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Issue Date: 28 March 2013

BALCA Case No.: 2013-TLC-00026

ETA Case No.: H-300-13015-870141

In the Matter of:

ALTENDORF TRANSPORT, INC.,
Employer.

Certifying Officer: William L. Carlson
Chicago National Processing Center

DECISION AND ORDER – AFFIRMING CERTIFYING OFFICER'S DENIAL OF TEMPORARY LABOR CERTIFICATION

The above-captioned case involves the labor certification of nonimmigrant foreign workers (H-2A workers) for temporary and seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101, *et seq.*, and its implementing regulations at 20 C.F.R. Part 655, Subpart B.

In this case, Altendorf Transport Inc. ("Employer") has filed a timely request for expedited administrative review of the Certifying Officer's February 28, 2013 denial of temporary labor certification. In expedited administrative review cases, the administrative law judge has five working days after receiving the Appeal File ("AF") to issue a decision on the basis of the written record after due consideration of any written submissions not including new evidence. 20 CFR §655.171(a). The Administrative File for this case was received by this Administrative Law Judge on Thursday, March 21, 2013. The Parties were directed to file any additional argument/briefs by Tuesday, March 24, 2013. Since the denial determination was based in large part on the certification of 24 "Custom Agricultural Products Haulers" as H-2A workers for Valesco Diversified, Inc. ("VDI") for the period from December 1, 2012 to May 31, 2013 in application C-12314-36009 and the Employer had only included one page of that application[1] in its request for administrative review, the Parties were directed to submit a copy of the C-12314-36009 application. The Employer failed to submit any further part of the C-12314-36009 application with its March 26, 2013 written argument. The Solicitor submitted written argument

[1] Employer's attached document labeled "Feb 9th Letter, Exhibit F, page 1 of 1, H-300-13015-870141"

and a copy of the January 17, 2013 letter certifying the C-12314-36009 application as well as the application's ETA Form 9142 (Application for Temporary Employment Certification) and ETA Form 970 (Agricultural and Food Processing Clearance Order). The request for administrative review, the AF, written argument of the Parties and the certifying letter, ETA Form 9142 and ETA Form 970 for DVI constituted the entire administrative file and were considered in deliberation.

ISSUE

The issue in this case is whether the Employer's application for 24 H-2A non-immigrant workers is for a period of time exceeding that limited period of "seasonal and temporary" work under the INA.

STATEMENT OF THE CASE

On January 21, 2013, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification for twenty-four workers to perform work as "Agricultural Equipment Operators" for the period from March 11, 2013 through December 31, 2013 (AF[2] 155).

On January 28, 2013, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD") finding that the Employer's application failed to meet the criteria for acceptance for four reasons (AF 108-115). The first two deficiencies noted involved the issue of employment for a period of time exceeding that of a seasonal or temporary basis. The remaining deficiencies noted the need to submit a surety bond and need for the employer to certify acceptance of the assurances and obligations set forth in 20 CFR §655.135.

On February 11, 2013, the Employer filed a response to the NOD that cured the stated deficiencies related to the surety bond and acceptance of the assurances and obligations set forth in 20 CFR §655.135 (AF 78-106). With respect to the seasonal or temporary period of employment issue, the Employer reported that Altendorf Transport Inc. does business as Altendorf Harvesting, "a custom harvester that harvests small grain crops in the Great Plains region, extending from North Dakota/Montana down to Texas/New Mexico. The company "harvests corps in the field [exclusively by combine] and transport these crops directly to the farmers storage site … [and] does not participate in any growing or raising of crops, including but not limited to soil tillage, planting, cultivating or chemical spraying … [which]are strictly the responsibility of the farmer." The Employer reports that the harvesting cannot begin before May and is completed by the last week in November or first week in December, with "a few operators" being required in March to service and prepare the machinery used in harvesting.

The Employer objected to consideration of the certified H-2A application for VDI being linked to its application for 24 workers because the companies were separate entities, located in different cities, and operated under separate tax identification numbers. The Employer submitted a one page exhibit related to the 2012 H-2A application of VDI (d/b/a Grain Express Trucking), 2012 payroll records, and harvest schedules for consideration. The Employer also argued that

[2] Citations to the Administrative File in this case will be abbreviated "AF" followed by the page number(s).

the CO should not consider the adverse 2011 Decision and Order involving Altendorf Transport Inc. doing business as Altendorf Harvesting since it involved an opportunity to expand "its small 5 or 6 person OTR trucking fleet with American drivers."[3]

On February 28, 2013, the CO denied temporary labor certification on grounds that the Employer's description of the job opportunity in the submitted ETA Form 9142, Section B, Items 5 and 6 and the submitted ETA Form 790, Item 9, when coupled with the filing history of VDI[4] "indicates the employer's dates of need are from December 1, 2012 through December 31, 2013; a 12-month, 30-day periods of need." The CO determined that the Employer and VDI were so interconnected and the respective agricultural jobs were so similar that "the employer has failed to establish how this [Altendorf'] job opportunity is temporary, rather than permanent and full-time, in nature." (AF 70-74)

On March 6, 2013, the Employer requested an expedited administrative review of the CO denial. The Employer submits that the CO failed to consider the documentary evidence submitted in its response to the deficiency notice and failed to address the arguments set forth by the Employer. The Employer argues that that CO improperly considered a prior 2010 denied application in deciding this 2013 application and that the CO improperly considered VDI as the same organization even though they were separate business entities located in different cities and organized as separate business entities. Employer also submits that the job opportunities were different because the work with VDI was "for over-the-road (OTR) 'Custom Agricultural Products Hauler' driver[s] that haul product from the temporary storage site several hundred miles to a large city where the crop is processed" and requires "drivers that can work independently over thousand mile trips into large cities and congested traffic." Employer described the work with Altendorf Harvesting as "a harvest driver 'Agricultural Equipment Operator' that hauls crops directly from the field where combines/tractors are working and delivers the crops a few miles to temporary storage." (AF 2-14) In support of the request for administrative review, the Employer attached exhibits expanding on those documents submitted in response to the NOD.

DISCUSSION

It is the Employer's burden to establish eligibility for temporary labor certification, 20 CFR §655.161(a).

I. The Employer is an H-2A labor contractor.

The Employer failed to indicate its business identity, type of employer classification, or agent in its original ETA Form 9142 application, Items C, E, and Appendix A.2 Item A. In Appendix

[3] *In the Matter of Altendorf Transport, Inc*., ETA Case No. C-10344-25770, OALJ Case No. 2011-TLC-00158 (Feb. 15, 2011). Here the Employer argued that Altendorf Transport Inc. was a separate entity from Altendorf Harvesting and that the application was for 50 "custom grain haulers," classified by the State Workforce Agency (SWA) as "truck drivers, heavy and tractor-trailer," to service and maintain trucks, trailers and machinery and to transport crop from the farm to the first point of sale with over-the-road drivers.

[4] Valesco Diversified Inc., doing business as Grain Express Trucking, filed an application for 24 agricultural equipment operators for the period December 1, 2012 through May 31, 2013 on November 9, 2012 that was certified in ETA Case No. C-12314-36009.

A.2, Item B the individual signing the "Employer Declaration" is Janice M. Altendorf as president.[5] The point of contact in the ETA Form 9142 has an e-mail address at "Altendorfharvesting.com" and telephone number of 701-248-3521. The same point of contact is listed for used in referrals from the State Workforce Agency ("SWA") with an address for "Altendorf Harvesting." (AF 155-172) In the filed ETA Form 9142 the Employer indicates the address for Altendorf Harvesting is 15061 County Road #19, Ardoch, ND 58261. Official notice is taken of public records with the Secretary of State for North Dakota[6] that indicate the Employer is a business corporation established in 1998, in good standing, and with a principal place of business as 1506 County Road #19, P.O. Box 356, Minto, ND 58261-0356; telephone number 701-248-3521; and registered agent identified as Janice Altendorf at 732 2nd Street, P.O. Box 356, Minto, ND 58261-0356. "Altendorf Harvesting" does not appear in the public records with the Secretary of State for North Dakota. (AF 182-185) Official notice is also taken of public records with the U.S. Department of Transportation (DOT), Federal Motor Carrier Safety Agency (FMCSA)[7] that the Employer operates under DOT #819385 and MC-542584; does business as "Altendorf Harvesting" at 133 Harvey Avenue, Minto, ND 58261, telephone 701-248-3521; reports it has 53 drivers operating 49 power units for 2,128,199 miles in 2011; and reports it carries liquids, gases, machinery as well as fresh produce, grain, feed and hay.

In its ETA Form 9142 and ETA Form 970, VDI indicated it was an H-2A Labor Contractor doing business as "Express Grain Trucking" at 745 12th Street East, P.O. Box 621, Grafton, ND 58237-0621, telephone number 701-520-4439. The ETA Form 970 indicates a point of contact at "graintrucking.com" but this web site is nonfunctional. Official notice is taken of public records with the Secretary of State for North Dakota[8] that indicate VDI is a business corporation established in January 2011, in good standing, and with its principal place of business as 732 2nd Street, P.O. Box 351, Minto, ND 58261-0351; telephone number 701-248-3521; and registered agent identified as Janice Altendorf at 104 7th Street, P.O. Box 351, Minto, ND 58261-0356. The public records also indicate VDI is the owner of "Grain Express Trucking" and "Grain Express", both with a telephone number of 701-248-3521. Official notice is also taken that the public records of trucking companies maintained by FMSCA does not recognize the names "Valesco Diversified, Inc.," "Grain Express Trucking" or "Grain Express" as truck companies registered with the DOT.

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,

[5] In BALCA case number 2011-TLC-00158 (Feb. 15, 2011), Janice Altendorf testified on February 4, 2011 that she is the owner and general manager of Altendorf Transport, that Altendorf Harvesting is the same company, and that Altendorf regularly employs approximately 30 workers with Class A commercial driver's license to perform over-the-road truck driving.
[6] https://apps.nd.gov/sc/busbsrch/busnSearch.htm
[7] http://safer.fmcsa.dot.gov/query.asp
[8] https://apps.nd.gov/sc/busbsrch/busnSearch.htm

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 seeks to recruit, solicit and hire 24 H-2A workers as "agricultural equipment operators." The Employer in this case has consistently described the work to be performed by the requested H-2A workers as solely the transportation of grain from the harvesting combine in the respective farm fields to that farm's designated storage facility for 22 identified farms in Texas, New Mexico, Oklahoma, Kansas, Colorado, Montana, Nebraska, South Dakota, and North Dakota as well as maintenance of the machinery involved. (AF 182-185) There is no evidence that the Employer has an ownership interest in any of the serviced farms. There is no evidence that the Employer engages in the purchase of the grain from the farmer and subsequent transport of the agricultural product (i.e.: bird-dogging[9]).

In view of all the foregoing, this Administrative Law Judge finds that the Employer is not a "fixed-site employer" or agricultural association and is accordingly classified as an H-2A Labor Contractor.

II. The work described by the Employer is agricultural work under the H-2A program.

Under the H-2A program, "agricultural labor or services" is that work (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 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. See also *Aimable v. Long and Scott Farms*, 20 F.3e 434 (11th Cir. 1994)

Generally, the transportation of agricultural or horticultural commodities over the public highways from locations not on a farm to a processing center or market location is not secondary

[9] 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 *Chapman v. Durkin*, 214 F.2nd 360 (5th 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).

agricultural activity which would permit use of the H-2A program, but would fall under the H-2B program for non-agricultural activities. However, where such transport is under the sufficient direction and control of the "farmer-employer" (under the employ of the farmer), the H-2A program may apply. The appropriateness of classifying the activity under the H-2A program is fact specific to the application involved. Factors to consider in determining the involvement of the "farmer-employer" include, among others, the involvement in solicitation and recruitment of the H-2A workers, the extent of oversight directly provided by the "farmer-employer" to the H-2A workers, ownership of the transport vehicles operated/maintained by the H-2A workers, provision of housing to the H-2A workers, and payroll/accounting issues involving the H-2A workers.

As noted above, the Employer consistently describes the work of the requested 24 "agricultural equipment operators" as solely the transportation of grain from the harvesting combine in the respective farm fields to that farm's designated storage facility for 22 identified farms and maintenance of the machinery used. Except for some maintenance performed at its Ardoch, ND location, the work is performed on the respective farms and falls within the scope of agricultural work under the H-2A program.

III. The agricultural work to be performed by 24 "agricultural equipment operators" for the period March 11, 2013 through December 31, 2013, as described by the Employer in its application is the same as that previously certified for 24 "custom agricultural product haulers" for the period December 1, 2012 through May 31, 2013 with VDI.

The Employer argues that the work of the requested 24 "agricultural equipment operators" involves solely the transportation of grain from the harvesting combine in the respective farm fields to that farm's designated storage facility.

The Parties do not contest that the CO has previously certified the ETA Form 9142 application by VDI, d/b/a "Grain Express Transport", for work to be performed by the requested 24 "custom agricultural product haulers" for the period as proper H-2A work.[10] In the certified ETA Form 9142, Item B, Section 9, VDI described the work as "seasonal agricultural work transporting agricultural products from temporary storage facilities to permanent facilities" and expanded on the job description by stating "Drives heavy truck to transport crop from field to storage areas. Drives transporter truck to haul harvesting machinery between work sites. Services/maintains trucks, trailers and machinery as required. Workers are also expected to help with yard cleanup and grooming." In the ETA Form 9142, the description had hand drawn line-outs of the words "Operates self-propelled custom-class machine to harvest a variety of grain and oilseed crops. Adjusts speeds of cutters/blowers/conveyors/header heights using hand tools." The expanded job description, without the lined-out wording, corresponds exactly to the job specifications as listed in Item 15 of VDI's ETA Form 970.

In its request for administrative review the Employer argues that the work for VDI "is for over-the-road (OTR) 'Custom Agricultural Products Hauler' driver that hauls product from temporary storage site, several hundred miles to a large city, where the crop is processed …. [while the Employer's work] is for a harvest driver 'Agricultural Equipment Operator' that hauls crops

[10] ETA case number C-12314-36009

directly from the field where combines/tractors are working, and delivers the crops a few miles to temporary storage. … Each company has to use a different class of truck, with the OTR trucks requiring sleepers, APU's (auxiliary power units) GPS navigation, etc. and drivers that can work independently over thousand mile trips into large cities and congested traffic. Harvest trucks work within a few miles of a manager, in trucks without need of sleepers, APU's, or GPS systems, on rural gravel roads, and single lane highways."

The employer's argument that its application involves harvest truck drivers and VDI's work involved OTR truck drivers fails in two ways. First, contrary to the Employer's argument, the filed work descriptions by the Employer and VDI both involved hauling grain from the field to temporary storage, as noted above. This type of work was performed on the farm and is H-2A work. Second, if the Employer's argument that VDI work was OTR truck driving as he described, it would not be work done "under the employ of the farmer." The IRC, FLSA and H-2A program do not place specific mileage 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 "under the employ of the farmer" 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. Under the Employer's argument the OTR truck drivers would not be "under the employ of the farmer" and would not have qualified for H-2A certification.[11] Since VDI represented itself in a manner to be certified under the H-2A program, Employer's description of the VDI work as OTR truck driving is flawed.[12]

After deliberation on the all materials properly submitted, this Administrative Law Judge finds that the agricultural work to be performed by 24 "agricultural equipment operators" for the period March 11, 2013 through December 31, 2013, as described by the Employer in its application is the same as that previously certified for 24 "custom agricultural product haulers" for the period December 1, 2012 through May 31, 2013 with VDI.

IV. The Employer has failed to establish that the requested H-2A work is "seasonal and temporary" in nature.

The Employer argues that the certified H-2A application of VDI cannot be considered in determining the "seasonal and temporary" nature of the requested employment because they are separate business organizations.

The evidence of record and matter of official notice set forth above demonstrated that Janice Altendorf is the owner, president, general manager, and registered agent of Altendorf Transport, Inc. and Altendorf Harvesting of Minot, North Dakota. Secretary of State for North Carolina public records indicate that VDI was created January 20, 2011, with a principal place of business in Minot, North Dakota that has the same telephone number as Altendorf Transportation and the same register agent, Janice Altendorf, though she lists a different address for the businesses. It is

[11] The labor certification process for temporary employment in occupations other than agricultural or registered nursing in the United States generally falls under the H-2B program. 20 CFR Chapter V, Part 655, Subpart A

[12] The fact that no DOT trucking registration for VDI or its owned subsidiaries was found on search of the FMCSA public site was not considered in this determination.

specifically noted that the creation of VDI was two days after the Employer had requested a de novo hearing upon CO denial of similar H-2A work application. 2011-TLC-00158 (Feb. 15, 2011). Such events, together with Employer's unsupported description of VID certified H-2A work as OTR truck driving, creates reasonable inference that the business entities involved are so intertwined that they function in concert to circumvent the requirements of the H-2A program.

Here the CO analyzed the Employer's ETA Form 9142 and ETA Form 970 and found that the farm work to be performed was the same as that certified for VID. As set forth herein, this Administrative Law Judge finds that determination was proper. In determining the "seasonal and temporary" nature of the H-2A work, it is the need for the duties to be performed which determines the temporariness of the job. *In the Matter of Artee Corp*., 1982 WL 1190706 (BIA Nov. 24, 1982); *In the Matter of William Stanley*, 2009-TLC-60 (Aug. 12, 2009) An employer may not manipulate its "season" when the record shows a year-round need for the labor. *In the Matter of Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011) Nor may an employer continually shift its need in order to utilize the H-2A program to fill non-temporary labor needs. *In the Matter of Salt Wells Cattle Co*., 2010-TLC-00134 (Sep. 29, 2010) The CO analysis that the needs of VID and Altendorf, when considered together, demonstrated an overlapping need for the same H-2A labor from December 1, 2012 through December 31, 2013. This determination is also supported by the evidence of record. Such a 13-month period is in excess of the "seasonal and temporary" period for H-2A certification. 20 CFR §655.103(d); *In the Matter of Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008)

Employer argues that its application for H-2A workers cannot be considered together with the VID application for H-2A workers, simply because VID is a separate corporation with separate tax numbers. This argument does not overcome the interlocking nature of the business organizations and the specific circumstances surrounding the H-2A labor requested by the Employer and certified for VID. The Employer has the burden of persuasion to demonstrate that it and VID are truly independent entities. This Administrative Law Judge finds that the Employer has failed to establish by the evidence of record that it and VID are functioning as completely independent entities in this case. Accordingly, the Employer has failed to establish that the requested H-2A work in its application is "seasonal and temporary" in nature.

V. <u>The Employer's application for 24 agricultural equipment operators must be denied because it involves more than one "area of intended employment"</u>.

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 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

Here the Employer has identified 22 fixed-site employers to whom it is to furnish H-2A "agricultural equipment operators." These fixed-sites are scattered over Texas, New Mexico, Oklahoma, Kansas, Colorado, Montana, Nebraska, South Dakota, and North Dakota. The Employer indicates different housing locations for each of the 22 fixed-sites throughout the 9 states. None of the identified housing locations are within the normal commuting distance of all 22 fixed-sites. Additionally, the 22 fixed sites do not all fall with one MSA.

When Employer's application is viewed as a whole and standing alone, this Administrative Law Judge finds it must be denied because the Employer is an H-2A labor contractor and the requested H-2A labor falls in more than one area of intended employment in violation of 20 CFR §655.132(a).

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial determination is **AFFIRMED.**

Digitally signed by Alan L. Bergstrom
DN: CN=Alan L. Bergstrom,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Newport News, S=VA, C=US
Location: Newport News VA

ALAN L. BERGSTROM
Administrative Law Judge

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