

**U.S. Department of Labor**

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**Issue Date: 26 September 2012**

**OALJ Case No.: 2012-TLC-00097**

**ETA Case No.: C-12215-35415**

*In the Matter of:*

**DESOTO FRUIT AND HARVESTING, INC.,**

*Employer.*

Certifying Officer: William L. Carlson  
Chicago Processing Center

**DECISION AND ORDER – REVERSING CERTIFYING OFFICER’S DENIAL  
OF TEMPORARY LABOR CERTIFICATION**

The above captioned case involves the labor certification for temporary and seasonal agricultural employment of nonimmigrant foreign workers (H-2A workers) under the Immigration and Nationality Act (INA), as amended, 8 USC 1101, et seq., and its implementing regulations at 20 CFR Part 655, Subpart B. The Employer filed a timely request for an expedited administrative review of the Certifying Officer’s August 28, 2012, denial of its application for temporary labor certification issued pursuant to 20 CFR §655.164.

Following a telephonic conference held on September 14, 2012, schedule dates were set for the Parties to submit additional material for consideration as well as a date to submit a written position statement with supporting brief. No additional material was submitted for consideration.

**ISSUES**

During the September 14, 2012, telephonic conference, the Parties agreed that the remaining issues involved are –

1. Whether the requested non-immigrant H-2A workers recruited as “Heavy and Tractor-Trailer Truck Drivers” (O\*NET # 53-3032.00 as approved by the State Workforce

Agency) would be performing agricultural work under the provisions of 20 CFR §655.103(c) where the Employer is an H-2A Labor Contractor (H-2ALC) employer and not the fixed-site citrus farmer serviced by the requested non-immigrant H-2A workers.

2. Whether more than one area of intended employment as defined by 20 CFR §655.103(b) is involved in the Employer's application for non-immigrant H-2A workers recruited as "Heavy and Tractor-Trailer Truck Drivers" (O\*NET # 53-3032.00 as approved by the State Workforce Agency), in violation of the limitation placed on H-2ALC employers by federal regulations at 20 CFR §655.132(a).

## **PROCEDURAL HISTORY**

On July 13, 2012, the Employer filed an "Agricultural and Food Processing Clearance Order ETA Form 790" with the Florida State Workforce Agency (SWA)(AF 221-253). The ETA 790 was certified by Mr. J. Sorrell on July 9, 2012 and described specific work duties for 17 non-immigrant workers during the anticipated period of September 18, 2012 through July 12, 2013. On July 25, 2012 the SWA approved the ETA 790 as job order no. FL9696596 for "Citrus Driver 53-3032.00" with an expiration date of February 14, 2013 (AF 221). It is specifically noted that occupational code 53-3032.00 is assigned to O\*NET occupation "Heavy and Tractor-Trailer Truck Drivers"<sup>1</sup> and that code number 45-2091.00<sup>2</sup> was deleted by the SWA.

On August 2, 2012, the Employer filed its "Application for Temporary Labor Certification ETA Form 9142" with the Chicago National Processing Center (AF 180). The application was submitted for 17 total worker positions for the employment period of September 18, 2012 through July 12, 2013. The described job was "Citrus Truck Driver, Hauler" with the O\*NET code of 45.2091, vice the SWA approved job position of Heavy and Tractor-Trailer Truck Driver, O\*NET code 53-3032.00 (AF 180). On August 9, 2012 the Certifying Officer issued a Notice of Deficiency identifying specific deficiencies in the ETA Form 790 and ETA Form 9142, as well as failure to submit a surety bond, issues surrounding farm labor contract employers, and the two issues presently before this Administrative Law Judge (AF 158-168).

The Employer filed its response to the noted deficiencies on August 17, 2012 (AF 69-157). On August 28, 2012 the Certifying Officer denied the application because "two of the noted deficiencies were not corrected" (AF 62). The two noted deficiencies are the two remaining issues now before this Administrative Law Judge. The Employer filed its "Request for Expedited Administrative Review" with supporting materials on September 4, 2012 (AF 1-59).

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<sup>1</sup> <http://www.onetonline.org/link/summary/53-3032.00>

<sup>2</sup> O\*NET code 45-2091.00 is designated for Agricultural Equipment Operators and includes the operation of various farming equipment and tasks vastly different than that described in the Employer's ETA Form 790. See footnote 1 for reference material.

## DISCUSSION

### I. The Employer is an H-2A labor contractor engaged in agricultural business.

Under the federal regulations applicable to the temporary employment of non-immigrant agricultural workers (H-2A workers), a “fixed-site employer” is an individual or legal entity engaged in agriculture who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, employs, solicits, hires, houses or transports H-2A workers as incident to or in conjunction with the owner’s or operator’s own agricultural operation, 20 CFR §655.103. An “H-2A labor contractor (H-2ALC)” is any individual or legal entity that is not a fixed-site employer or employee, or an agricultural association or employee, who recruits, solicits, hires, employs, furnishes, houses or transports H-2A workers, 20 CFR §655.103. “The definition of an H-2ALC broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer,” Department of Labor comments to implementing regulations, 75 FR 8888 (2/12/2010).

The Employer in this case has consistently described the work to be performed by the requested H-2A workers as solely the transportation of citrus from the citrus groves of Sorrells Citrus, Inc., to numerous citrus processing plants in Florida. The Employer describes the tasks as “the use of tractor-trailer equipment of one 26,000 pound gross vehicle weight tractor to move empty trailers from [Employer’s] vehicle storage areas to specified locations in citrus groves where they are dropped; recovering the trailer after it has been filled by harvesters; delivering the filled trailer to the citrus processing plant; recovering the empty trailer from the processing plant; delivering the trailer to another citrus grove or returning the trailer to the [Employer’s] trailer parking area.” (AF 5) The citrus groves serviced are owned and/or operated by Sorrells Citrus, Inc., a fixed-site agricultural employer under the H-2A program. There is no evidence of record that the Employer is an agricultural association of farmers, growers, processing establishments, packing sheds or other fixed-site agricultural employers. There is no evidence that the Employer engages in the purchase of the citrus from the farmer and then transporting the agricultural produce (i.e.: bird-dogging<sup>3</sup>). The Employer has attested to the ability to house H-2A workers and has sought to recruit, solicit and hire H-2A workers as truck drivers.

Under the H-2A program, “agricultural labor or services” is (1) as defined and applied at 26 U.S.C. §3121(g) of the Internal Revenue Code (IRC); (2) as defined and applied by 29 U.S.C. §203(f) of the Fair Labor Standards Act (FLSA); or (3) “the pressing of apples for cider on a farm or logging employment.” An occupation included in either the IRC or FLSA definition is agricultural services even though it meets only one of the statutory definitions. 29 CFR §655.103(c); see also comments at 75 FR 8887-8889 (2/12/10) on returning the implementing

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<sup>3</sup> Bird dog involves the purchase of agricultural commodity while on the farm by another entity and removing/transporting the crop from the farm to market or processing. In such a case work on a farm or by a farmer ended when the sold crop was placed in transport off the farm by the “bird dog,” though work on the farm in loading the crop onto the transport vehicles may still be agricultural in nature. See pre H-2A program case *Champan v. Durkin*, 214 F.2<sup>nd</sup> 360 (5<sup>th</sup> Cir. 1954) There is no evidence in this case that the Employer had any ownership interest in the citrus crop being delivered to the market (processing centers).

regulations to the “adequately flexible” 1987 regulatory definitions of agricultural labor. In addition to activities performed by a farmer or on a farm incidental to farming operations, under the IRC definition when the worker is in the employ of a farmer, “the delivering to storage or to market, [in its unmanufactured state] of any agricultural or horticultural commodity, as long as more than 50 percent of the goods [with respect to which such service is performed] were produced by the farmer-employer” is agricultural labor or services. 75 FR 8888 (2/12/10); see also 29 CFR §103(c)(1)(i)(D); 29 CFR §655.103(c)(2); as well as 29 CFR §§780.152 - 780.156 for similar transportation of farm products from fields to other locations as “secondary” agriculture activity under §203(f) of the FLSA.

The uncontradicted evidence of record is that the Employer “hauls nothing but raw fruit for [the farmer-employer,] Sorrells Citrus, Inc. [which is] raw fruit picked by the Hand Harvesters in the groves in the raw form and hauled in the raw form by the citrus fruit hauler [Employer] to the local citrus [processing] plants that are in the various areas of the state.” (AF 147) The IRC, FLSA and H-2A program do not place limits on the distance traveled or the location of the storage or market in determining whether the transportation of the agricultural or horticultural commodity is agricultural labor or services. The only requirements are that the work be performed for the farmer-employer and that the delivery actions involve the delivery of loads which are composed of more than 50% from that farmer-employer’s agricultural or horticultural commodity. In this case, each load of raw citrus to be delivered directly from one of the farmer-employer’s identified fix-site citrus groves to one of the identified processing plants by tractor-trailers, to be driven by H-2A workers recruited, solicited, hired, and housed by the Employer, is 100% raw citrus of the farmer-employer, Sorrells Citrus, Inc.<sup>4</sup> Accordingly, such activity is agricultural in nature within the meaning of the H-2A program.

In view of all the foregoing, the Employer has established his classification under the H-2A program as an H-2A agricultural labor contractor (H-2ACL) and that the work involved is agricultural in nature.

## II. The described work does not involve more than one area of intended employment.

Federal regulations restrict an H-2A labor contractor’s ETA 9142 applications “to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees.” 20 CFR §655.132(a). An area of intended employment is “the geographic area within the normal commuting distance of the place of the job opportunity for which the certification is sought. ... If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multi-state MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of the MSA are not controlling in the identification of the normal commuting area; a

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<sup>4</sup> There is no indication in the AF of the identity of the owner of the tractor-trailers involved. If the equipage is owned by the farmer-employer, the case of the work being agricultural in nature is strengthened. The vehicles identified within the AF relate to passenger vehicles owned by the H-2ALC Employer and used to transport workers. If these vehicles were used to transport H-2A hand harvesters recruited by the H-2ACL Employer for work in the citrus groves of the farmer-employer the case of the truck drivers performing agricultural work would have been strengthened by the argument the H-2ALC was retained by the farmer to harvest and deliver the citrus crop.

location outside of an MSA may be within the normal commuting distance of a location that is inside (e.g., near the border of) the MSA.” 20 CFR §655.103

The Employer has identified Sorrells Citrus, Inc. as the only fixed-site employer to be serviced by H-2A workers under the filed ETA 9142. The ETA 9142 identifies Sorrells Citrus, Inc. as operator for citrus groves in Desoto County, Florida (46 fixed-sites); Hardee County, Florida (5 fixed-sites); Manatee County, Florida (4 fixed-sites); Polk County, Florida (1 fixed-site); Charlotte County, Florida (1 fixed-site); Highlands County, Florida (1 fixed-site); Sarasota County, Florida (1 fixed-site); and Hillsboro County, Florida (1 fixed-site)<sup>5</sup> (AF 192-195, 87, 95, 103, 111, 121, 129, 136, 48-57). The ETA 9142 specifies a wage rate for “spotting empty trailers” in 11 different Florida counties (AF 190), including the 8 counties in which Sorrells Citrus, Inc. has specifically identified fix-sites in the submitted ETA 9142. The evidence established that only the fixed-site citrus groves owned by Sorrells Citrus, Inc. are subject to the application, therefore listed spotting fees or other wage rates not involving those identified fixed-site citrus groves are not relevant.

The Department of Labor has classified the various MSAs throughout the United States. In the State of Florida, Desoto County, Hardee County, and Highlands County are in the South Florida MSA; Manatee County and Sarasota County are in the North Port-Bradenton-Sarasota Florida MSA; Polk County is in the Lakeland-Winter Haven Florida MSA; Charlotte County is in the Punta Gorda Florida MSA; and Hillsboro County is in the Tampa-St. Petersburg-Clearwater Florida MSA.<sup>6</sup>

As noted above, the Employer is not a fixed-site agricultural owner or operator. The Employer is an H-2A labor contractor seeking to provide drivers to transport citrus from farmer-employer Sorrells Citrus, Inc.’s various fixed-site citrus groves directly to various identified citrus processing plants within the state of Florida. The citrus groves are not within one MSA, therefore the four identified MSAs containing the identified serviced citrus groves must be evaluated to determine if they constitute only one area of intended employment, which is the maximum number of areas of intended employment that an H-2ALC can address in an application federal regulations restricting H-2ALC employers. 29 CFR §655.132(a)

The Employer submits that all 17 requested H-2A employees would be housed at 1192 NE Livingston, Arcadia, Florida<sup>7</sup> and transported by their respectively operated tractor-trailer from the designated housing to the serviced fixed-site citrus grove as determined by the needs of Sorrells Citrus Inc.. The requested H-2A employees would then load the filled citrus containers

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<sup>5</sup> The original ETA Form 9142 identified 54 specific citrus groves, six which were not included in the “corrected” ETA Form 9142 submitted in response to the Notice of Deficiency (Hog Bay North, Walt Boland, George Smith 10, Nelson Hull, Mytrice Martin and Hayden Grove). The ETA Form 9142’s submitted in response to the Notice of Deficiency and in the Request for Administrative Review, identified 51 specific citrus groves, four which were not included in the originally filed ETA Form 9142 and were in additional counties ( Rockwell Block, Sand Pit, Mabry Carlton, and Davis Balm Block). The list of 8 counties with fixed-sites includes the additional 4 counties identified in the ETA 9142’s submitted in response to the Notice of Deficiencies and Request for Administrative Review.

<sup>6</sup> [http://www.bls.gov/oes/current/msa\\_def.thm](http://www.bls.gov/oes/current/msa_def.thm)

<sup>7</sup> It is specifically noted that the closed citrus grove to the housing unit at 1192 NE Livingston, Arcadia, Florida, to be serviced under the application is the “Livingston” grove located “across the street from 1192 NE Livingston St” (AF 111).

located in the citrus grove and transport the filled container to a designated processing plant and return empty containers from the processing plant back to serviced citrus groves for refilling. At the end of the workday, the requested H-2A employees would return to the designated housing unit.

It is specifically noted that the designated housing unit is located near State Route 17 in the middle of Desoto County, Florida and that the closed citrus grove to the housing unit at 1192 NE Livingston, Arcadia, Florida, to be serviced under the application is the “Livingston” grove located “across the street from 1192 NE Livingston St” (AF 111). Accordingly, all citrus groves within the South Florida MSA of Desoto, Hardee and Highlands counties are within one area of intended employment.

The furthest northern serviced MSA is the Lakeland-Winter Haven Florida MSA. Only one fixed-site citrus grove was identified as being in this MSA, which was the “Polk” grove located on the Lake Buffum Church Road in Polk County (AF 136, 56). This grove is approximately 45 miles from the designated housing unit and is within 60 minutes of travel time.<sup>8</sup>

The furthest southern serviced MSA is the Punta Gorda Florida MSA. Only one fixed-site citrus grove was identified as being in this MSA, which was the “Rockwell Block” grove located on Washington Loop Road in Charlotte County (AF 129, 56). This grove is approximately 23 miles from the designated housing unit and is within 30 minutes of travel time.

The furthest western serviced MSA is the Tampa-St. Petersburg-Clearwater Florida MSA. Only one fixed-site citrus grove was identified as being in this MSA, which was the “Davis Balm Block” grove located on Owens Road in Hillsboro County (AF 129, 57). This grove is approximately 63 miles from the designated housing unit and is within 72 minutes of travel time.

The furthest eastern serviced county is Highlands County which is within the South Florida MSA that also includes Desoto County and would be governed by the normal commuting distance for the closest citrus grove within that MSA. In this case, the “Livingston” grove located across the street from the housing unit.

As noted above, the distance and time required to deliver the farmer’s citrus to storage or market, on or off the farm, is not regulated by statute or federal regulation under the H-2A program<sup>9</sup>.

In view of the foregoing, the H-2ACL Employer has established that all the serviced fixed-site citrus groves of the farmer Sorrells Citrus, Inc., are within the normal commuting distance of the designated housing unit and are within a single area of intended employment within the meaning of the H-2A program.

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<sup>8</sup> <http://www.mapquest.com> was used to establish travel distance and time required for travel.

<sup>9</sup> Other federal statutes and regulations do apply to the operation of the described vehicles over public highways.

## FINDINGS AND CONCLUSIONS OF LAW

After deliberation on the evidence of record, this Administrative Law Judge finds:

1. The described work to be performed by the requested H-2A workers, tractor-trailer drivers, is agricultural in nature and within the scope of the H-2A program.
2. The Certifying Officer erred in determining that the work to be performed by the requested H-2A workers was not agricultural in nature.
3. The farmer-employer's fixed-site citrus groves are all located within the South Florida MSA, North Port-Bradenton-Sarasota Florida MSA, Lakeland-Winter Haven Florida MSA, Punta Gorda Florida MAS and the Tampa-St. Petersburg-Clearwater Florida MSA.
4. The housing designated for use by the H-2A workers is situated within the normal commuting distance of at least one of the farmer-employer's fixed site citrus groves within each of the involved MSAs.
5. The application, as submitted, is for one area of intended employment under the H-2A program.
6. The Certifying Officer erred in determining that more than one area of intended employment was involved in the application by the H-2ACL Employer.

## ORDER

It is hereby **ORDERED** that the Certifying Officer's Denial of August 28, 2012 is **REVERSED and REMANDED** for expeditious processing consistent with this Decision and Order.

ALAN L. BERGSTROM  
Administrative Law Judge