

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 June 2013

BALCA Case No.: 2013-TLN-00054
ETA Case No.: H-400-13092-629679

In the Matter of:

MRL FENCING AND CONSTRUCTION,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Jeff Thomas, Esquire
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For the Employer

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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
VACATING DENIAL OF CERTIFICATION

The above captioned matter arises under the H-2B nonimmigrant provision of the Immigration and Nationality Act, 8 USC §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 CFR Part 214 and 20 CFR Part 655, Subpart A. This provision permits employers to bring foreign nationals to the United States on a temporary basis to perform

temporary, nonagricultural services or labor “if unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C. § 1101(a)(15)(H)(ii).

An employer who wishes to hire foreign workers under this program must apply for and receive a “temporary labor certification” from the U.S. Department of Labor, Employment and Training Administration (ETA). 20 CFR § 655.20. Applications for temporary labor certification are reviewed by a Certifying Officer (CO) within ETA. 20 CFR § 655.23. If the CO denies certification, in whole or in part, the aggrieved employer may request review before the Board of Alien Labor Certification Appeals (BALCA or the Board). 20 CFR § 655.33(a).

BACKGROUND

The Employer, MRL Fencing and Construction (Employer), is a construction firm that specializes in the construction, repair, and maintenance of commercial and residential fencing. On April 2, 2013, the Employer filed an application with ETA requesting temporary labor certification for five H-2B workers to be employed as “Fence Erectors” from May 1, 2013 to February 28, 2014. AF 62-102.¹ In the application’s Statement of Temporary Need, the Employer stated that it contracts with ranchers, farmers, business owners, and private landowners in Runnels County, Texas to construct specialized fencing for livestock, farming, and residential purposes. AF 68.

The CO issued a *Request for Further Information* (RFI) on April 9, 2013, informing the Employer that it failed to comply with the criteria necessary for certification. AF 56. Among other things, the CO found that the Employer failed “to submit a complete and accurate [application] for nonagricultural services or labor.”² Specifically, the CO explained:

In accordance with Departmental regulations at 20 CFR sec. 655.6(a), to use the H-2B program, an employer must establish that its need for nonagricultural services or labor is temporary.

On the ETA Form 9142, Section F.a., Item 5, the employer described an occupation that may be agricultural in nature. Occupations that are agricultural in nature are not processed under H-28 *Applications for Temporary Employment Certification*. Specifically, the employer has indicated that it is engaged in the business of constructing fencing for farming, ranching and other commercial and residential purposes. During the processing of the employer’s previous case (C-12146-59235), the employer indicated that “the majority of the construction work we perform is on ranches and farms in Runnels County.” Therefore, it is clear that the employer is performing work on a farm. However, it is unclear whether or not its work is connected to the raising, shearing, feeding, caring for, training and management of livestock. The employer has specifically stated that it specializes

¹ Citations to the Appeal File will be abbreviated “AF” followed by the page number.

² The RFI identified two additional deficiencies, but the Employer later resolved these deficiencies to the CO’s satisfaction. *See* AF 15.

in "fencing for livestock, farming." However, it is unclear what purpose and/or function the fencing serves.

According to H-2A regulations found at 29 CFR 501.3 (*Definitions*), agricultural labor means all service performed:

On a farm, in the employ of any person, 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.

AF 59. The CO directed the Employer to "submit additional information which explains how the job opportunity is non-agricultural in nature" and "provide information about the work locations in order to determine whether the job opportunity is non-agricultural in nature." AF 59. The CO specifically instructed the Employer to provide "specific information as to what function its fencing is used for and define what it means when it states that it specializes in 'fencing for livestock'" including "examples, contracts or other documentation which show[] what purpose the fencing serves." AF 59.

On April 15, 2013, the Employer filed a response to the RFI. Among other things, the Employer's RFI response included: a letter from its President, Mr. Rudy Lara; a letter from its attorney; proposals for projects it intended to complete in the next ten months; and a Decision and Order issued by the undersigned on August 8, 2012, holding that the Employer's work constitutes "nonagricultural labor or services." AF 22-55. AF 22-55. In his letter, Mr. Lara addressed the CO's concern that the Employer's job opportunity was agricultural in nature. Specifically, Mr. Lara stated:

MRL Fencing and Construction is a construction company that specializes in many different types of fencing projects for commercial and residential purposes. This year, I have submitted 11 new proposals for projects that my company must complete by February, 2014. From these new jobs, all projects that involve the construction of barbed wire or net fencing will be for farming and ranching operations in Runnels County. For instance, we will complete a project to build 2600 feet of net fencing for Mr. Ali, a ranch-owner in Runnels County, and we will build 5500 feet of barbed wire fencing for Mrs. Applebee, another ranch-owner. The purpose of these fences is to keep livestock on the ranch and prevent predation. However, the full purpose and function of these fences does not rightly concern me. My company builds new fencing, but has no connection to the livestock raising [sic] or harvesting function of the ranch. What the rancher or farmer does with the fence is not my concern. We build the fences, and we leave all livestock raising and harvesting to ranch hands and farm workers.

