In the Matter of:

HEARN CATTLE COMPANY,
Employer.

Appearance:  Wendel V. Hall, Esquire
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Washington, D.C.
For the Employer

Anthony Tran, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before:  Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER

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 December 8, 2020, Hearn Cattle Company (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) December 7, 2020 Denial determination in regard to Employer’s temporary alien agricultural labor certification (H-2A) application. The undersigned received the Administrative File (AF) on December 14, 2020. A telephone conference call with Counsel for the parties was conducted on December 14, 2020, in which the parties agreed to a telephone hearing date of December 18, 2020. On December 15, 2020, the undersigned issued an order that clarified filing deadlines and formally scheduled the December 18, 2020 hearing. On December 18, 2020, the parties jointly requested a continuance of this hearing, which was rescheduled to December 30, 2020, at the request of the parties.
On December 30, 2020, the undersigned conducted a telephonic hearing in this matter, where all parties were represented by counsel, and likewise, were afforded the opportunity to present and cross-examine witnesses, as well as introduce exhibits. 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. 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 October 28, 2020, the Employer filed an H-2A Application for Temporary Employment Certification on ETA Form 9142. The Employer’s application requested certification for 10 agricultural equipment operators under the SOC code 45-2091.00 (Agricultural Equipment Operators) for the period beginning December 15, 2020 and ending March 15, 2021. The operator indicated that it was operating as an H-2A contractor and the nature of temporary need was listed as seasonal. The job duties were listed as follows:

Perform primary duties on a farm for a farmer like: Drive/operate equipment such as GPS auto-steer systems, industrial sized loader, and skid-steer loader for liquid manure management; attach implements; perform removal, pumping, application, and treatment of manure on farms. Clean and maintain irrigation ditches on farms. Load trucks with manure on employer owned feedlot and apply to farm fields listed in Addendum B.

Secondary duties include: Record information about liquid manure management. Repair, lubricate, and maintain equipment and pumps.

Employer’s application included copies of three contracts with entities to provide these services. Two of the contracts entered into by Hearn Cattle Company were with Hearn Farms, Inc. and Hearn Cattle Company. The third was with Haas, Inc. Brent Hearn signed the contracts on behalf of Hearn Cattle Company, as well as on behalf of Hearn Farms Inc.

On November 3, 2020, the Certifying Officer (CO) issued a Notice of Deficiency (NOD) listing three deficiencies in the Employer’s application. The first 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(d). The second deficiency stated that the Employer had failed to establish the job opportunity as seasonal or temporary pursuant to 20 C.F.R. § 655.103(d). An additional the third deficiency noted by the CO has been remedied, and therefore, will not be addressed in this decision.

References to the Administrative File are designated as “AF,” Employer’s Exhibits as “EX,” Certifying Officer’s Exhibits as “CX” and references to the hearing transcript are designated as TR.
In regard to the first deficiency, the CO stated that in accordance with Departmental regulations at 20 C.F.R. § 655.103(c) the job opportunity must consist of agricultural labor or services. 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);
3) the pressing of apples for cider on a farm; or
4) logging employment.

The CO noted that the Employer has requested 10 agricultural equipment operators “to assist in among other job duties, hauling and applying manure.” The CO determined that the activity of “hauling manure” does not appear to qualify as agricultural for H-2A program purposes. The CO explained:

[Under the FLSA definition of agriculture “cultivation, growing, and harvesting of any agricultural or horticultural commodities constitute “primary” agriculture, and qualify as agricultural activities for H-2A program purposes, whether the workers performing the activities are employees of the farmer or a third party. In contrast, “transportation to storage or to market or to carriers for transportation to market practices” may constitute “secondary” agriculture only when those activities are performed “by a farmer or on a farm as an incident to or in conjunction with such farming operations.” See 20 CFR 655.103(c)(2) (emphasis added). The regulations implementing FLSA clarify that when this type of transportation occurs off of the farm it does not constitute agriculture if it is performed by employees of anyone other than the farmer. See 29 CFR 780.156.

AF 45.

The CO pointed out that since Hearn Cattle Company is an H-2A labor contractor and is the sole employer of the workers sought, the workers are not employees of the individual farms that contract with the farm labor contractor. Further, as Hearn Cattle is not the “farmer” it has not established that its employee will transport manure as incident to or in conjunction with its farming operations as is necessary to show the hauling and application of manure qualifies as “secondary” agriculture.

The CO also determined that Employer did not meet the eligibility standard under the IRC. The CO pointed out that under the IRC definition only workers who are “in the employ of the operator of a farm” when “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”—and “such operator produced more than one-half of the commodity with respect to which such service is performed”—are engaged in agricultural labor, citing 20 CFR 655.103(c)(1)(D).
The CO concluded that Employer failed to establish that it is the operator of the farms for the time period requested and it has not established that it has “produced more than one half of the commodity with respect to which such service is performed” on a pay period basis, as the CO found is necessary for the work its employees perform to qualify as agricultural for H-2A program purposes under the IRC provision. The CO stated “[r]ather the farmers produce the manure that the employer seeks to transport.” Accordingly the CO determined that Employer had failed to establish that the “hauling and applying manure duties” in its application had met the IRC definition of agricultural.

The CO directed the Employer to submit information or documentation to establish that its job opportunities qualify as agricultural under the FLSA and/or IRC. Specifically the CO directed the employer to “identify the source of the manure to be transported and applied.” AF 46. In the alternative the CO noted that Employer could authorize withdrawal of its application.

In regard to the second deficiency, the CO stated that the Employer had not sufficiently demonstrated the job opportunity was temporary or seasonal in nature citing 20 C.F.R. § 655.103(d), which defines temporary or seasonal need as employment that is “tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.” AF 46.

The CO cited the case, In the Matter of Grandview Dairy, 2009-TLC-00002 (2008), for the proposition that “10 months is a permissible threshold at which to question the temporary nature of a stated period of need.” Id.

The CO noted the employer’s filing history in the following chart found at AF 47:

<table>
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<th>Case Number</th>
<th>Employer Name</th>
<th>Status</th>
<th>Start Date Of Need</th>
<th>End Date Of Need</th>
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<td>H-300-19029-470900</td>
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<td>Certified</td>
<td>03/15/2019</td>
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<tr>
<td>H-300-20003-231417</td>
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<td>Certified</td>
<td>03/15/2020</td>
<td>12/15/2020</td>
</tr>
<tr>
<td>H-300-20275-854276</td>
<td>Hearn Cattle Company</td>
<td>Pending</td>
<td>12/15/2020</td>
<td>03/15/2021</td>
</tr>
</tbody>
</table>

The CO concluded that the Employer’s filing dates in its current application coupled with the filing dates in its previous two applications show that its actual dates of need span the entire calendar year. Accordingly the CO determined that the Employer has not established how this job opportunity is seasonal, rather than permanent and full time, in nature. AF 47. The CO noted the following explanation submitted with Employer’s application regarding the seasonality of its job opportunity that stated in part:
We have season-specific work that needs to be done, that does not get done any other time of the year. It consists of removal and application of fertilizer for farmers on the farms listed on our itinerary located on Addendum B on the Form ETA 790A. We use an industrial-sized Loader to remove the manure from our feedlot listed in Section C of the ETA 790A and load it directly onto the truck then dump the manure on the listed worksites to be applied to the farm field with a tractor and spreader. Our work is necessary after the Fall Harvest when crops are not in the ground. Therefore, because this work is performed in conjunction with crop farming, our work is seasonal.

Our work is essential in the winter season as the fields are free of crops and the ground is in fallow. The ground is plowed and harrowed but left un-sown for a period to restore its fertility. The manure fertilizer is then applied. The fallow season runs from December through March. It is best to apply the manure fertilizer during this time. The spreader is hooked to a tractor and has a blade to break up the ice and/or snow as the manure is being spread. When the snow/ice melts the manure fertilizer mixes naturally and better saturates the ground, treating the farmland in preparation of the Spring crop-season.

We remove manure from our own feedlot, load it on a truck with an industrial sized loader. The manure is then dumped on the farm sites. All duties listed will be performed on farms listed on Addendum B on the Form ETA 790A. We also use this time to service, repair, and maintain all our equipment and pumps so they stay in proper working order for the fertilizer application of thousands of acres of farmland.

AF 47-48.

The CO noted that while the work can be considered essential in the winter season, as described by the Employer, the job opportunity for Agricultural Equipment Operators, itself appears to be a year-round need. The CO cited the similarity of the requirements for Agricultural Equipment Operators in the current and former applications, as well as the work duties. The CO also noted that contracts submitted by the Employer state the following which appears to be “contradictory to the seasonal need claim”:

The H-2A Labor Contractor ("H-2ALC") will provide the necessary staffing and equipment resources to provide the services described generally below to the Fixed-Site Farm Owner ("Farmer"). On an as-needed basis, the Farmer will give the H-2ALC a written Task Order to provide the below described services in the quantity requested. The Farmer represents that it has a need for the services but cannot predict precisely within the specific term (initial or renewal) of the Agreement exactly when the services will be needed and in what quantity. (Emphasis in the original).

AF 49.
The CO concluded that based on Employer’s “current requested dates of need, its previously established dates of need and its overlapping job duties,” it was unclear how the Employer’s job opportunity is temporary or seasonal in nature. The CO directed the Employer to provide a detailed explanation as to why its job opportunity is seasonal or temporary rather than permanent and year-round in nature.

The CO stated the Employer’s explanation must include the following:

1. A statement describing the employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year and (d) where claims are made as to required maintenance intervals, employer must provide documentation to substantiate said claims including equipment models and manufacturer maintenance schedules;

2. A statement regarding why the employer’s need should be considered seasonal when the job opportunity outlined in its application can be performed by its temporary Agricultural Equipment Operators from March to December. The statement should include complete maintenance records from prior years;

3. Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Agricultural Equipment Operators the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;

4. If contractors or other entities, e.g., repair shop were used by the employer to address the need described in this application, three years of contracts/receipts detailing the services provided and dates of said services must be provided. If family members or other individuals not directly employed by the employer were used, signed affidavits attesting to their work schedule and duties must be provided.

5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

The employer responded to the Notice of Deficiency on November 6, 2020. AF 30-39. In regard to the CO’s request that the Employer identify the source of the manure it transported Employer stated:
Hearn Cattle Company has a feedlot of their own and they own 100% of the manure they apply to the farmlands listed on their ETA 790A Addendum B. They are requesting 10 workers to assist with removing the cow manure from the pens and grounds, located on their own feedlot, using an industrial-sized loader and load it on a truck. They will then drive to the farm fields listed in the ETA 790A Addendum B which are all within 8.3 miles from their farm and apply the manure to the farmers crop fields per the signed contracts attached to the application. As per the requirements as a Farm Labor Contractor all work is done on a farm for a farmer. Given this information, the application is completely agriculturally related.

AF 30.

In regard to the question of why the job is seasonal or temporary Employer asserted that the work is only done in the winter when the fields are free of crops. Employer stated that the fallow season runs from December through March and that it is best to apply the manure fertilizer during this time. Employer also stated, “Employer only has a need for additional labor during the requested dates of need and no other time of year due to the manure application being spread only when the fields are un-sown to prepare the farmland for the Spring crop season.”  Id.

Employer asserted that the Employer’s seasonality is being questioned due to an error in the analysis as there are two separate entities, Hearn Farms, Inc., and Hearn Cattle Company, and the CO has grouped their applications together. Employer asserts that Hearn Farms, Inc., filed the two previous applications for agricultural equipment operators during the period of March 15 through December 15 in the two prior years. Employer notes that the two businesses are owned by Brent Hearn and have the same mailing address. AF 30-31.

Employer also addressed the vague job duties cited by the CO contained in the contracts which states the farmer has a need for the services but cannot predict precisely when the services will be needed. Employer states that the term of the agreement is 1/16/21 to 2/15/21 and the work will only be performed during this period. Employer indicates that it “assures that the work will only be performed during the contracts specific term.”  Id.

On December 7, 2020, the CO issued a Final Determination-Denial of Employer’s H-2A application. AF 16-27. In regard to the first deficiency cited of whether the job opportunity was agricultural as defined by the applicable regulations, the CO determined that the Employer had not established that it is “the farmer,” and that its employees will transport manure as incident to or in conjunction with “its” farming operations, as necessary to show the hauling and application of manure qualifies as “secondary” agriculture and therefore Employer’s job opportunities do not appear to fit within the FLSA definition of agriculture. AF 22-23.

In addition, the CO determined that Employer had not identified the source of the manure to be transported as the CO had previously requested. “Rather the employer responded by stating that they own the feedlot and that they would apply to the farmlands, and did not identify the source of the manure to be transported and applied as requested.” Accordingly, the CO concluded that Employer failed to establish its hauling and applying manure duties, were eligible for the H-2A program under the IRC definition. AF 23.
The CO also addressed the second deficiency of whether Employer had established that its job opportunity was seasonal or temporary as required by the regulations. The CO determined that Employer’s NOD response did not “justify the need for the exact same job opportunity with the same job requirements, and minimum qualifications for the months from December to March and as the previous application states, from March to December.” AF 25. The CO concluded that there is no clear distinction between these job opportunities that would substantiate the certification of Agricultural Equipment Operators year round.

In addition, the CO pointed out that Employer’s NOD response failed to include the information and documentation which the CO had requested in the NOD including:

[A] statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year and (d) where claims are made as to required maintenance intervals, employer must provide documentation to substantiate said claims including equipment models and manufacturer maintenance schedules; Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Agricultural Equipment Operators, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

AF 26-27.

The CO also found that Employer had failed to show how the need for Agricultural Equipment Operators can be justified when the job qualifications and minimum requirements appear to be the same as those in prior applications resulting in year round employment.

Accordingly, the CO concluded that Employer had failed to prove the job opportunity was seasonal or temporary and also had failed to prove the job opportunity qualified as agricultural under the applicable provisions of the FLSA or the IRC. Thus the application for 10 agricultural equipment operators was denied. AF 27.

On December 8, 2020, Employer timely requested a de novo hearing regarding the CO’s Denial of its H-2A application. AF 1-15.

EVIDENCE AND ARGUMENT

At the December 30, 2020 de novo hearing in this matter, held by telephone conference, the Administrative File (CX 1), consisting of 235 pages, was admitted without objection. TR 15-16. No other documentary evidence was offered by either party.
The Solicitor and the Employer called the Certifying Officer, Alejandra Dominguez, as a witness. Additionally, the Employer called Brent Hearn as a witness.

A. Summary of Testimony

Alejandra Dominguez

Certifying Officer Alejandra Dominguez (CO) testified on direct examination that she is currently employed by the U.S. Department of Labor with the official title of “supervisory immigration program analyst,” and that she is currently serving as an H-2A certifying officer. TR 20. She indicated that she held this position for four years. TR 21. She noted that she was the final reviewer of the current application and had approved the denial that was issued. TR 21. She stated that the initial review of the application included review of the job title, duties, wage offered, minimum job qualifications and requirements, as well as review of the filing history. TR 23.

Ms. Dominguez stated that review of the application disclosed that the job duties as described on the application did not fit the definition of agricultural labor and also that the “employer was, in fact, looking to hire an agricultural equipment operator year round” which was determined based on the review of the filing history. Id. She confirmed the parts of the administrative file that show the Employer had filed as an individual employer operating as an H-2A labor contractor. TR 24. The Employer was listed as Hearn Cattle Company with an employer point of contact listed as Brent Hearn as the Owner. Id. The listed job title was agricultural equipment operator with an SOC occupational code of 45-2091.00 and the requested dates of need for 10 workers was noted as December 15, 2020, to March 15, 2021. TR 25. Job duties included “load trucks with manure on employer-owned feedlots and apply to farm fields listed in Addendum B.” TR 26. Noted job requirements included lifting of 60 pounds, minimum experience of three months and ability to obtain a commercial driver’s license within 30 days of hire. AF 27.

The Certifying Officer also referred to, and confirmed, a certified application filed by Hearn Farms, Inc., (application # H-300-20003-231417) located in the Administrative File at pages 89-154, in which Hearn Farms, Inc., received certification for agricultural equipment operators under the SOC code of 45-2091.00 for the period of employment of March 15, 2020, to December 15, 2020. The point of contact for the Employer, Hearn Farms Inc., was listed as Brent Hearn as Owner. TR 28-29. The Certifying Officer confirmed that the applications filed by Hearn Farms, Inc., and Hearn Cattle Company, listed the same point of contact, Brent Hearn, as the owner, with the same mailing address listed on both applications. TR 30. Ms. Dominguez testified that a red flag was raised in the consideration of the current application because the application filed by Hearn Farms, Inc., ended on December 15, 2020, the same date that the current application, filed by Hearn Cattle Company, began. She also testified that further review of the job duties and other information listed for the agricultural equipment operator position in the two applications did not show a justification for a continuous job opportunity. In addition, the CNPC questioned both the agricultural nature of the position in the current application, as well as the seasonal/temporary nature of the job opportunity. TR 31. Therefore, a Notice of Deficiency was issued. Employer responded to the Notice of Deficiency, but the CNPC determined that the Employer’s response did not overcome the deficiencies.
Ms. Dominguez testified that the Employer’s response, which asserted that the job in the current application was seasonal because it could only be performed between December 15th through March 15th, was insufficient to establish Employer’s seasonal need because it was CNPC’s position that even though the duties could only be done during that period, Employer was seeking to hire agricultural equipment operators year-round to perform a variety of duties which included hauling and distributing manure, as well as other farming activities of planting, cultivating, and harvesting grain crops, as described in the previously certified application. TR 34. The Certifying Officer explained that for purposes of the H-2A program, it did not matter that the applications were filed in two names, that is, Hearn Cattle Company vs. Hearn Farms, Inc., because the Certifying Officer could “deduce that the employer was the same,” based on factors and similarities which included the employer point of contact, the addresses, and the work site locations. TR 34.

On cross examination the Certifying Officer reiterated the basis for the denial regarding the agricultural nature of the position as stated in the final determination which stated that “Hearn Cattle Company has not established that it is a farmer, and that its employees will transport manure as incident or in conjunction with its farming operations as necessary to show the hauling and application of manure qualifies as secondary ag.” TR 37. Accordingly, she noted that the Chicago National Processing Center (“CNPC”) determined that with regard to the hauling and application duties, the Hearn Cattle Company’s job opportunities did not fit within the FLSA definition of agriculture. She also noted that the CNPC determined that the position failed to fall within the IRC’s definition of agricultural services or labor. TR 37-38. She further clarified the CNPC’s position that while hauling the manure by [farmers] to serve their own fields may meet the definition of agriculture labor or services for purposes of the H-2A program, the hauling of the manure by an external source, by an H-2A labor contractor to serve its clients’ fields, may not meet the definition of agricultural labor or services as defined by the H-2A regulations. TR 38-39.

The Certifying Officer confirmed that she did not question that the application of manure to fields is agriculture within the FLSA definition. However she explained that the denial letter determined that Employer had not established that the “hauling of the manure” fell within the definition. TR 40-41.

In regard to the issue of whether the Employer’s job opportunity is seasonal or temporary Ms. Dominguez admitted that she did not dispute that the work described in the current application, “is essential in the winter season as the fields are free of crops and the ground is fallow.” She also noted that she did not dispute that the duties themselves are specific to the winter season. TR 52-53. Ms. Dominguez also confirmed that the State Workforce Agency assigns the SOC code and title to a job opportunity, and that the employer may dispute the assigned code, if it needs to be disputed. TR 54.

Brent Hearn

Brent Hearn testified briefly on behalf of the Employer, Hearn Cattle Company. He testified that Hearn Cattle Company “feed[s] cattle, maintain[s] feed yards, clean[s] pens and spread[s] manure.” TR 56. He confirmed the statement in regard to his current application at AF
which states, “Employer only has a need for additional labor during the requested dates of need and no other time of the year due to the manure application being spread only when the fields are unsown to prepare the farmland for spring crop season.” TR 57. He also testified that hauling manure from the feedlot to the field is part of the manure spreading operation as it has to “be moved from Point A to Point B.” Id.

On cross examination Mr. Hearn admitted that he is part owner of Hearn Cattle Company with his father, noting that “we take care of cattle in the winter, clean pens, and mend fences, and that sort of thing.” TR 58. In the current application, in addition to the fertilizing itself, “You’ve got to have scraper operators and loader operators and spreader operators that make it all work efficiently.” He also admitted that the “ag equipment operator is also expected to “repair, lubricate and maintain equipment and pumps.” Id. He explained that they only spread the manure in the winter season because normally there are no crops growing on the fields. TR 59. He stated that Hearn Cattle Company was established about ten or fifteen years ago. He also confirmed that he owns Hearn Farms, Inc., which he stated was established in 1999 or 2000. Id.

Mr. Hearn further admitted that he oversees and manages both Hearn Cattle Company and Hearn Farms Inc. TR 61. He admitted that they share a common mailing address and that he operates both companies out of the same office. Id. He also indicated that the two companies share employee housing. He stated that the employees do not work for both Hearn Cattle Company and Hearn Farms, Inc., and currently there are no managers that work for both companies. TR 61-62. Mr. Hearn likewise acknowledged that he personally owns the equipment that is used by both Hearn Cattle Company and Hearn Farms, Inc. TR 62.

C. Argument of the Parties

At the close of the telephonic hearing the parties presented closing arguments and were also granted leave to file written closing briefs, submitted on or before January 6, 2021. Both parties filed timely post hearing briefs.

1. The Employer

Employer argues in its brief that the job opportunity of agricultural equipment operator in the current application, which involves, among other duties, manure spreading and fertilizing, qualifies as agriculture under the definition of agriculture under the Fair Labor Standards Act. Employer also asserts that the presence of non-agricultural duties does not necessarily defeat a claim that certain work is agricultural labor or services.

In support of its position Employer cites several cases including Reich v. Tiller Helicopter Service, Inc., 8 F.3d 1018, 1024 (5th Cir. 1993), for the proposition that the definition of agriculture embodied in the agricultural exemption found in the FLSA should be given a broad construction. Employer contends that the application of fertilizer is included in the “cultivation and tillage” of the soil.

Employer also asserts that the duties of the agricultural equipment operators should also qualify as agricultural labor under the IRC as the duties occur, “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…” citing 26 U.S.C. §3121 (g)(1).

Employer also maintains that the Employer’s request for agricultural equipment operators qualifies as a seasonal or temporary need under the regulations. Employer asserts that the focus should be on the Employer’s need for the duties to be performed rather than the fact that the duty can be performed at any time of the year. Employer argues that the CO incorrectly focused on the job title of agricultural equipment operator, as employer’s need should not be measured by the general job title, but by the Employer’s need for the particular services, citing *Vermillion Ranch Limited Partnershi*, 2014-TLC-00002 (Dec. 5, 2013). Specifically, Employer contends that it only needs manure spreading in the winter when the fields are fallow, and before planting, and therefore, the overlap of duties in the filed applications for the agricultural equipment operator position should be overlooked as it is not significant. Employer does not address the relationship of Hearn Cattle Company and Hearn Farms, Inc.

2. The Certifying Officer

The Solicitor’s brief, filed on behalf of the Certifying Officer, argues that the evidence in the record and presented at the hearing did not meet the Employer’s burden of proving that the job opportunity consists of agricultural labor or services under the IRC, or agriculture under the FLSA. The CO asserts that the job description which includes loading manure onto trucks and driving equipment on other farms to spread manure, as well as repairing and maintaining the equipment, involves duties that do not qualify as agricultural under either definition. The CO argues that the job opportunity does not qualify under the IRC definition because it does not involve performing service, “in the employ of the operator of a farm” because the employer is a labor contractor and not the operator of the farm. The CO also asserts that an application that involves both agricultural and nonagricultural duties does not qualify for the H-2A program citing *Double J Harvesting, Inc.*, 2019-TLC-00057 at 6, and *Carlson Orchards, Inc.*, 2004-TLC-00009 (July 23, 2004).

The CO also maintains that the job opportunity does not satisfy the definition of agriculture under the FLSA. The CO acknowledged that the duties related to spreading manure qualify as primary agriculture as cultivation and tillage of the soil. However, the CO asserts that although certain duties identified in Employer’s application qualify as primary agriculture, other duties are not within the definition of primary agriculture. These duties include, “clear and maintain irrigation ditches on farms,” “load trucks with manure on employer owned feedlot,” “record information about liquid manure management,” and “repair, lubricate and maintain equipment and pumps.” The CO contends that duties which do not meet the definition of primary agriculture must fit within the definition of secondary agriculture under the FLSA, and therefore, must be performed either by a “farmer or on a farm.” The CO states that Employer has failed to meet its burden of demonstrating that the activities in question fall under the parameters of secondary agriculture, because there is no evidence that these duties would be performed in connection with, or as an incident to, farming operations. The CO points out that the Employer did not file the current application as the farmer, but rather, as the farm labor contractor. Accordingly, the CO asserts that “off farm” activities do not qualify under the FLSA.
The CO also asserts that the Employer has not established that it has a need for employment of a temporary or seasonal nature under the applicable regulations. The CO maintains that the intertwined entities of Hearn Cattle Company and Hearn Farms, Inc., requires that they be treated as a “single employer” under the H-2A program, and therefore, their dates of need for the position of agricultural equipment operator must be aggregated in determining whether seasonal need for the position has been established. The CO states that Employer has failed to demonstrate that it should be considered a separate employer from Hearn Farms, Inc., and that different FEIN numbers is insufficient to establish that Hearn Cattle Company and Hearn Farms, Inc., should be considered separate entities for purposes of the H-2A program, especially in light of such factors as common ownership and management. Further the CO asserts that when the aggregated dates of need of Hearn Cattle Company and Hearn Farms, Inc., for the position of agricultural equipment operator are considered, a year-round, permanent, employment need is shown. Thus, Employer is ineligible for the H-2A temporary labor program.

The CO contends that Employer’s argument that the fertilizing duties can only be performed in the winter should be rejected because the Employer’s need for the position of agricultural equipment operator is year round with only minor seasonal differences in the position. For these reasons, the Solicitor maintains that the CO’s denial of temporary labor certification in this case should be affirmed.

ISSUES

1) 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).

2) 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 is “temporary or seasonal” as defined by the applicable regulation at 20 C.F.R. § 655.103(d)?

SCOPE OF REVIEW

The current case arises from the Employer’s request for a de novo hearing in regard to the CO’s decision to deny the Employer’s application for temporary alien labor certification under the H-2A program based upon the application and information available to the CO at that time. 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, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the
employer, CO, OFLC Administrator, and DHS by means normally assuring next-day delivery.” 20 C.F.R. § 655.171(b)(2).

Since 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, I will review the evidence presented in this case de novo, but will also review the CO’s decision for abuse of discretion. *T. Bell Detasselling, LLC*, 2014 TLC 00087, slip op. at 3, fn. 7 (May 29, 2014), citing *RP Consultant’s, Inc.*, 2009-JSW-00001, slip op. at 8 (June 30, 2010), and *Hong Video Technology*, No. 1988-INA-202 (BALCA Aug 17, 2001). See also *David Stock*, 2016-TLC-0040 (May 6, 2016)(where “Employer requested de novo review, the Administrative Law Judge must independently determine if the employer has established eligibility for temporary labor certification”).

**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; or

4. Logging employment.

In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural services or labor. 20 C.F.R. § 655.161. In the current case the CO has denied Employer’s application on two bases: 1) because the Employer has failed to establish that the job opportunity did not constitute agricultural labor as defined in the IRC, or agriculture as defined in the FLSA; and 2) because the Employer has failed to establish that the job opportunity is temporary or seasonal as required by the H-2A regulations. To prevail,
the Employer must establish the CO erred on both grounds. Otherwise, either of the CO’s bases for denial is sufficient to support the CO’s denial of Employer’s H-2A application. I will address temporary or seasonal need first.

**Temporary or Seasonal Need**

Employment is “temporary” where an employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). A “seasonal” need occurs if employment is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing operations. 20 C.F.R. § 655.103(d).

In determining temporary need for purposes of the H-2 temporary alien labor certification program it is well settled that it is “not the nature of the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). *See Sneed Farm, 1999-TLC-7*, slip op. at 4 (Sept. 27, 1999)(It is appropriate to determine if the employer’s needs are seasonal, not whether the duties are seasonal). *See also William Staley, 2009-TLC-9*, slip op. at 4 (Aug. 28, 2009).

It is also well established that the H-2A program is designed to fill only temporary or seasonal labor needs, and therefore, the need for the particular position cannot be a year-round need, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). Ten months has been viewed as an acceptable threshold to question whether an employer’s need is temporary. *See Grand View Dairy Farm, 2009-TLC-2* (Nov. 3, 2008)(finding that applying ten months as a threshold, where employer is given the opportunity to submit proof to establish the temporary nature of its employment needs, it is not an arbitrary rule).

In order to utilize the H-2A program it is the employer’s burden to establish that its need to fill a particular position or job opportunity is either temporary or seasonal. 20 C.F.R. § 655.161(a). In regard to a seasonal need, an employer must demonstrate when the employer’s season occurs, and how the need for labor or services during the season differs from other times of the year. *Altendorf Transport, 2011-TLC-158*, slip op at 11 (Feb. 15, 2011).

In administering the H-2A program, BALCA has resisted efforts to use temporary labor certification under the H-2A program to address permanent or year-round employment needs to fill a particular position. In many instances employers have gone to great lengths in their attempts to characterize what is, in fact, a year-round need for a particular position, as a seasonal need. Some of these attempts have involved employers who have filed multiple labor certification applications through separate, but related business entities, or submitted applications by related individuals in order to portray as seasonal a year-round need for a particular position. *See Katie Heger, 2014 TLC-00001* (November 12, 2013)(Certification denied where two applications covering entire year reflected “same job title, job duties, job requirements and were filed by different but related parties for the same worksite). *See also Sugar Loaf Cattle Co., LLC, 2016-TLC-00033* (April 6, 2016).
Similarly, denial of certification has been affirmed where it was determined that two applications involved only minor seasonal variations in a year round position. *Lancaster Truck Line*, 2014–TLC-00004 (November 26, 2013)(Minor seasonal variation in position with the same job title does not establish employer’s need for this position as seasonal despite applications filed by separate legal entities). *See also Mapleview Dairy, LLC*, 2020-TLC-00013 (December 4, 2019) (Certification denied where it was determined that winter and summer duties of a maintenance worker actually represent the same job opportunity.)

In the current case, the CO reasonably questioned whether the Employer, Hearn Cattle Company, had a seasonal or temporary need for agricultural equipment operators on the basis of its filing history, when considered in conjunction with that of Hearn Farms, Inc. The filing history of the two entities is summarized below:

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Employer Name</th>
<th>Status</th>
<th>Start Date Of Need</th>
<th>End Date Of Need</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-300-19029-470900</td>
<td>Hearn Farms, Inc.</td>
<td>Certified</td>
<td>03/15/2019</td>
<td>12/15/2019</td>
</tr>
<tr>
<td>H-300-20003-231417</td>
<td>Hearn Farms. Inc.</td>
<td>Certified</td>
<td>03/15/2020</td>
<td>12/15/2020</td>
</tr>
<tr>
<td>H-300-20275-854276</td>
<td>Hearn Cattle Company</td>
<td>Pending</td>
<td>12/15/2020</td>
<td>03/15/2021</td>
</tr>
</tbody>
</table>

The above-noted filings by Hearn Farms, Inc., are located in the Administrative File at AF 89-154 and AF 155-235, respectively. As noted in the record, and confirmed by the CO’s testimony, the applications filed by Hearn Farms, Inc., and Hearn Cattle Company reflect that Brent Hearn filed as the owner on all of the above applications, and is listed as the same point of contact with the same mailing address on all applications. The applications are all for the same position of agricultural equipment operator, and as noted during the CO’s testimony, when considered in conjunction, are sequential and cover all twelve months of the year.

A long line of BALCA decisions support that an employer may not circumvent the temporary need requirement by using a closely related business entity to file an overlapping application. *Katie Heger*, 2014-TLC-00001 (Nov. 12, 2013). *See also Altendorf Transportation*, 2013-TLC-00032(March 28, 2013) and *Sugar Loaf Cattle Co., LLC*, 2016-TLC-00033 (April 6, 2016)(using principles developed under the NLRA to determine if two companies were so intertwined so as to constitute a single employer).

Due to the fact that both of the entities, Hearn Farms, Inc., and Hearn Cattle Company, appear to be related entities with the same owner, point of contact, and mailing address, as well as the filing of sequential applications for the same position covering all twelve months of the year, the CO reasonably issued a Notice of Deficiency and requested further explanation and documentation regarding these entities in order to determine if they should be considered the same employer for purposes of the H-2A program, and additionally, whether Employer had established a true seasonal need for the position in question. The specific documentation requested by the CO included information regarding the Employer’s business operations and schedule of operations.
throughout the year, as well as “summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Agricultural Equipment Operators the total number of workers or staff employed, total hours worked, and total earnings received,” as well as other documentation that would establish the Employer’s seasonal need in this case.

Employer’s response to the NOD failed to provide the requested information. The CO pointed out in the Final Denial that Employer’s NOD response failed to include the information and documentation which the CO had requested in the NOD, including the following:

[A] statement describing the employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year and (d) where claims are made as to required maintenance intervals, employer must provide documentation to substantiate said claims including equipment models and manufacturer maintenance schedules; Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Agricultural Equipment Operators, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

AF 26-27.

It is Employer’s burden to prove it is entitled to temporary labor certification under the regulations, including its need for temporary or seasonal labor. As noted in the CO’s brief, where multiple applications for temporary labor certification are filed by closely related entities, previous BALCA decisions support that Employer bears the burden of persuasion in demonstrating that the related entities should be considered separate entities for purposes of the H-2 temporary labor certification program. See e.g., Altendorf Transport, Inc., 2013-TLC-00026 at p. 8 (Mar. 28, 2013) (“The Employer has the burden of persuasion to demonstrate that it and [another entity] are truly independent entities.”); Cressler Ranch Trucking, LLC, 2013-TLC-00007 at p. 3; H Bar H Farms, 2015-TLC-00012 at p. 5 (Dec. 31, 2014)(“Notably, the Employer has the burden to demonstrate that the businesses are truly independent entities.”). Relevant factors considered in other BALCA decisions in reaching the determination of whether such related entities should be considered so intertwined as to be the same entity for purposes of the H-2 program, include such factors as common ownership, common management, common control over operations and employment decisions, and shared worksites.

The undersigned finds that the CO’s denial was supported by the fact that Employer failed to provide the requested information noted above, including the relevant payroll information which would have addressed, to some extent, the relationship of the two entities, Hearn Cattle Company and Hearn Farms, Inc. As the Employer requested a de novo hearing in this matter Employer had another opportunity to provide the requested information, or other information which would
establish the relationship between the two related entities, Hearn Cattle Company and Hearn Farms Inc.

The undersigned finds that Employer failed to provide the information necessary to meet its burden of proof regarding its alleged seasonal need for agricultural equipment operators for the requested period of December 15, 2020, to March 15, 2020. At the hearing, Employer offered no documentary evidence whatsoever which would shed light on the relationship between Hearn Cattle Company and Hearn Farms, Inc. Employer failed to provide the payroll information requested by the CO, or any other documentation to support that the two entities should be considered separate for purposes of analyzing its seasonal need for agricultural equipment operators under the H-2A program. The minimal testimony offered by the Employer at the hearing does not adequately prove that the two related entities should not be considered a single employer for purposes of the H-2A program. The Employer confirmed that he is the owner of both Hearn Cattle Company and Hearn Farms, Inc., with both entities sharing the same mailing address and both being operated out of the same office. TR 59-60. He also confirmed that the two entities utilize the same housing for employees. TR 60. The equipment used by the agricultural equipment operators certified in the applications of both entities is owned by Brent Hearn, the owner of both companies. TR 60-61. Brent Hearn also admitted during testimony that he oversees and manages both entities. TR 59.

Further adding to the relationship between Hearn Cattle Company and Hearn Farms, Inc., it must be noted that Hearn Farms, Inc., is one of two farms for which Hearn Cattle Company would be providing services under the current application. AF 82. TR 60

Although the Employer asserted that Hearn Cattle Company and Hearn Farms, Inc., have different FEIN numbers, this factor alone is not controlling. See JSF Enterprises, 2015-TLC-00009 at p. 11 n.5 (“The fact that two entities have separate FEINs is not dispositive in establishing that they are separate companies for purposes of the H-2A program.”).

The H-2A applications for Hearn Cattle Company and Hearn Farms, Inc., viewed in conjunction, establish a need for agricultural equipment operators for twelve months of the year. Employer argued at the hearing, and in its brief, that the Employer’s need for agricultural equipment operators to spread fertilizer should be determined to be a seasonal need because the fertilizer is only applied in the winter months when the fields are unsown and in fallow. However I find that the seasonal variations in the year-round position of agricultural equipment operator in this case do not establish a separate and distinct need for this position. See Lancaster Truck Line, 2014 –TLC-00004 (November 26, 2013)(Minor seasonal variation in position with the same job title does not establish employer’s need for this position as seasonal despite applications filed by separate legal entities). See also Mapleview Dairy, LLC, 2020-TLC-00013 (December 4, 2019) (Certification denied where it was determined that winter and summer duties of a maintenance worker actually represent the same job opportunity.)

In this case the undersigned finds that the applications of Hearn Cattle Company and Hearn Farms, Inc., establish a year-round need for the position of agricultural equipment operator. Duties for the position stated in all of the pertinent applications primarily involve driving and operating farm equipment, as well as performing general maintenance on the machinery. The position may
vary somewhat throughout the year with some additional seasonal duties. However, the applications of the intertwined entities establish a need for the position of agricultural equipment operator that spans the entire year. The requested positions in all of the applications filed by Hearn Cattle Company and Hearn Farms, Inc. were assigned the same SOC code 45-2091.00 (Agricultural Equipment Operators) by the SWA based on the SWA’s consideration of the duties as well as the minimal experience requirement, which was noted in all of the applications.

Although the duties of the agricultural equipment operators requested in the applications of Hearn Cattle Company and Hearn Farms, Inc., may vary somewhat by season, the Employer’s need for the position of agricultural equipment operator, when considered in conjunction with that of its related entity Hearn Farms, Inc., is year-round.

Accordingly, I find that that Employer has failed to meet its burden of proving its temporary need for agricultural equipment operators on the basis of a seasonal need, as noted in its H-2A temporary labor certification application. I have based my decision on my review of the administrative file, as well as the evidence, testimony, and argument presented at the December 30, 2020 hearing, as well as closing briefs.

Therefore, for the reasons stated above, the undersigned affirms the CO’s denial of the Employer’s application for agricultural equipment operators for the requested period of December 15, 2020, through March 15, 2021, due to Employer’s failure to prove its seasonal need for the position of agricultural equipment operator. As I have affirmed the denial of certification on this basis, I will only briefly address the CO’s additional bases for denial, that is, whether the application for labor involves agricultural labor or services under the FLSA or agriculture under the IRC.

**Agricultural labor or services**

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)).

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).

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.

As discussed above, I have determined that Employer, Hearn Cattle Company, has failed to establish and clarify the nature of its association with Hearn Farms, Inc., and whether, in fact, the two entities should be considered a single employer for purposes of the H-2A program. This is a necessary factor in proving both its seasonal need, as well as an important consideration in a determination of whether all of the duties of the agricultural equipment operator contained in the current application, constitute agricultural services or labor under the IRC or agriculture under the FLSA. As I have affirmed the CO’s denial on the grounds that Employer has failed to establish its seasonal need for the position of agricultural equipment operator as stated in its current application, it is unnecessary to address whether the CO should be affirmed on the alternate grounds that Employer has failed to show that the job opportunity qualifies as agricultural labor or services, as defined by the applicable regulation at 20 C.F.R. § 655.103(c).

CONCLUSION

Employer has not established that its need for agricultural equipment operators is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). Therefore, the basis for the CO’s Denial of Employer’s H-2A application is affirmed.

ORDER

After the de novo hearing, Employer has failed to establish that its application for temporary labor certification should be accepted for processing, as Employer has failed to establish its temporary or seasonal need for ten agricultural equipment operators with a start date of December 15, 2020, and an end date of March 15, 2021, as requested in its application, pursuant to 20 C.F.R. § 655.103(d). Accordingly, it is hereby ORDERED that the Certifying Officer’s Denial is AFFIRMED.
For the Board of Alien Labor Certification Appeals:

SEAN M. RAMALEY
Administrative Law Judge