DECISION AND ORDER REVERSING
DENIAL OF CERTIFICATION

This matter arises under the Temporary Labor Certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These provisions, referred to as the “H-2B program,” permit U.S. employers to bring foreign
nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient workers who are able, willing, qualified, and available at the place where the alien is to perform such services or labor. *See* 8 C.F.R. § 214(2)(h)(1)(ii)(D).

**STATEMENT OF THE CASE**

On May 25, 2012, MRL Fencing and Construction (the “Employer”) filed an application for H-2B temporary labor certification with the U.S. Department of Labor (“the Department”), Employment and Training Administration (“ETA”) for five “fencing and construction laborers.” AF 80.¹ In its application, the Employer stated that it is a construction firm specializing in the construction, repair, and maintenance of commercial and residential fencing. *Id.* The Employer went on to explain that because a majority of its clients are ranchers and farmers in Runnels County, Texas, its work primarily involved the construction and maintenance of fencing for livestock, farming, and other projects. *Id.* The job duties listed on the Employer’s application included:

Install, repair, and maintain fencing for farming, ranching, and other commercial and residential purposes. Dig postholes with augers, diggers, and spades, align posts, stretch barb [sic] wire, railing and other mesh coverings. Assemble gates when needed using equipment to stretch, crimp, and set tension on fencing. Practice upmost safety; work long house in inclimate conditions.

AF 82.

On June 1, 2012, the CO issued a *Request for Further Information* (RFI), identifying two deficiencies in the Employer’s application. AF 73-79. Only one of these deficiencies, the Employer’s alleged failure to provide sufficient documentation to establish that the requested positions are non-agricultural in nature, is relevant to this appeal.² Specifically, the RFI stated:

[T]he employer described an occupation that may be agricultural in nature. Occupations that are agricultural in nature are not processed under H-2B Applications for Temporary Employment Certification. Specifically, the employer has indicated that it is engaged in the business of constructing

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

² The second deficiency—the Employer’s failure to establish that the nature of its need is temporary—was not addressed in the CO’s Final Determination, and counsel for the CO confirmed that this deficiency had been resolved. *See* CO’s Brief at 2, footnote 1.
fencing for farming, ranching and other commercial and residential purposes. It is unclear if the requested temporary workers will perform work on farms and ranches, which is incidental to the farming activities of harvesting crops and housing livestock.

AF 76. To remedy this deficiency, the CO instructed the Employer to “submit additional information which explains how the job opportunity is non-agricultural in nature,” and to “provide information about the work locations,” so that the Department may determine whether the requested positions were non-agricultural in nature. AF 76.

The Employer’s counsel responded to the RFI on June 8, 2012, submitting, *inter alia*, a letter from the Employer’s President, Rudy Lara, dated June 5, 2012. AF 29-72. In this letter, Mr. Lara explained:

MRL Fencing and Construction is a construction company. We specialize in fence construction, and we build many different types of fences for commercial and residential purposes. The large majority of the construction work we perform is on ranches and farms in Runnels County, Texas. . . . I ask that you closely review the work orders submitted with this statement. These work orders show that the main service we offer is construction. . . . [O]ur fulltime construction workers are not ranch hands or farm workers. They do not mend fences, as agricultural workers must do to maintain their fences. Our construction workers build new fences and repair fences that are damaged beyond mending. Their work is more specialized than the fence mending of farm workers, and our workers require more knowledge of construction techniques, tools, and equipment. . . . Further, in [75 Fed. Reg. 6887-6889], the Labor Department noted that agricultural work includes incidental work like the maintenance of farm buildings and machinery. This implies tasks beyond mere maintenance, like the construction of a barn, the repair of a farm truck, or the manufacture of tools that are not agricultural. They are nonagricultural tasks that facilitate agricultural production, and the workers who do these tasks are nonagricultural workers. The contractor who builds the barn, the mechanic who repairs the truck, and the manufacturer who makes the tractor are not agricultural workers, even though they may work on a farm, for a farmer, and advance the farm’s production. Our workers are in the same category.

AF 50.

On July 9, 2012, the CO issued a Final Determination denying the Employer’s application, citing the Employer’s failure “to provide sufficient
documentation to establish that the job opportunity is non-agricultural in nature.” AF 24-28. The CO acknowledged the Employer’s response to the RFI, but stated:

Whether the work performed is beyond the normal duties of agricultural workers has no bearing on the fact that MRL Fencing and Constructing [sic] is seeking workers to build structures on farms and ranches which are connected to the farming activities of harvesting crops and housing livestock. These duties fall under the category of agricultural labor.

AF 28.

The Employer requested review of the CO’s denial before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) on July 18, 2012. In its request, the Employer argued that the employment for which it sought certification was non-agricultural, and that the CO had disregarded the evidence to that effect. AF 1-19.

Counsel for the CO filed a brief on July 31, 2012, asserting that the fence work performed by the Employer is “incidental to farming operations and, therefore, agricultural in nature.” CO’s Brief at 3, citing 20 C.F.R. § 655.103(c); 75 Fed. Reg. 6684, 6888 (February 12, 2010).

**DISCUSSION**

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) (2008) (emphasis added). The Department’s 2008 H-2B regulations do not define “nonagricultural services or labor;” however, because agricultural services or labor are covered under the H-2A program, and subject to a separate set of statutory rules and regulations, it is thus reasonable to conclude that nonagricultural services or labor, for purposes of the H-2B program, do not include those services or labor covered under the H-2A regulations. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and the implementing regulations at 20 C.F.R. Part 218.

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3 The Department’s newly promulgated H-2B regulations define “non-agricultural labor and services” as “any labor or services not considered to be agricultural labor or services as defined in subpart B of this part.” Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Final Rule, 77 Fed. Reg. 10038, 10150 (Feb 21, 2012). However, after the Department’s enforcement of these provisions was enjoined by the U.S. District Court for the Northern District of Florida, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. See Bayou Law & Landscape Services et al. v. Solis, Case 3:12-cv-00183-MCR-CJK (April 26, 2012); Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance, 77 Fed. Reg. 28764, 28765 (May 16, 2012).
655, Subpart B. The Department’s H-2A regulations define “agricultural labor or services” as:

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

20 C.F.R. § 655.103(c). The FLSA defines “agriculture” as:

[Farm]ering 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 section 15(g) of the Agricultural Marketing Act, as amended), 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.


Counsel for the CO argues that “the record establishes that the fence work performed by the Employer’s workers is incidental to farming operations and, therefore, agricultural in nature.” CO’s Brief at 3. Yet aside from observing that the Employer builds and maintains fences on farms and ranches, the CO never specified why exactly the fence work for which the Employer seeks certification is “incidental to farming operations.” While the FLSA’s definition might appear to be broadly inclusive of all work performed on a farm, the Department’s FLSA regulations provide that “[i]n order for practices other than actual farming operations to constitute ‘agriculture’ . . . it is not enough that they be performed by a farmer or on a farm in connection with the farming operations conducted by such farmer or on such farm . . . . They must also be performed ‘as an incident to or in conjunction with’ these farming operations.” 29 C.F.R. § 780.146 (2011). These regulations further provide:

The line between practices that are and those that are not performed “as an incident to or in conjunction with” such farming operations is not susceptible of precise definition. Generally, a practice performed in connection with farming operations is within the statutory language
only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business. Industrial operations (Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398) and processes that are more akin to manufacturing than to agriculture (Maneja v. Waialua, 349 U.S. 254; Mitchell v. Budd, 350 U.S. 473) are not included.

Id. (emphasis added). Thus, the mere fact that the Employer seeks workers to “build structures on farms and ranches” is not determinative, as the CO suggests. In fact, the Employer’s construction and repair business appears to fall squarely within the type of independent business that the Department’s FLSA regulations specifically exclude, and the CO has not cited any specific statutory or regulatory authority indicating otherwise. Accordingly, I find that the CO erred in finding that the Employer “failed to submit a complete and accurate ETA Form 9142 for nonagricultural services or labor,” and thus incorrectly denied the Employer’s application for H-2B temporary labor certification.

ORDER

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge