



Issue Date: 12 June 2012

BALCA Case No.: 2012-TLN-00036

ETA Case No.: C-12093-58889

In the Matter of:

MARTENS PACKING COMPANY, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Juan Carbajal
Agent for the Employer

Gary M. Buff, Associate Solicitor
Harry S. Sheinfeld, Counsel for Litigation
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the H-2B temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent

basis, as defined by the Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).

STATEMENT OF THE CASE

On April 2, 2012, Martens Packing Company, LLC (“the Employer”) submitted an application to the United States Department of Labor (the “Department”), Employment and Training Administration (“ETA”), Certifying Officer (“CO”) requesting H-2B temporary labor certification for fifteen (15) “Grader and Sorters, Agricultural Products.” AF 65-84.¹ The Employer listed the job duties for these positions as: “work to sort, grade and pack potatoes by hand, move bags and boxes, clean packing area, heavy lifting up to 50 pounds.” AR 67. Under “Statement of Temporary Need,” the Employer explained:

Martens Packing Company LLC. is a farm, growing 850 acres of potatoes, the period from June/08/2012 through November/31/2012. During this time we prepare for harvest repairing boxes, cleaning storage areas in June and July. In August, we begin harvesting and continue through October. We continue grading and storing the potatoes in November to the next months.

AF 65.

On April 9, 2012, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that its application failed to establish a temporary need for nonagricultural services or labor, as required by 20 C.F.R. § 655.6(a). AF 60-64. In particular, the CO questioned whether the job duties that the Employer listed in its application described an occupation that was agricultural in nature. AF 63. In order to remedy this deficiency, the CO directed the Employer to submit: (1) a revised ETA Form 9142 that does not include job duties that are agricultural in nature; and (2) a detailed statement of temporary need containing:

1. A description of the Employer’s business history and activities (*i.e.*, primary products or services) and schedule of operations through the year;
2. A detailed description of where the Employer’s farm operation is located;

¹ Citations to the appeal file will be abbreviated “AF” followed by the page number.

3. Information and/or documentation detailing whether the applicants will be planting, harvesting, and transplanting potatoes and other vegetables; and
4. The percentage of harvested potatoes produced by the employer (*i.e.*, whether the employer will be harvesting potatoes and/or other produce for multiple farms, or only its farm).

AF 63-64.

The Employer responded to the RFI on April 16, 2012, submitting an amended ETA Form 9142. AF 47-59. In its amended ETA Form 9142, the Employer inserted the following attachment to its original description of job duties:

Information Requested On the ETA Form 9142, Section F. a., Item 5.

1. Martens Packing Company has being established in the year of 1998, since then our job performed in this farm has being growing our own potatoes, harvest potatoes; with the most sophisticated agricultural equipment. With this special machines We dig and extract from the ground the potatoes that are place in the load truck, they take the potatoes to the packing facilities and unload on the pre-wash area were the potatoes go in a big machine that wash with water and take off all dirt from the fields. After the pre-wash the potatoes run in the process grade lines where workers star to select potatoes taking out all the dry brush potatoes plant and some small stones. From there the potatoes get in a second wash getting ready to be grade and sort in the packing line processes area.

The description of job duties to be perform by workers consist in: Grade and Sort the potatoes on the grade lines where the potatoes are turnover multiple times; workers need to observe and sort the potatoes taking out by hand all the rotten, broken, green, soft, dark and brown spots in the potatoes. After selecting all the good potatoes, in the packing lines workers pack in paper bags and/or plastic bags of 5 pounds, 10 pounds and 50 pounds. Workers help to sew the bags with sewing machine and observing potatoes bags run in the processed lines to be pale; the person in charge with this job has to rope and tie with plastic to secure the potatoes bag pale. Workers are request to clean the packing process area swiping and placing bags and boxes in the supply storage area.

2. All the operation and work is realize in the location 1323 Towpath Road, Port Byron, New York 13140
3. Worker are not needed to perform planning neither harvesting; does activities will be perform with special agricultural equipment design for this type of activities

4. The only product that We produce and harvest are potatoes, and this is the only farm that We own. All potatoes produced by Martens Packing Company LLC; are sale and distributing by Us.

AF 53. The Employer did not, however, include a revised statement of temporary need.

On May 10, 2012, the CO issued a Final Determination denying the Employer's application for H-2B temporary labor certification. AF 43-46. The CO's denial was based on his finding that the Employer failed to submit a complete and accurate ETA Form 9142 for *nonagricultural services or labor*, as required by 20 C.F.R. § 655.6(a). AF 45 (emphasis added). In particular, the CO cited the Department's determination that the positions for which the Employer requested temporary labor certification were "agricultural in nature," and thus "not appropriate for processing under H-2B Applications for Temporary Employment Certification." AF 46.

On May 23, 2012, the Employer requested review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). AF 1-42. In addition to a cover letter from the Employer's Agent, the Employer submitted a letter from Patrick Redman, a partner of Martens Packing Company, LLC, dated May 17, 2012, as well as various other attachments (including emails between the agent and the Department, a copy of the final determination denial, a copy of the RFI letter, a copy of the job order, a copy of the prevailing wage determination, a copy of the Employer's advertisements and recruitment report, a copy of the Employer's ETA 9142, and a copy of Marten Farms' payroll report for the year 2011). *Id.*

On June 5, 2012, counsel for the CO submitted a short brief requesting that this denial be affirmed for the reasons set forth by the CO in his denial letter. Specifically, counsel for the CO argues that the Employer's application "describes employment that is demonstrably agricultural in nature and which should have been foiled under the H-2A regulations," and that the Employer's response to the RFI "reinforces the idea that the application involved agricultural employment." Although Counsel for the CO acknowledges that the Employer's letter from Patrick Redman "suggests that the employer actually intended to file an H-2B application for packing house workers," he contends that this letter was belatedly filed, and asserts that if this is the Employer's actual desire, it needs to file a new application properly describing its actual need.

DISCUSSION

Scope of Review

Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may appeal to BALCA for administrative review. 20 C.F.R. § 655.33(a). The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e). In this case, the Employer submitted evidence before BALCA, including a letter written by Patrick Redman, which it did not provide to the CO in its original application or RFI response materials. Accordingly, this evidence may not be considered on BALCA review.

Nonagricultural vs. Agricultural Services

An employer seeking H-2B labor certification must “establish that its need for nonagricultural services or labor is temporary.” 20 C.F.R. § 655.6(a) (emphasis added). Positions involving temporary agricultural services or labor are covered under the H-2A program, and thus subject to a separate set of statutory rules and regulations. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The Department's H-2B regulations do not define “nonagricultural services or labor”; however, the Department's H-2A regulations define “agricultural labor or services” as:

[A]gricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition.

20 C.F.R. § 655.103(c). This definition of “agricultural labor” includes, *inter alia*, “all service performed . . . [i]n the employ of the operator of a farm in handling, . . . packing, . . . grading, . . . 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.” 20 C.F.R. § 655.103(c)(1)(i)(D).

Here, the Employer seeks H-2B temporary labor certification for fifteen (15) “Grader and Sorters, Agricultural Products.” AF 50. In its application, the Employer specified that the job duties for this position include sorting, grading, and packing potatoes by hand, as well as moving bags and boxes, and cleaning the packing area. In its response to the RFI, the Employer confirmed that all of the potatoes were produced and harvested on its own farm. AF 53. Thus, by its own admission, the Employer seeks H-2B temporary labor certification for services performed “in the employ of the operator of a farm” in handling, packing, and grading an “agricultural or horticultural commodity”—specifically, potatoes—that are produced and harvested on the Employer’s farm.

Based on the foregoing discussion, I find that the Employer requested temporary labor certification for positions that fall squarely within the Department’s definition of “agricultural labor.” And, because “agricultural labor” is the antithesis of “nonagricultural labor,” I find that the Employer failed to “establish that its need for nonagricultural services or labor is temporary,” as required by Section 655.6(a). Accordingly, I find that the CO properly denied certification.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge