U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 April 2020

OALJ Case No.: 2020-TLC-00056

ETA Case No.: H-300-20017-260634

In the Matter of

PAMELA ANN ELLIOTT,
Employer.

Appearance:
Edward Waldman, Esq.
For the Certifying Officer

Before: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act[1] and its implementing regulations.[2] The temporary alien agricultural labor certification (H-2A) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

The standard of review in H-2A expedited administrative review cases is limited. The CO's decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[3] When an employer requests administrative review under 20 C.F.R. § 655.171(a), the Administrative Law Judge may consider only the written record and any written submissions from the parties—and may not consider

[1] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188.
[2] 20 C.F.R. Part 655, Subpart B.
[3] *Rosalba Gonzales*, 2017-TLC-00028 (Oct. 11, 2017); *J & V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).

new evidence. The burden of proof to establish eligibility for a labor certification is on the petitioning employer.[4]

On 19 Mar 20 Employer filed a request for expedited administrative review of the Final Determination issued by the Certifying Officer (CO). I received the Administrative File (AF) from the Employment and Training Administration (ETA) on 30 Mar 20. The Solicitor, on behalf of the CO, submitted a brief on 3 Apr 20. Employer did not submit a brief. This decision and order is based on the written record and brief received.

STATEMENT OF THE CASE

The Administrative File

On 7 Feb 20 Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (Application).[5] Employer's Application requested certification for 4 Aquaculture Farmworkers beginning 1 Apr 20 and ending 30 Nov 20.[6]

On 14 Feb 20 the CO issued a Notice of Deficiency[7] informing Employer that its Application and/or job order failed to meet the criteria for acceptance, stating that the job opportunity must consist of agricultural labor or services.[8] The CO noted that based on the job location (waters of the Chesapeake Bay) and the commodity harvested ("wild commodities" under the FLSA[9]), the regulations appeared to preclude access to the H-2A program. It noted that the requested workers would be performing their duties in the waters of the Chesapeake Bay, including:[10]

> Temporary/Seasonal full-time aquaculture farm workers needed for crab season. Job duties include repair traps, paint traps, bait traps, set traps, check traps, remove crabs/peelers from traps, sort crabs to remove by products and place in containers for shedding. Minimum job requirements include baiting, setting, checking pots, and sorting crabs for shedding at a rate of 80 pots per hour. Shed, sort and package crabs for retail sale. Work involves frequent stooping, lifting of traps and crates, loading of product off boat and onto truck. Perform extensive physical activities aboard a moving vessel using repetitive body movements such as balancing, lifting up to 50lbs, twisting, bending, shaking, pushing and pulling traps. Possible contact with insects and jellyfish. Able to work outside in inclement weather conditions from extreme heat to cold and rain . . .

The CO noted that Employer had not established that the workers would be employed on a farm.

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[4] 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011).
[5] AF 65-70.
[6] AF 73.
[7] AF 52-53.
[8] 20 C.F.R. 655.103(c).
[9] 29 C.F.R. 780.114.
[10] AF 55-56.

> Specifically, while the workers may be involved in the harvesting an agricultural commodity as that is defined by the IRC, based on the location where the employer's workers will be performing the job duties, the open waters of the Chesapeake Bay Cambridge, it does not appear that they will be doing so on a farm. Therefore, Employer has failed to establish that this job opportunity is eligible for the H-2A program under the IRC definition of agricultural labor.[11]

Employer was given the opportunity to modify the Application by submitting information or documentation to establish that its job opportunity qualifies as agricultural under the FLSA and/or IRC based on its worksite location in the waters of the Chesapeake Bay.[12]

On 17 Feb 20 Employer responded, providing the address of the "farm property" located on the tributary/waters of the Chesapeake Bay as 5389 Cassons Neck Road, Cambridge, Maryland. Employer noted that the cages, traps, containers, floats, etc. housing the crabs would be placed in the tributary/waters of the Chesapeake Bay in connection with the farm property, and authorized the CO to change the work location of the job opportunity to reflect the farm property.[13] Employer argued the job opportunity would require the Aquacultural Workers to check traps/cages, place "peelers" in other containers as they are molting/shedding, and remove the soft shell crabs once they have shedded their outer shell. It notes those duties are completed under controlled conditions of tanks, containers, traps, and cages placed in the tributary/waters of the Chesapeake Bay. Employer also included a Wikipedia definition of "aquaculture" and a description of the Maryland Blue Crab from MarylandCrab.com.[14] Employer attached a Real Property Data Search listing the use of the land as "RESIDENTIAL", but noting it is a "Waterfront" address;[15] an aerial view of the property;[16] and a diagram/map of the property parcel.[17]

On 12 Mar 20 the CO issued a denial letter to Employer. The reason for denial was given as "Employer did not demonstrate its job opportunity qualifies as agricultural labor as outlined at 20 C.F.R. 655.103(c)."[18] It explained that the job opportunity did not meet FLSA requirements because:

> The employer indicated that the work site is not on a farm, but rather is located in the waters of the Chesapeake Bay Cambridge in Maryland. The implementing regulations of the FLSA establish that the commodity harvested in this application precludes access to the H-2A program under the FLSA, *see* 29 C.F.R. § 780.114 Wild commodities, "[e]mployees engaged in the gathering or harvesting of wild commodities such as

[11] AF 57.
[12] *Id.*
[13] AF 47.
[14] AF 46-47.
[15] AF 11, 48.
[16] AF 13, 49.
[17] AF 14, 50.
[18] AF 22.

> mosses, wild rice, burls and laurel plants, the trapping of wild animals, or the appropriation of minerals and other uncultivated products from the soil are not employed in "the production, cultivation, growing, and harvesting of agricultural or horticultural commodities...."
>
> Here, the employer's workers would be involved in the trapping of "wild" crabs in a non-farm location. Both the worksite and the nature of the work render the job opportunity ineligible for the H-2A program under the FLSA.

It then explained why the job opportunity did not meet requirements under the IRC:

> In implementing the IRC, the IRS has explained that "a natural environment which is . . . used primarily for fishing . . . or trapping, is not a 'farm' and services performed . . . in taking . . . animals or wildlife therefrom, do not constitute 'agricultural labor' within the meaning of section 3121(g) [of the Internal Revenue Code]." IRS Rev. Rul. 57-217, 1957-1 C.B. 343 (1957); *see also Araiza-Calzada v. Webb's Seafood, Inc.*, 49 F.Supp.3d 1001, 1006 (N.D. Fla. 2014) (finding "agricultural labor" under section 3121(g) is tied to work on a "farm" and, unlike other provisions of the IRC, does not cover catching, taking, or harvesting fish, shellfish, crustacean, and other forms of aquatic life).
>
> [Employer] has not established that its workers will be employed on a farm. Rather, its workers will be working in a "natural environment," to "trap" wild crabs. Therefore, [Employer] has failed to establish that this job opportunity is eligible for the H-2A program under the IRC definition of agricultural labor.

Employer's Request for Administrative Review

On 17 Mar 20 Employer requested expedited administrative review of the denial. It argued that the location of the job location was, in fact, a farm, since it had provided information from the Maryland Taxation and Assessment office, a state agency, identifying Employer as the owner of the land. It also argued the aerial view showing a large building, pond area, wharf area, boat dock, equipment, etc. and showing the property to be waterfront on a tributary of the Chesapeake Bay proves that the property is a farm.

Additionally, it argues that the CO's 'wild commodity' analysis is misplaced, and the CO must fundamentally misunderstand the nature of Employer's business. It argues that oyster harvesting is currently being accepted under the H-2A process and is nearly identical in nature to the soft-shell crab harvesting process. It then provides further explanation of the nature of its business in harvesting soft shell crabs.[19] It additionally argued:

[19] As this is an administrative review, any information that was not provided to the CO prior to the denial will not be considered. 20 C.F.R. § 655.171(a).

> Finally, the DOL references *Araiza-Calzada v. Webb Seafood, Inc.*,[20] as support for their denial. In this legal decision, the plaintiffs were seeking relief under the Migrant and Seasonal Agricultural Workers Protection Act (AWPA) in relation to the H-2B program not the H-2A program. The plaintiff's agreed they were not working on a farm and their work was not agricultural in nature, (the plaintiffs were shucking oysters, a process that takes place after the oysters [are] grown, cultivated, harvested and sold. This process is much like picking a crab, peeling a shrimp, or scaling a fish). The plaintiffs were arguing they were protected under the AWPA and desired relief, not that they wanted the courts to find they were working on a farm. In fact, the court in their decision stated, in order to fall under the definition of 'agricultural employment,' the work must be performed 'on a farm.' The plaintiffs clearly admitted they did not work on a farm. This employer's job opportunity does provide for work on a farm. Although the DOL may be more familiar with conventional farming in the sense of growing and cultivating crops, Merriam-Webster defines the term "farm" in multiple ways, one which includes a tract of water reserved for the artificial cultivation of some aquatic life form, a fish farm, (see attachment). In addition, Dictionary.com similarly identifies farm as land or water devoted to the raising of animals, fish, plants, etc., (see attachment).[21]

It concludes that The DOL continues to provide their own interpretation of FLSA and IRC and fails to seek broader understanding of the employer's business operations and acceptable definitions of the term "farm" by Merriam Webster and Dictionary.com.

The CO's Brief

On 3 Apr 20 the CO filed a brief requesting that BALCA affirm the denial. The CO argued that Employer failed to carry its burden to prove that the job opportunity qualified as "agricultural labor or services" under 20 C.F.R. § 655.103(c). Under this definition, "agricultural labor or services" is defined as: (1) agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986;[22] (2) agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA);[23] the pressing of apples for cider on a farm; or logging employment.

> Employer's job opportunity includes baiting, setting, checking, and lifting traps; removing crabs and peelers from the traps; and performing "extensive physical activities aboard a moving vessel."[24] Additionally, Employer notes that its "workers compensation insurance is covered through crew insurance as the work is performed in the waters of the Chesapeake Bay aboard the vessel."[25]

[20] 49 F. Supp.3d 1001, 1006 (N.D. FLA 2014).
[21] As this is an administrative review, any information that was not provided to the CO prior to the denial will not be considered. 20 C.F.R. § 655.171(a).
[22] 26 U.S.C. 3121(g).
[23] 29 U.S.C. 203(f).
[24] AF 32.
[25] AF 89.

Under the IRC, "a natural environment which is . . . used primarily for fishing . . . or trapping, is not a 'farm' and services performed . . . in taking . . . animals or wildlife therefrom, do not constitute 'agricultural labor' within the meaning of section 3121(g) [of the Internal Revenue Code],"[26] Similarly, because the workers sought would be engaged in trapping "wild commodities," and not employed in "the production, cultivation, growing, and harvesting of agricultural or horticultural commodities," the job opportunity also does not constitute "agriculture" under section 3(f) of the FLSA.[27] Since Employer's job opportunity does not meet either of the required definitions, it does not constitute "agricultural or labor services."

The CO concludes that it properly denied the Application because Employer's workers would be working in a 'natural environment' to 'trap' wild crabs."[28]

Law

IRC Definition of "Agricultural labor"[29]

"Agricultural labor" means:

- "all service performed . . . [o]n a farm . . . in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity,"
  - with examples of "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."

and,

- "all service performed . . . 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."

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

FLSA Definition of "Agriculture"[30]

Section 655.103(c) defines the term "agriculture" to mean "farming in all its branches" including:

[26] IRS Rev. Rul. 57-217, 1957-1 C.B. 343 (1957).

[27] *Compare* 29 C.F.R. § 780.114 ("wild commodities") *and* 29 C.F.R. § 708.117-125 ("production, cultivation, growing" and "harvesting"). Section 780.114 states that employees engaged in "the gathering or harvesting of wild commodities such as mosses, wild rice, burls and laurel plants, the trapping of wild animals . . . are not employed in 'the production, cultivation, growing, and harvesting of agricultural or horticultural commodities.'" Sections 780.117 and 118 define "production, cultivation, and growing," and "harvesting," respectively, sections 780.119-125 elaborate on those terms.

[28] AF 16, 21, 22.

[29] 26 U.S.C. 3121(g); 20 C.F.R. § 655.103(c)(1)(i).

[30] 29 U.S.C. 203(f); 20 C.F.R. § 655.103(c)(1)(ii)(2).

- "cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, fur-bearing animals, or poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations,"
  - with examples of such practices including "preparation for market, delivery to storage or to market or to carriers for transportation to market."

DISCUSSION

In order to bring nonimmigrant workers to the U.S. to perform agricultural work, an employer must first demonstrate to the Secretary that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.[31]

The H-2A regulations provide statutory definitions of "agricultural labor," "agriculture," and "farm" that may be less inclusive than other dictionary definitions of the same words. Statutory definitions are important because they suggest that legislatures intended for a term to have a specific meaning that might differ in important ways from a word's common usage.

Since Employer is not involved in the pressing of apples or logging activities, in order to qualify for the H-2A program, the job duties must fall under "agricultural labor" as defined and applied in section 3121(g) of the Internal Revenue Code (IRC) of 1986,[32] or "agriculture" as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (FLSA).[33]

> Under the IRC, "a natural environment which is . . . used primarily for fishing . . . or trapping, is not a 'farm' and services performed . . . in taking . . . animals or wildlife therefrom, do not constitute 'agricultural labor' within the meaning of section 3121(g) [of the Internal Revenue Code]."[34]
>
> Similarly, because the workers sought would be engaged in trapping "wild commodities," and not employed in "the production, cultivation, growing, and harvesting of agricultural or horticultural commodities," the job opportunity also does not constitute "agriculture" under section 3(f) of the FLSA.[35]

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[31] 20 C.F.R. § 655.103(a).
[32] 26 U.S.C. 3121(g).
[33] 29 U.S.C. 203(f).
[34] IRS Rev. Rul. 57-217, 1957-1 C.B. 343 (1957).
[35] *Compare* 29 C.F.R. § 780.114 ("wild commodities") *and* 29 C.F.R. § 708.117-125 ("production, cultivation, growing" and "harvesting"). Section 780.114 states that employees engaged in "the gathering or harvesting of wild commodities such as mosses, wild rice, burls and laurel plants, the trapping of wild animals . . . are not employed in 'the production, cultivation, growing, and harvesting of agricultural or horticultural commodities.'"

Additionally, under the IRC, the specific statutory definition of "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

The CO, using all the information provided by Employer prior to the denial, found that the parcel of land Employer intended to provide as the job site did not qualify as a "farm" and that the job duties did not qualify as "agricultural labor" or "agriculture" under either the FLSA or IRC definitions.

It is employer's burden to establish eligibility for labor certification. From the information provided to the CO, I cannot find the denial decision to be arbitrary, capricious, or otherwise not in accordance with law. I affirm the CO's denial of the Application for 4 aquaculture workers.

PATRICK M. ROSENOW
Acting District Chief Administrative Law Judge

Covington, Louisiana

Sections 780.117 and 118 define "production, cultivation, and growing," and "harvesting," respectively, sections 780.119-125 elaborate on those terms.