DECISION AND ORDER DIRECTING GRANT OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Ashwood Farm, LLC’s (“Employer’s”) request for review of the Certifying Officer’s Final Determination in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis, as defined by Department of Homeland Security regulations.\(^1\) Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).\(^2\) A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.\(^3\)

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\(^1\) 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).

\(^2\) 8 C.F.R. §214.2(h)(6)(iii).

\(^3\) 20 C.F.R. §655.61(a).
STATEMENT OF THE CASE

On January 1, 2022, Employer filed an Application for Temporary Employment Certification (ETA Form 9142B), ETA Form 9142B Appendix A. (AF 74-96).\(^4\) Employer requested certification for six horse groomers\(^5\) to “assist with the daily care of horses/preparation of horses for training/show.” (AF 76.) Employer requested workers from April 1, 2022 to October 1, 2022. (AF 74, 76.)

On January 13, 2022, the CO issued a Notice of Deficiency (“NOD”) stating, \textit{inter alia,}\(^6\) that:

In accordance with 20 Code of Federal Regulations (CFR) § 655.6(a) an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

On the ETA Form 9142, in Section B., Item 8 and in the employer’s detailed statement of temporary need, the 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.

(AF 70.) The CO explained that the job duties appear to be “agricultural in nature as the employer appears to describe horse care-taking job duties that appear to occur on a ranch (farm) where horses are raised and cared for horse racing purposes.” (AF 72.)

To correct this deficiency, the CO required Employer to provide the following:

1. A statement describing where the horse grooming work will be performed, including a description of the ranch where the horse grooms will be taking care of the horses; and

2. A statement providing a more detailed explanation of the business operations of Ashwood Farm, LLC and schedule of operations through the year.

If the employer believes that this position is not agricultural in nature, it should provide further information and documentation to demonstrate whether and how this position is non-agricultural in nature.

(AF 72-73.)

Employer responded to the Notice of Deficiency on January 13, 2022. (AF 17-65.) Employer provided documentation regarding the horse show circuit in Lexington, Kentucky during the period April 1 to October 1, 2022. (AF 29-65.) Employer explained that:

\(^4\) In this Decision and Order, “AF” refers to the Appeal File.
\(^5\) SOC (O*Net/OES) occupation title “Nonfarm Animal Caretakers” and occupation code 39-2021.00. (AF 74.)
\(^6\) The CO identified one other deficiency that was resolved by Employer. (AF 73.)
Although we listed the primary worksite as 3444 Newton Pike, Lexington, KY 40511, which is the address of Ashwood Farm, the workers will also be traveling frequently to Horse Shows within the Lexington, Kentucky MSA during the course of their employment. We also wish to confirm that Ashwood Farm does not have a horse breeding program, therefore the position does not fall within the definition of "agriculture", especially since a significant portion of the duties will be performed off-farm at horse show venues. We also wish to confirm that Ashwood Farm does not participate in Horse Racing. They are solely a "show" stable.

In between the Horse Shows, the workers will transport the horses to and from the Farm. At both Ashwood Farm and the Horse Show venues, the Horse Grooms will perform the duties [detailed in the] submitted application.

(AF 17-18.) Additionally, Employer described its operations as follows:

Ashwood Farm, LLC is a full-service boutique boarding and equine training facility, at which horses are trained to compete in national and international horse shows during the horse show season. The farm also provides facilities and care related to the boarding of horses that are in training. Ashwood Farm does not engage in any horse breeding activities. The majority of horses boarded at the farm are those of clients that have contracted with Ashwood Farm for training to compete in horse shows.

(AF 18.)

On January 28, 2022, the CO issued its Final Determination, denying Employer’s application due to one unresolved deficiency. (AF 8-16.) The CO explained the deficiency as follows:

It is noted that the additional supporting documentation submitted by the employer in its NOD response, do not establish the job opportunity as non-agricultural.

As stated in the NOD issued to the employer, non-agricultural services or labor are those that are not agricultural. Departmental regulations define agricultural labor or services as:

For the purposes of this subpart, agricultural labor or services, pursuant to 8 U.S.C.1101(a)(15)(H)(ii)(a), 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. For informational purposes, the statutory provisions are listed below.

(1)(i) 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;

In its NOD response, the employer, Ashwood Farm, LLC, clarified that the horses are cared for at the horse farm located at 3444 Newton Pike, Lexington, KY 40511. Horses are livestock and as the employer is a farm, the employer’s need is agricultural in nature. The employer’s NOD response does not establish the job opportunity as non-agricultural. Therefore, the employer did not overcome the deficiency.

(AF 15-16.)

On January 31, 2022, Employer appealed the CO’s Final Determination. (AF 1-5.) On February 9, 2022, this office received the Appeal File. On February 10, 2022, I issued the Notice of Docketing and Order Setting Briefing Schedule. On February 18, 2022, I received an email from the Solicitor’s office stating that Employer and the CO were in settlement discussions; that an update would be provided by March 1, 2022; and that Employer had consented to waive the date requirement for issuance of the Decision and Order. On March 1, 2022, the Solicitor’s office stated that no settlement agreement could be reached. An email was sent informing both parties that briefs could be submitted by Thursday, March 3, 2022, and a decision would be issued as expeditiously as possible. The Solicitor’s office informed the undersigned on March 1, 2022 via email that it would not file a brief in this case. On March 3, 2022, Employer submitted a brief.

**STANDARD OF REVIEW**

The standard of review in H-2B is limited. When an employer requests a review by an Administrative Law Judge (“ALJ”) under §655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. Id. The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; Salt Wells Cattle Co., LLC, 2011-TLC-00185 (Feb. 8, 2011). The CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. J & V Farms, LLC, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); Midwest Concrete & Redi-Mix, Inc., 2015-TLC-00038, slip op. at 2 (May 4, 2015).
DISCUSSION

An employer seeking certification to employ H-2B non-immigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The qualifications and requirements for the job “must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment,” 20 C.F.R. §655.20(e). Additionally, the employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a).

Where an employer has applied for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues a Notice of Deficiency (“NOD”) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b). BALCA may only consider the documentation considered by the CO in its final denial determination as contained in the AF and may also consider the arguments set forth in the request for review and submitted legal briefs. 20 CFR §655.61(e).

Program regulations at 20 CFR §655.31(c) provide: “If the CO finds the response to the Notice of Deficiency unacceptable, the CO will deny the Application for Temporary Employment Certification in accordance with the provisions in §655.51.”

The CO asserted that Employer has failed to establish that the job opportunity is non-agricultural and therefore, cannot be processed under H-2B Applications for Temporary Employment Certification. According to the applicable regulation:

Employees engaged in the breeding, raising, and training of the horses on farms for racing purposes are considered agricultural employees. Included are such employees as grooms, attendants, exercise boys, and watchmen employed at the breeding or training farm. On the other hand, employees engaged in the racing, training, and care of horses and other activities performed off the farm are not employed in agriculture. For this purpose, a training track at a racetrack is not a farm. Where a farmer is engaged in both the raising and commercial racing of racehorses, the activities performed off the farm by his employees as an incident to racing, such as training and care of the horses, are not practices performed by the farmer in his capacity as a farmer or breeder as an incident to his raising operations. Employees engaged in the feeding, care, and training of horses which have been used in commercial racing and returned to a breeding or training farm for such care pending entry in subsequent races are employed in agriculture.

29 C.F.R. § 780.122 (emphasis added).

In several cases decided by BALCA, employers who engaged in operations dealing with the sales, showing, or racing of horses sought certification of temporary job opportunities classified...
under SOC (O*Net/OES) occupation title “Nonfarm Animal Caretakers.”

7 In all these cases, the description of the job opportunities included either horse grooming or horse training duties similar to the job opportunity at issue in the instant case. In none of these cases did the employers engage in, or contract with farms that engaged in, the breeding and/or foaling of horses. The COs in these cases did not identify any deficiencies in the applications for H-2B temporary workers due to the non-agricultural nature of the job opportunities.

Conversely, in Hillenmayer Landscape Services, LLC, 2019-TLC-00047 (May 3, 2019), an employer applied for certification of sixty temporary farmworkers under the H-2A program. The employer “provide[d] farm labor contracting services to Kentucky horse farms whose operations are tied to the breeding, foaling, and sales cycles.” (Hillenmayer at 3.) In its denial, the CO argued that the job opportunity did not comply with 29 C.F.R. § 780.122 because “the work performed by the employer’s temporary employees fell outside the scope of agricultural work because its client’s horses are being sold at thoroughbred auctions in Kentucky and New York.”

8 (Id. at 4.) The ALJ reversed the CO’s denial of the application, finding, inter alia, that the work performed by the temporary workers was agricultural in nature since the work they engaged in (tied to the breeding, foaling and sales of horses) was exclusively performed on the farm, and not

As these precedent case decisions have recognized, there is a distinction between employers who are engaged in (or have contracted with farms who are engaged in) the breeding and/or foaling of horses and those employers who are engaged in the services of training and boarding of horses for racing or show event purposes. Job duties involving the training and grooming/care of horses are agricultural when that work also includes breeding and/or foaling of horses. See 29 C.F.R. § 780.122. On the other hand, job duties involving the training and grooming/care of horses are non-agricultural when the employer does not engage in the breeding and foaling of horses but is instead engaged in services such as training and/or boarding horses primarily for purposes of racing or showing the horses. Moreover, work that is performed primarily on the farm is agricultural, while work that is performed primarily off the farm is non-agricultural in nature.

7 See Hill’n’ Dale Sales Agency, Inc., 2016-TLN-00031 (April 14, 2016), (the ALJ affirmed the CO’s denial of the application due to employer’s failure to show that its job opportunity was temporary); Trade Winds Farm (TAC, LLC), 2011-TLN-00013 (April 12, 2011)(the ALJ affirmed the CO’s denial of the application due to the employer’s failure to utilize the highest applicable wage among all relevant worksites); Mark Edward Casse, d/b/a Casse Racing, LLC, 2018-TLN-00014 (December 6, 2017)(the ALJ affirmed the CO’s denial due to the employer’s failure to establish that the job opportunity was temporary in nature); Dallas Stewart Racing Stable, Inc., d/b/a Dallas Stewart, 2018-TLN-00012 (Dec. 01, 2017)(ALJ reversed the CO’s denial due to the employer’s failure to submit an amended recruitment report); Gary Cross Racing Stables, 2015-TLN-00055 (Sep. 02, 2015)(ALJ affirmed the CO’s denial due to the employer’s failure to comply with recruitment requirements); Richard K. Owens Racing Stables, 2010-TLN-00068 (Jul. 06, 2010)(the ALJ affirmed the CO’s denial due to the employer’s failure to establish temporary and seasonal need); KDE Equine, LCC, d/b/a Steve Asmussen Racing Stable, 2020-TLN-00043 (May 20, 2020)(ALJ affirmed the CO’s denial due to the employer’s failure to demonstrate how the two submitted applications represent different job opportunities).

8 The CO also denied the application because the employer failed to establish a temporary or seasonal need and failed to submit completed work contracts.

9 Breeding and foaling horses falls under the definition of agricultural labor as defined by 26 U.S.C. § 3101(g)(1) and 29 U.S.C. § 203(f), which states that “Agricultural labor . . . means all services performed: On a farm, in the employ of any person, . . . in connection with raising . . . any agricultural commodity, including the raising, . . . feeding, caring for, training and management of livestock, . . .” 26 U.S.C. § 3101(g)(1)(A); 29 C.F.R. § 203(f).
The documentation provided by Employer in its NOD response supports its assertion that the job opportunities are non-agricultural in nature. Employer explained that, while the address provided was the primary worksite, “the worker’s will also be traveling frequently to Horse Shows within Lexington, Kentucky MSA during the course of employment.” (AF 17.) Employer further stated that “a significant portion of the duties will be performed off-farm at horse show venues.” (Id.) Additionally, Employer described Ashwood Farm, LLC as a “full-service boutique boarding and equine training facility, at which horses are trained to compete in national and international horse shows during the horse show season.” (AF 18.) Employer further explained that “[t]he majority of horses boarded at the farm are those of clients that have contracted with [Employer] for training to compete in horse shows.” (Id.) Employer emphasized that it “does not engage in any horse breeding activities.” (Id.)

Upon review of the records, I find that Employer established that the job opportunity of horse groomer was non-agricultural in nature as defined in the regulations. 29 C.F.R. § 780.122. Accordingly, I find that the CO’s denial of certification based on the Employer’s failure to establish that the job opportunity was non-agricultural in nature pursuant to 20 C.F.R. § 655.6(a) was not in accordance with the law.

ORDER

Accordingly, it is HEREBY ORDERED that the Certifying Officer’s denial of the Employer’s Temporary Employment Certification Application is REVERSED, and this matter is REMANDED for certification.

LARRY S. MERCK
Administrative Law Judge