



Issue Date: 17 November 2020

OALJ Case No.: 2021-TLC-00019

ETA Case No.: H-300-20248-805747

In the Matter of:

SMITH PACKING, INCORPORATED,
Employer.

DECISION AND ORDER REMANDING DENIAL OF LABOR 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 set forth at 20 C.F.R. Part 655, Subpart B. 8 C.F.R. § 214(h)(5) The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary or seasonal basis.

SUMMARY

Employer Smith Packing, LLC, (“Employer”) operates as an H-2A Labor Contractor (“H-2ALC”) supplying labor to farms throughout the southwest United States. On September 17, 2020, Employer filed an application with the Office of Foreign Labor Certification requesting H-2A temporary labor certification for 42 farmworkers. Employer’s application stated these workers were to work as “harvesters” and “stackers” picking crops around Yuma, Arizona. After issuing a Notice of Deficiency and Notice of Required Modification, and receiving Employer’s responses, the Certifying Officer denied Employer’s application. The Certifying Officer stated that the Employer did not establish its job opportunities were agricultural due to its inclusion of hauling duties, or provide sufficient information on the fixed site growers and their work locations. After review of the administrative file¹, the court finds that the Certifying Officer’s determination on whether Employer’s job opportunity constituted agricultural labor was arbitrary and capricious. The Certifying Officer overlooked that Employer removed “hauling” from its contract with Sun Coast Farms. The Certifying Officer speculated that the “hauling” referenced in the Zada Fresh contract was to occur off the farm, which is not stated in the plain language of the contract. This meant the Certifying Officer’s determination was based on conclusions that are inconsistent with the underlying established facts of the contract. Therefore, the Certifying Officer improperly found that Employer’s job opportunity was not agricultural labor and erred where denying Employer’s application. The court remands the matter to the Certifying Officer. The Certifying Officer shall review the existing record as well as any new records Employer provides to the Certifying Officer.

¹ The court received the administrative file on November 9, 2020.

ISSUE

The issues before the court are:

1. Did Employer establish that its job opportunity consisted of “agricultural labor or services” under the Regulations?
2. Was Employer’s application deficient with respect to establishing Employer’s relationship with the fixed site growers and its work itinerary?

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On September 17, 2020, the Office of Foreign Labor Certification received Employer’s ETA Form 9142A application requesting temporary labor certification under the H-2A program for 42 “farmworker[s].”² (AF 170). Employer applied to employ these farmworkers from November 3, 2020 through May 1, 2021. Employer requested these workers to fill a projected need for seasonal labor during the harvest season for cabbage, lettuce, and broccoli. (AF 170). The job duties for these workers included:

Harvester:

Cut or pack lettuce, broccoli, cabbage, Romaine of the correct quality, size and weight for the correct packs in the field. Pack or package by hand a wide variety of produce in the correct packs in the field. Continual visual examination of produce to determine if product is right for harvesting. Use hands and arms to handle the product. Place commodity into appropriate packing box. Place completed packed product onto moving equipment such as conveyors. Mark cartons by using marking tools. Examine and inspect containers, packaging material and product to ensure that packing specifications are met. Harvest product by hand, and/or using a harvest knife. Continual bending to reach product. Walk throughout shift on even ground and in leafy rows with debris. Ensure that all Food Safety policies are followed. Ensure that all safety procedures are followed to reduce the risk of any type of injury to either the employee or others. Reports all safety problems, incidents and injuries to harvest foreperson immediately. Comply with all Company policies.

Stacker:

To stack 25 lb boxes from the conveyer to the pallets. Also required to lift empty pallets weighing 45 lbs. Your job duty is to lift 25 lbs. boxes off a conveyer and place them on a pallet. You will stack eight layers of ten boxes per layer on each pallet. (80 boxes). The stacks must be straight. The foreman will show you the position the boxes must be on the pallet.

(AF 170).

² Employer stated that 50 workers were needed, 42 of which would be H-2A. (AF 170).

As an H-2A Labor Contractor, Employer would provide labor to fixed site growers. On the application, the Employer listed the names of fixed site growers it would provide labor to, including sites owned by Mellon Farms and Pasquinelli Produce Co. (AF 171, 179-186). In addition to these fixed site employers, the application contained letters from Zada Fresh Farms, Sun Coast Farms, and Ippolito International. (AF 189-191). These letters detailed that Employer was providing harvest labor to pick crops from plots that were being grown for these companies.³ Employer attached a copy of the “Custom Harvesting Agreement” contract between Employer and Sun Coast Farms to the application. (AF 192). In this contract, Sun Coast Farms contracted with Employer to provide “harvesting, packing, and hauling services” for certain agricultural commodities. (AF 192). A separate contract between Ippolito International and Employer stated:

The Harvester [Employer] will provide all equipment, tools, worker and equipment safety training, food safety training, and all pertinent insurance and licensing to facilitate harvesting in the Yuma and Imperial Counties, depending on the needs dictated by both parties through the course of the growing program(s). Harvester will provide a crews for Romaine Hearts and Broccoli. Smith Packing, Inc. will provide **45 farm workers**.

(AF 198) (Emphasis in original).

This contract contained prices for the harvest as “(billed by Suncoast to Ippolito).” (AF 201). Employer’s application included other supporting documents, including bond certificates and riders, United States Department of Labor Farm Labor Contractor Certificates of Registration for Employer, and a statement of seasonal need from the owner of Employer. (AF 162-209).

On September 22, 2020, Employer contacted the Certifying Officer with an additional request from Sun Coast Farms for 24 additional H-2A farmworkers. (AF 148). Employer also provided a contract for housing for these 24 additional workers. (AF 155). Employer stated “please let me know if anything else is required” but there was no formal request for amendment of its application. (AF 146).

On September 24, 2020, the Certifying Officer issued a Notice of Deficiency to Employer. (AF 134). The Certifying Officer noted a number of deficiencies with Employer’s application for temporary labor certification. Stating that an H-2A job must consist of “agricultural labor or services” pursuant to 20 C.F.R. § 655.103(c), the Certifying Officer stated that Employer’s “hauling” services found in its contract with Sun Coast Farms did not appear to fall under the applicable regulatory definitions within the Internal Revenue Code or Fair Labor Standards Act. (AF 137-139). The Certifying Officer stated Employer “may submit information or

³ Explaining the relationship between the various companies, farms, and the Employer in this application, CFO Jennifer Morse of Sun Coast Farms stated: “Smith Packing, Inc. will perform harvest activity from 11/1/2020 to 5/1/2021 in the Yuma area on Mellon Farms ranches for Sun Coast Farms LLC. Sun Coast Farms is the fixed site grower for this acreage. This job will require 10 workers, who will report directly to Smith Packing, Inc.” (AF 190). A similar statement was provided by Andrew Williams of Zada Fresh Farms. (AF 189, 191).

documentation to establish that its job opportunities qualify as agricultural under the FLSA and/or IRC.”⁴ (AF 139).

The Certifying Officer also noted deficiencies with Employer’s application as it related to its status as an H-2A Labor Contractor. The Certifying Officer stated that, as a labor contractor, Employer was required to submit “copies of the fully-executed work contracts with each fixed-site agricultural business...” (AF 141). While Employer submitted harvesting agreements with Sun Coast Farms and Ippolito International, the Certifying Officer stated none were submitted for Mellon Farms or Pasquinelli Produce Company. (AF 141). Employer was required to submit documentation for these growers. The Certifying Officer also required Employer to provide the addendums referenced in the Sun Coast Farms contract that were missing. (AF 141). Noting that Employer’s contract with Ippolito International referenced harvests in Imperial County, Arizona, but that no worksites were listed for Imperial County in Employer’s application, Employer was also required to “provide an itinerary that lists all worksites in connection with this application for H-2A workers.” (AF 142).⁵

On September 30, 2020, Employer responded to the Notice of Deficiency. Employer’s response included dozens of worksite maps, copies of executed surety bond contracts with Harco National Insurance Company, Employer’s Farm Labor Contractor Migrant and Seasonal Laborer Protection Act certifications, and transportation documentation showing that Employer’s H-2A workers would have transportation provided through CalVans. (AF 88-121). Employer also submitted a revised copy of its contract with Sun Coast Farms. This revised contract removed “hauling” as a service Employer would provide to Sun Coast Farms in section 2(a) and specified that the services to be provided were packing and harvesting.⁶

On October 13, 2020, the Certifying Officer issued a Notice of Required Modifications. (AF 76). The Certifying Officer stated:

Your application was issued a Notice of Deficiency (NOD) on September 24, 2020; however, after further review it has been determined that your application for temporary employment certification and/or job order fails to meet the criteria for certification. The specific reason(s) why your application cannot be certified,

⁴ See 20 U.S.C. § 203(f); 26 U.S.C. 3121(g).

⁵ The Notice of Deficiency raised other issues with the application, such as a lack of the proper “Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration,” the terms of the surety bonds and contact information for the surety bond holders, and a correction to the offered wage term. The Certifying Officer did not cite these issues in the Final Determination. As they were not grounds for the Certifying Officer’s denial of certification, they have not been considered further by this court.

⁶ While hauling was removed from the services to be provided section of the contract, the word remained in section 2(a) when discussing contractual amendment procedure. A reference to hauling was also found on Exhibit A of the Sun Coast Farms contract, which discussed a “cost-plus” situation in which higher rates could be charged in case of a difficult harvest. (AF 105, 122).

with citation(s) to the relevant regulatory standards, appear on the enclosed attachment.

(AF 76).

The Certifying Officer stated that the Sun Coast Farms contract provided that:

CUSTOM [Employer] will provide harvesting, packing and **hauling services** for the commodities. [sic] (collectively, “the Commodities”) described in the Commodity and Pricing Specifications in Exhibit A. Nothing in this Section 2 shall restrict the parties from amending this Agreement, including the Commodity and Pricing Specifications, to include additional Commodities to be harvested, packed and **hailed**.⁷

(AF 80) (Emphasis in original).

The Notice of Required Modifications then restated the other required corrections raised by the Certifying Officer in the Notice of Deficiency. (AF 76-87).

On October 14, 2020, Employer responded to the Notice of Required Modifications. This response included copies of the bond paperwork, additional maps of ranches and field worksites in Imperial County, Arizona, and a statement concerning Employer’s Farm Labor Contactor vehicle authorization along with supporting documentation. (AF 24-42). The response contained copies of the revised Sun Coast Farms harvest contract, the Zada Fresh Farms contract, and an “Amendment No. 6 to Harvest Agreement” between Green Gate Fresh, L.L.L.P., and Employer.⁸ (AF 45). This amendment noted that Employer was to provide harvesting services and laid out pricing and rates. These rates included allowances for:

1. Harvest Equipment: (a) Stainless Steel Harvest Machine, (b) Tractors, (c) Nurse Tanks, (d) Restrooms and (e) Shade Trailers;
2. Food Safety Equipment: (a) Hair and Beard Nets, (b) Gloves, (c) Aprons, and (d) Sleeves; and
3. Hauling: (a) Haul Trucks, (b) Trailers, and (c) Dollies.

⁷ The word “hauling” was removed from the Sun Coast Farms contract. The Sun Coast Farms contract section 2(a) cited by the Certifying Officer is not present in the amended contract submitted by Employer in its response to the Notice of Deficiency. The section 2(a) present in the amended contract stated: “CUSTOM will provide harvesting and packing services for the commodities (collectively, “the Commodities”) described in the Commodity and Pricing Specifications in Exhibit A. Nothing in this Section 2 shall restrict the parties from amending this Agreement, including the Commodity and Pricing Specifications, to include additional Commodities to be harvested, packed and hauled.”

⁸ The Green Gate Fresh amendment is a stand-alone submission in the Employer’s response. There is no other contract involving these parties in the record and its relationship to the other contracts is unknown based on the contents of the Administrative File. For instance, while Employer is listed as the harvester and purportedly signed the amendment, the actual signatory is Sonny Smith of Sun Coast Farms. (AF 46). It is unclear from the record if this amendment relates to Employer’s contract with Sun Coast or if Sun Coast was acting as an agent or contractor of Employer.

(AF 45-46).

Employer included a written response to the Certifying Officer's Notice of Required Modification.⁹ (AF 43). Employer stated that "they will not be hauling of [sic] product for Sun Coast Farms... Permission is hereby granted to amend and remove Hauling from the job description." (AF 43). Explaining the distinction between the fixed-site growers and farm owners, Employer stated:

Smith Packing, Inc. does not have a relationship with Mellon Farms or Pasquinelli Produce Co. Smith Packing, Inc. will be harvesting for a total of 4 Fixed-Site Growers, attached please find the fully executed work contracts with Green Gate Fresh, Ippolito International, Sun Coast Farms and Zada Fresh. All the worksites listed in the application are owned or controlled by the fore-mentioned Fixed Site Growers. B. Attached please find the revised work contract with Suncoast Farms for the additional 24 workers including the Worksites and crop activities. The employer hereby gives permission to amend the itinerary to reflect the amended work contract.

On October 27, 2020, the Certifying Officer issued her Final Determination. The Certifying Officer denied Employer's application for temporary labor certification. In denying Employer's application, the Certifying Officer stated that hauling did not fall under the definition of "agricultural labor or services" required by the regulations. (AF 12). The Certifying Officer stated that the Sun Coast Farms harvesting contract provided that Employer would provide "harvesting, packing and hauling services." (AF 12-13). While the Certifying Officer acknowledged that Employer's response that it would not be providing hauling services to Sun Coast Farm, the Certifying Officer did not address the removal of hauling from section 2(a) of the revised Sun Coast Farms contract. The Certifying Officer stated that, in addition to the Sun Coast Farms contract, the custom harvesting agreement with Zada Farms and Green Gate also included hauling as a job duty. (AF 13).

The Certifying Officer noted issues with the work contracts and fixed site locations found in Employer's application. (AF 14-15). The Certifying Officer stated that Employer's response addressing the four fixed site grower contracts and their relationship to Mellon Farms and Pasquinelli Produce Company "failed to provide clarification and brought additional questions as to who the fixed site growers... are and whether the employer has permission to perform the labor at the worksites listed on the application. Specifically, it is unclear whom Ippolito International has contracted with for harvesting." (AF 15). The Certifying Officer stated that Employer's work itinerary "in the Addendum B to the ETA Form 790A failed to include the worksite listed in Section C of the ETA Form 790A, County 14th Street and Avenue D Yuma Az 85365." (AF 15). The Certifying Officer stated that the Employer's worksite clarification and map attachments "failed to provide a clear itinerary to be entered into Addendum B... Therefore,

⁹ The Employer's response was titled "Re: Response to NRM dated October 13, 2020" but was dated September 24, 2020. It also stated it was a response to the Notice of Deficiency in its opening paragraph. (AF 43).

the correct fixed-site growers and itinerary remain unclear.” (AF 15-16). In conclusion, the Certifying Officer stated:

The employer did not satisfy the filing requirements and failed to establish agricultural labor or services as required by 20 C.F.R. sec. 655.103(c). Further, the employer failed to provide the comprehensive information required to determine the fixed site growers and whether the employer has permission to perform labor on its land. Therefore, the application is **denied** for 42 farmworker job opportunities.

(AF 16) (Emphasis in original).

On October 29, 2020, Employer requested administrative review of the Certifying Officer’s final determination by the Board of Alien Labor Certification Appeals.¹⁰ On October 30, 2020, the court issued its Notice of Assignment and Order Setting Expedited Briefing Schedule. This briefing schedule was subsequently amended on November 4, 2020. On November 9, 2020, the court received the administrative file. This Decision and Order is based upon a complete review of the parties’ briefs, submissions, and the contents of the administrative file.¹¹

APPLICABLE LAW

Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a labor certification that:

- (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.100; *Form ETA-9142A, H-2A Application for Temporary Employment Certification*, UNITED STATES DEPARTMENT OF LABOR (“ETA Form 9142A”).

The implementing regulations at 20 C.F.R. Part 655, Subpart B set forth a multi-step process by which this certification may be applied for, and denied or granted. The petitioning employer must file a job order with the State Workforce Agency (“SWA”) serving the area of intended employment. 20 C.F.R. § 655.121(a). The State Workforce Agency will review the job order for compliance with the regulations and, if found to be acceptable, post the job order on its intrastate

¹⁰ With its request for administrative review, Employer also provided a brief response to the Certifying Officer’s final determination. This response contained additional information on the structure of the custom grower – fixed site grower – harvester arrangement in this application. This evidence is not properly before the court. *See* 20 C.F.R. § 655.171(a). As the court is remanding this matter, it may be properly considered by the Certifying Officer.

¹¹ The Certifying Officer’s brief was received on November 12, 2020. The Employer’s brief was received on November 13, 2020.

clearance system and begin recruitment. 20 C.F.R. § 655.121(c). If the State Workforce Agency does not locate able, willing, and qualified workers to fill the position(s) for which the employer seeks certification, the employer may file an ETA Form 9142A with the United States Department of Labor (“Department”), Employment and Training Administration (“ETA”), Office of Foreign Labor Certification (“OFLC”). 20 C.F.R. § 655.130. A Certifying Officer within the Office of Foreign Labor Certification reviews the application for compliance with the requirements set forth in the regulations. 20 C.F.R. § 655.140. It is the applicant’s burden to prove that its application complies with all applicable regulatory requirements. 20 C.F.R. § 655.151. If the application is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the Certifying Officer notifies the employer via a Notice of Deficiency within seven calendar days. 20 C.F.R. § 655.141. If an employer submits the requested corrections and modifications, the Certifying Officer then reviews the application and either approves or denies the application for temporary labor certification. 20 C.F.R. § 655.160.

Where the employer operates as a labor contractor supplying workers to a fixed-site agricultural business, its application must also comply with the requirements of 20 C.F.R. § 655.132. The employer must provide the name and location of the fixed-site business, with dates of employment and descriptions of the work to be done, proof of its ability to discharge its financial obligations, a Farm Labor Contractor Certification of Registration if required, and copies of executed contracts with the fixed-site agricultural business verifying adequate transportation and housing of workers. *See* 20 C.F.R. § 655.132(b).

To qualify for certification, the employer’s job opportunity for which certification is sought must consist of the “performance of agricultural labor or services.” 8 U.S.C. § 1101(a)(15)(H); 20 C.F.R. § 655.103(c). “Agricultural labor or services” is defined as:

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.¹²

¹² The regulations include the Internal Revenue Code and Fair Labor Standards Act definitions in-line, and are quoted below:

Agricultural labor for the purpose of paragraph (c) of this section 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.

(ii) As used in this section, 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.

(2) Agriculture. For purposes of paragraph (c) of this section, agriculture 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. See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived:

20 C.F.R. § 655.103(c).

To prevail upon administrative review, the employer must demonstrate that the Certifying Officer's determination of eligibility was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible. "The CO's decision in H-2A cases is reviewed on an 'arbitrary and capricious' standard. Blondin Enterprises, Inc., Case No. 2009-TLC-56, slip op. at 3-4 (ALJ July 31, 2009); Keller Farms, Case No. 2009-TLC-8 (ALJ Nov. 21, 2008)." J & V Farms, LLC, 2015-TLC-00022 (March 4, 2016).

ANALYSIS AND FINDINGS OF FACT

The Certifying Officer's final determination addressed whether Employer's job opportunity qualified as "agricultural labor or services" under the applicable regulations and whether Employer provided sufficient information on the work sites and fixed site growers listed in its application.¹³ See 20 C.F.R. § 655.103(c); 20 C.F.R. § 655.132. The court addresses each of these issues individually.

A. Did Employer establish that its job opportunity consisted of "agricultural labor or services" under the Regulations?

The Certifying Officer stated the Employer's job opportunity did not consist of agricultural labor or service under any of the application regulation definitions in 20 C.F.R. § 655.103(c) because it included hauling. The Certifying Officer noted that, under the Fair Labor Standards Act definition, transportation off the farm to market does not constitute agriculture unless performed by a farmer. (AF 13). As Employer in this matter is a labor contractor and not a farmer, hauling performed by the temporary labor employees of Employer could not have been performed by a farmer. The Certifying Officer found that Employer's job opportunity also did not meet the Internal Revenue Code definition, as Employer failed to establish that it was the "operator of the farms" so that its workers would be "in the employ of an operator of a farm." (AF 13-14). The Certifying Officer noted various references to hauling in the harvest contracts Employer submitted to support her conclusion that the job opportunities included hauling, which would render it outside the definition of agricultural labor.

Whether or not hauling services can constitute agricultural labor or services is a fact-specific and heavily litigated area of H-2A visa law. While the Board of Alien Labor Certification has held at various times that hauling alone cannot be agricultural labor or services, see In the Matter of

gum spirits of turpentine and gum rosin. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

¹³ The Certifying Officer had the work contracts and fixed site grower issues as separate grounds for denial in her final determination. As they are ultimately interlinked (i.e., a failure to clarify the nature and ownership of the fixed site growers calls into question the nature of the work sites and Employer's authority to harvest them), the court addresses those items together in section B of the Analysis and Findings of Fact section.

ATP Agri-Services, Inc., 2019-TLC-00050 (May 17, 2019); Double J Harvesting, Inc., 2019-TLC-00057 (July 2, 2019), the Board has also held at times that hauling can constitute agricultural labor or services in narrow circumstances. In the Matter of JLC Farms, Inc., 2020-TLC-00033 (Feb. 10, 2020). The Solicitor cited additional case law, including Everglades Harvesting & Hauling, Inc., 2019-TLC-00088 (Nov. 8, 2019), to support the proposition that any hauling in the present case would not be agricultural labor and thus render the application defective as an H-2A. However, this line of case law was recently called into question by Judge Richard Leon of the United States District Court, District of Columbia in Everglades Harvesting & Hauling, Inc. v. Scalia, 427 F. Supp. 3d 101, 113 (D.D.C. 2019).

Reviewing the administrative file, Employer removed the “hauling” language from its contract with Sun Coast Farms and the contract with Zada Fresh regarding “hauling” was unclear. The court notes that only two documents stated that Employer was to provide hauling services as a job duty. These were the original contract with Sun Coast Farms (AF 192) and the contract with Zada Fresh (AF 155). While both of these contracts specified that Employer was to provide hauling services, this language was removed from the Sun Coast Farms contract after the parties executed an amended contract. (AF 47). Other references to hauling do not actually support, on its face, that Employer’s job opportunity included hauling. The remaining reference to hauling in the Sun Coast Farms contract referenced it in the context of contractual amendment.¹⁴ The reference to hauling in the Green Gate Fresh agreement was included after a list of harvest rates and stated: “Above Rates Include: 1. Harvest Equipment: (a) Stainless Steel Harvest Machine, (b) Tractors, (c) Nurse Tanks, (d) Restrooms and (e) Shade Trailers; 2. Food Safety Equipment: (a) Hair and Beard Nets, (b) Gloves, (c) Aprons, and (d) Sleeves; and 3. Hauling: (a) Haul Trucks, (b) Trailers, and (c) Dollies.” (AF 46). There is no indication from this paragraph or its surrounding context who was to provide hauling equipment and services. It could be either the Employer, the fixed site grower, or both. This leaves only the Zada Fresh contract as stating that Employer was to provide hauling services. Reviewing that contract, it is unclear where, if at all, these hauling duties might occur.¹⁵ Whether these duties occur on or off farm determines whether the job can be considered agricultural labor under the Fair Labor Standards Act definition. Everglades Harvesting & Hauling, Inc. v. Scalia, 427 F. Supp. 3d 101, 113 (D.D.C. 2019).

Supporting Employer’s claim that its jobs would not include hauling, the job description on Employer’s Form 9142A application included no reference to hauling. The 42 requested

¹⁴ “Nothing in this Section 2 shall restrict the parties from amending this agreement, including the Commodity and Pricing Specifications, to include additional commodities to be harvested, packed and hauled.” (AF 47).

¹⁵ The Solicitor acknowledged this, stating “Employer did not establish whether the H-2A workers, who will be hired by this Employer, a labor contractor, would have to leave the farm to complete the hauling duties contained in Employer’s contracts, the work may not be performed on a farm. And since the activities at issue would not be performed by a farmer and *possibly not on a farm*, the Employer has not met its burden to establish whether these hauling duties qualify as ‘secondary’ agriculture under the FLSA.” Solicitor’s Brief, In the Matter of Smith Packing, Inc., 2021-TLC-00019 (Nov. 12, 2020) (Emphasis added).

farmworkers¹⁶ were to work only as harvesters and stackers. (AF 170). The 42 harvester and stacker positions Employer sought H-2A labor for did not include any reference to moving crops off farm to market, operating trucks off a farm, or any other indication that their job opportunity included hauling off of a farm. The harvesting and stacking jobs fall clearly within the Fair Labor Standards Act definition of agriculture – and therefore fall within the Regulations definition of agricultural labor. *See* 20 U.S.C. 203(f) (“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.”). Employer’s application also included that the job would include eight non H-2A workers. (AF 170).

It is Employer’s burden to establish that the job opportunity it seeks certification for constitutes agricultural labor or services. In this case, there is significant evidence in the record that the job opportunity for the 42 farmworkers did not include hauling as a job duty. This included the revised contract with Sun Coast Farms, the contract with Ippolito International, the job description provided in the Form 9142A Application for Temporary Labor Certification, and Employer’s statements that it will not engage in hauling. The Certifying Officer was correct in finding that the Zada Fresh contract did provide Employer was to engage in hauling. However, the court finds that the decision of the Certifying Officer’s determination that Employer’s job opportunity was not agricultural labor was materially inaccurate and unreliable where it was based on speculation and facts not supported by the evidence in the record. The Certifying Officer did not address the removal of hauling from the Sun Coast Farm contract and speculated that any hauling in the Zada Fresh contract, if performed, was to occur off farm. This was integral to a finding that hauling cannot be agricultural labor.

For these reasons, the court finds the Certifying Officer’s determination that Employer’s job opportunity was not agricultural labor was arbitrary and capricious. It was impermissibly speculative in assuming any hauling would occur off farm and failed to address the removal of hauling from the amended Sun Coast Farms contract. For the reasons stated above, the appropriate remedy in this case is to remand this matter to the Certifying Officer with instruction to consider the amended Sun Coast Farms contract and evidence in the record when making her determination on whether Employer’s job opportunity qualified as agricultural labor. Employer is permitted to submit new evidence.

B. Was Employer’s application deficient with respect to establishing Employer’s relationship with the fixed site growers and its work itinerary?

In light of the court’s holding on the issue of whether Employer’s job opportunity qualified as agricultural labor or services, the court finds that the issue of whether Employer’s application was deficient in addressing its relationship with the fixed site growers and job site itinerary is moot at this time. As the Certifying Officer must reconsider the record and any new evidence on the agricultural labor issue, it is improper to make a finding at this time. The Certifying Officer,

¹⁶ The court acknowledges that during the pendency of its application, Employer requested an additional 24 H-2A workers, but there is no amended Form 9142A application or determination involving these additional workers that is properly before the Board of Alien Labor Certification Appeals. As such, the court considers only Employer’s original request for 42 farmworkers.

as the fact finder in best position to consider all the evidence, has the opportunity to address whether any new evidence submitted by Employer on remand also influences her finding on this issue. As such, the court declines to rule on this issue at this time.

ORDER

It is hereby ORDERED that the Certifying Officer's denial of Employer's application for temporary labor certification is REMANDED to the Certifying Officer for further fact-finding and determination in accordance with this decision.

The court requests that this Order be served on the following parties by email: (1) the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor; (2) Nicole Schroeder, Esq., counsel for the Certifying Officer, Employment and Training Administration; (3) Mr. Jesse Duron, representative for the Employer; and (4) the Office of Foreign Labor Certification.

SO ORDERED.

For the Board:

DANA ROSEN
Administrative Law Judge

Newport News, Virginia