF 14.) Further, the Employer conceded that mixing, loading, and unloading of the agricultural chemicals and fertilizer are unrelated to the Employer's own farming operation. (AF 47.) Instead, the agricultural chemicals/fertilizer to be mixed, loaded, and unloaded is for application on fields that are not owned or operated by the Employer. Therefore, as eighty percent of the work is to be performed in an airport hangar, the Employer has failed to show that the services for which it seeks temporary labor certification will be primarily performed on a farm or in the employ of the operator of a farm. Moreover, the Employer did not establish that it is an operator on which more than one-half of the commodities harvested were produced. Thus, the job opportunity does not satisfy the IRC's definition of agricultural labor.

2. "Agriculture" under Section 3(f) of the FSLA[2]

The Employer may still demonstrate that the agricultural chemical and fertilizer mixing duties of its H-2A worker qualify as "agricultural labor or services" by showing that such activities fall within the FLSA's definition of "agriculture." 20 C.F.R. § 655.103(c). The FLSA's definition of "agriculture" recognizes "two distinct branches" of agriculture: (1) primary agriculture, and (2) secondary agriculture. 29 U.S.C. § 203(f); *see also* 29 C.F.R. § 780.105.

Primary agriculture refers to "farming in all its branches." 29 C.F.R. § 780.105. Included in this definition is the "growing and harvesting of any agricultural or horticultural commodities" whether performed by employees of a farmer or a third party. 29 C.F.R. § 780.105(b). At least eighty percent of the H-2A worker's duties consist of mixing, loading, and unloading agricultural chemicals and fertilizers. These activities are not "primary" agriculture, as the activities do not involve growing or harvesting agricultural commodities. The services for which the Employer seeks temporary labor certification therefore do not meet the definition of "primary" agriculture under the FLSA. Thus, the services must meet the definition of "secondary" agriculture in order to fall within FLSA's definition of agriculture.

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." 29 U.S.C. 203(f); *see also* 29 C.F.R. § 780.105 (*emphasis added*). Under 29 C.F.R. § 780.131, in order to be considered a "farmer," "an employer must undertake farming operations of such scope and significance as to constitute a distinct activity, for the purpose of yielding a farm product." An employer is not a farmer if he simply "engages in some actual farming operation of the type specified in section 3(f)." (*Id.*) Generally, a farmer performs his farming operations on land that that is "owned, leased, or controlled by him and devoted to his own use." (*Id.*) Moreover, "one who merely performs services or supplies materials for farmers in return for compensation… is not a 'farmer.'" 29 C.F.R. § 780.132.

While, in response to the CO's NOD, the Employer stated that it owns and operates a small farming operation, it has not established that its farming operation is of "such scope and significance as to constitute a distinct activity" under 29 C.F.R. § 780.131. The Employer primarily identifies itself as an "agricultural chemical/fertilizer custom spray application

[2] Located at 29 U.S.C. 203(f).

business." (AF 47.) Eighty percent of the H-2A worker's time would consist of working with the Employer's spray application business in an airport hangar, not its farming operation. (*Id.*) The Employer has conceded that it does not own or control the land on which his company sprays agricultural chemicals and fertilizers. (*Id.*) Furthermore, the Employer does not undertake the agricultural spraying for the purpose of yielding a farm product, but instead provides the service for compensation. (*Id.*) Therefore, I find that the services for which the Employer seeks temporary labor certification is not performed by a farmer.

Under the regulations implementing the FLSA, if a practice is not performed by a farmer, it must, among other things, be performed "on a farm" to come within the secondary meaning of "agriculture" in section 3(f). 29 C.F.R. § 780.134. Under 29 C.F.R. § 780.136, even though "an employee may work on several farms during a workweek, he is regarded as employed 'on a farm' for the entire workweek if his work on each farm pertains solely to farming operations on that farm. The fact that a minor and incidental part of the work of such an employee occurs off the farm will not affect this conclusion." While pilots engaged in aerial spraying of crops are considered to be employed in practices performed on a farm, other employees of crop dusting firms who are employed away from the farm are not considered to be employed on a farm. 29 C.F.R. § 780.136; *Wirtz v. Boyls*, 230 F. Supp. 246 (S.D. Tex. 1964) (holding employees of a crop dusting firm are not employed in agriculture unless their work is done on a farm), aff'd 352 F.2d 63 (5th Cir. 1965). In this case, the Employer concedes that eighty percent of the work will occur in an airport hangar, not on a farm. I do not consider eighty percent to be a "minor or incidental" part of the work. Moreover, the Employer stated that the H-2A worker would not engage in aerial spraying and would remain at the hangar to mix, load, and unload the agricultural chemicals and fertilizer. (AF 15.) Therefore, I find that the work to be performed at the airport hangar is not "on a farm" under the FLSA.

Because the Employer has failed to establish that the services for which it seeks temporary labor certification are either primary or secondary agriculture, I find that the job opportunity does not satisfy the FLSA's definition of agriculture.

ORDER

It is hereby **ORDERED** that the CO's decision denying the Employer's Application for temporary labor certification is **AFFIRMED**.

JOHN P. SELLERS, III
ADMINISTRATIVE LAW JUDGE