We will complete water gap (fencing over creeks and streams) and cross fencing (fencing within perimeter fences) projects for four other ranchers and farmers in Runnels County. These projects, like the perimeter fencing projects mentioned above, will involve the construction of new fencing for ranchers and farmers. We

will not maintain these fences after completing our construction projects, and will leave this work to ranch hands. Our employees do not mend fences, as agricultural workers do. Our construction workers are more specialized, and must know the construction techniques, tools, and equipment of our trade. Our employees work solely for MRL Fencing, and are not agricultural workers.

Also this year Jeffrey Oats has hired our company to build 700 feet of chain link fencing for residential purposes. Mr. Oats saw another job we completed in the area and was impressed. He now wants us to fence in his residential property with chain link.

In all, MRL Fencing bids for its construction work, like any other general contractor, and we do not perform the daily agricultural tasks of mending fences and caring for livestock. We provide our own tools and equipment for the work we do, and we are located at one central location in Winters, Texas. We build fences for many different purposes, and are not agricultural workers.

AF 34-35. Mr. Lara specified that the Employer planned to complete 11 projects this year, ten at a “ranch/farm and residence” and one at a “private residence.” AF 35.

On May 24, 2013, the CO issued a Final Determination denying certification. AF 13-21. The CO cited only one basis in support of the denial: the Employer’s “failure to submit a complete and accurate [application] for nonagricultural services or labor.” AF 15, *citing* 20 C.F.R. 655.6. The CO explained:

Based on the information provided, it is understood that the fencing the employer constructs does not serve in a decorative capacity, but indeed serves as a functional fence, necessary to farming operations. The employer readily admits that these fences are used to care for livestock. Therefore, this job opportunity would be considered "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."

The employer argues that it is not an agricultural employer because it has no business connection to the livestock. It is noted that the employer has contracted directly with farmers to provide a service that is a necessary component to the farmers' operations of raising cattle. In essence, the employer is working collectively with farmers by providing fencing specifically for the farmer to maintain and manage its livestock. Furthermore, based on the information provided, the majority of its work involves contracts with farmers for fencing related to farming operations. Specifically, of the 11 jobs listed in its response, 10 of them will take place on a farm and as the employer has stated, this fencing is use to maintain livestock. Therefore, the supermajority of the work the H-2B workers sought will perform is on a farm and involves fencing that will be constructed for agricultural purposes (i.e. - livestock management). Essentially, if

the employer did not have these contracts with farmers, it would not have a business.

Moreover, job opportunities which are filed and certified in the H-2A program involve duties such as constructing livestock buildings and animal housing or enclosure structures. These structures are considered an essential component in housing and/or in the management of livestock. MRL Fencing and Construction has pointed out that they "do not care for animals, and have no ongoing connection with the landowners." Similarly, H-2A employers who perform construction related functions on a farm such as building livestock buildings are also not in the business of caring for the animals and do not generally have an ongoing relationship outside of installing/building additional structures. These employers have contracted with farmers to provide these types of services. Therefore, work covered by these contracts is considered to be "in connection" with the "management of livestock" which is in turn considered an H-2A involved job opportunity.

AF 17-18. In conclusion, the CO stated: "Therefore . . . the CNPC has determined that the employer's job opportunity is agricultural in nature and therefore, does not meet the requirements of the H-2B program." AF 18.

On June 3, 2013, the Employer petitioned BALCA for administrative review of the CO's Final Determination. AF 1-12. In its request for review, the Employer argues that the CO incorrectly characterized its Fence Erector positions as agricultural. The Employer acknowledged that the definition of agricultural labor at 20 C.F.R. § 655.103(c) is broad, but argued that it would lead to unreasonable conclusions if the Board did not place a meaningful limit on its application. AF 3.

The Board issued a Notice of Docketing on June 5, 2013, in which it provided the parties an opportunity to submit briefs on an expedited basis. Both parties timely submitted briefs in this matter.

DISCUSSION

To obtain certification for H-2B workers, an employer must "establish that its need for *non*agricultural services or labor is temporary." 20 C.F.R. § 655.6(a) (2008) (emphasis added). The CO's cited basis for denial in this matter is almost identical to the denial reversed in *Matter of MRL Fencing and Construction*, 2012-TLN-42 (August 8, 2012). After reviewing the arguments of the parties, I am not convinced that the reasoning employed in *MRL Fencing and Construction* is incorrect. Because the facts in the instant case are not materially distinguishable from those in *MRL Fencing and Construction*, I rely upon the reasoning set forth in *MRL Fencing and Construction* to find that the CO erred in denying the Employer's application.

ORDER

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

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge