



Issue Date: 22 July 2013

OALJ Case No.: 2013-TLC-00035

ETA Case No.: 13114-967381

In the Matter of:

GREENBANK, INC.

Employer

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act and the associated regulations promulgated by the Department of Labor.¹ This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration, and the written stipulations, exhibits, and arguments submitted by the parties.

PROCEDURAL HISTORY

Employer filed an electronic application for Temporary Employment Certification for H-2A Workers on 30 Apr 13, for a stated period of need from 15 Jun 13 to 31 Oct 13. The Certifying Officer (CO) issued a Notice of Deficiency (“NOD”) on 7 May 13, listing multiple reasons the application could not be accepted for consideration.² The NOD required Employer to either show it abided by the regulations for H-2A Labor Contractors (H-2ALC) if it did not own or operate the proposed worksites, or demonstrate it qualified for a waiver of the H-2ALC requirements under the Department’s special procedures, as a custom combine operator.³

In accordance with 20 C.F.R. Section 655.142, Employer was invited to submit a modified application within five business days of the NOD’s receipt. Alternatively, Employer was reminded of its right under 20 C.F.R. Section 655.142(c) to request an expedited administrative review or *de novo* hearing of the NOD within the same time.

¹ 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655.

² AF 152-168.

³ 20 C.F.R. §§ 102, 132. As per the CO’s brief, the other issues raised in the first NOD were resolved.

On 14 May 13, Employer submitted its response to the NOD.⁴ On 15 May 13, Employer submitted supplemental evidence in support of its response to the NOD that was not available until after the submission deadline.⁵

On 23 May 13, the CO sent a second NOD letter to Employer, noting only one remaining deficiency, which was based on the CO's determination that Employer was not a custom combine operator and did not qualify for special procedures.

The employer was issued a Notice of Deficiency letter on May 7, 2013 because the employer requested four Grain Cleaning Machine Operators which do not fall under special procedures. The employer indicated in its application that 'workers will be performing the following custom combine activity: clean and condition grain at various worksite locations. However, this activity does not encompass the activity which has been described above as agricultural labor (the operating of farm machinery to plant, cultivate, harvest and store grain crops such as wheat, oats, rye and corn).

The described job opportunity contains activities involving cleaning grain (primarily wheat) with proprietary cleaning machines for seed planting. Workers will drive 10 ton truck with cleaning machine from jobsite to jobsite (10% of time) and will operate cleaning machine: set augers, monitor and adjust the machine to maintain flow of grain to create clean seed product using electric switches or electronic touch-screen pad (85% of the time). Workers must maintain the cleaning machine by greasing points, lubricating/tightening chains and visually inspecting parts every day (5% of the time).

Additionally, the documents provided by the employer titled 'housing facilities per 2013 harvesting itinerary' lists different locations in multiple States. However, the employer did not submit the 2013 harvesting itinerary. Furthermore, in its Temporary Need statement, it has indicated that it is unable to provide fully executed work contracts as customers are unwilling to sign contracts in advance[.]

The employer also indicated in its application that 'workers will be working on various jobsites that are private homes of customers.' However, custom combine work is predominantly performed in vast agricultural lands. Therefore, it is unclear if the work is taking place on a farm as defined above. Also, grain cleaning activity (solely) which is 85% of the job duties would not be considered within the umbrella of the custom combine activities. The job duties described above alone do not meet the definition of agricultural labor or services.

In its response to the NOD...the employer indicated that it provides mobile service that saves the grain producer money and time by bringing the necessary equipment to the farmer. Also, it stated that grain cleaners fall under Agricultural equipment operator category. It also requests a variance to TEGl No. 16-06, Change 1, as it performs work in conjunction with custom combiner job duties....

[T]he Chicago NPC has deemed that the employer is not a custom combine owner/operator as it seeks workers to provide post-harvest grain cleaning activities. The employer must limit its application to a single area of intended employment and file separate application [*sic*] for each

⁴ AF 81-115.

⁵ AF 58-64, 68-78.

State. Also, it has to provide letter of intent or work contracts from its customers to confirm that it has seasonal work.⁶

Since the CO had determined it was not a custom combine operator, Employer had to comply with 20 C.F.R. Section 655.132 (H-2ALC filing requirements) and submit separate applications for each state where it was conducting agricultural work.

On 31 May 13, Employer submitted its request for a *de novo* hearing to the Office of Administrative Law Judges. Following a number of conference calls, Employer and the CO agreed they could stipulate to the general factual background, submit additional exhibits as necessary, and did not need to take any live testimony or oral argument.

BACKGROUND

To expedite the hearing process, Employer and the CO submitted a joint stipulation of facts that included the following:

Employer provides mobile grain cleaning equipment and services to farms located in Colorado, Nebraska, Wyoming, Kansas, Oklahoma, South Dakota, Texas, Missouri, and New Mexico. Grain cleaning is a process in seed production that removes contaminants that could lead to spoilage of the grain after storage. The machinery conditions the grain and cleans jointed goat grass, wild oats, cheat grass, buckwheat, and rye. Customers hire a custom combine harvester for harvesting and then hire Employer to clean the grain for market. Employer transports machinery from farm to farm in various states to clean and condition grain on its customers' fixed-site properties. Employer's itinerary is subject to weather, crop harvest, and other changes that cannot be anticipated during the course of the season. Additionally, when Employer arrives on a site, other local, fixed-site agricultural business owners may seek its services.

The only function of Employer's machines is to clean the grain. Last year, in Colorado alone, Employer cleaned 40,000 bushels of wheat.⁷

ISSUES AND POSITIONS OF THE PARTIES

The CO determined that Employer is not a custom combine operator and thus is not entitled to use the special procedures available to such operators. The CO also determined that because Employer is not a fixed-site employer but an H-2ALC, it must file a separate application for each state within which it intends to operate and follow the other requirements for such employers. The CO argues its NOD was proper and Employer's appeal should be rejected.

Employer answers that grain cleaning should be considered part of custom combine harvesting activity for purposes of the special procedures for H-2A applications. It notes that the regulations do not provide a specific definition of custom combine harvesting activities, that its

⁶ AF 49-53.

⁷ The stipulations are incorporated by reference herein and made part of the factual background of the case.

business shares several features with custom combine operations, and that it provides an essential service in the grain harvesting process.

LAW

The H-2A regulations permit an employer to request a *de novo* hearing before an ALJ of the Notice of Deficiency issued by the CO.⁸ In a *de novo* review, the ALJ may accept additional evidence from the parties and must affirm, reverse, modify the CO's determination, or remand to the CO for further action. Where an employer has requested appeal at this stage, the ALJ is limited to deciding whether or not the CO issued a proper NOD.⁹ The decision of the ALJ must specify the reasons for the action taken, must be immediately provided to the parties, and is the final decision of the Secretary.¹⁰

Special Procedures

The regulations provide for a "limited degree of flexibility" under the Section entitled "Special Procedures." This provision states:

the OFLC Administrator has the authority to establish, continue, revise or revoke special procedures for processing certain H-2A applications. Employers must demonstrate upon written application to the OFLC Administrator that special procedures are necessary. These include special procedures currently in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine harvesting crews....Prior to making determinations under this section, the OFLC Administrator may consult with affected employer and worker representatives. Special Procedures in place on the effective date of this regulation will remain in force until modified by the Administrator.¹¹

⁸ 20 C.F.R. § 655.141(b)(4).

⁹ Though there is limited regulatory guidance and little case law on the matter, I find the following instructive: 20 C.F.R. § 655.102 vests the authority for establishing, continuing, revising, or revoking special procedures for processing certain H-2A applications in the OFLC Administrator, who presumably bears special expertise in determining whether or not an employer's services merit special procedures. 20 C.F.R. § 655.171 describes the appeals process for decisions by the CO, and the regulations at 29 C.F.R. part 18 apply to *de novo* hearings. 29 C.F.R. § 18.57 states that "the decision of the administrative law judge shall be based upon the whole record. It shall be supported by reliable and probative evidence." Since the Immigration and Nationality Act does not contain a standard of review for ALJs of decisions by the CO, I find a hybrid approach is appropriate and supported by the regulations and case law. I will review the evidence presented *de novo*, but will also review the CO's decision for abuse of discretion. See *RP Consultants, Inc.*, 2009-JSW-00001 at p. 8 (June 30, 2010), citing *Hong Video Technology*, No. 1988-INA-202 (BALCA Aug. 17, 2001).

¹⁰ 20 C.F.R. § 655.171(b).

¹¹ 20 C.F.R. § 655.102.

The Employment and Training Administration has issued a guidance letter outlining special procedures for custom combine harvesting, which states:

An employer engaged in custom combine harvesting activities is allowed to submit a single Agricultural and Food Processing Clearance Order, ETA Form 790 (job order), Office of Management and Budget Control Number 1205-0134, and all appropriate attachments covering a planned itinerary of work in multiple states. If the job opportunity is located in more than one state, either within the same area of intended employment or multiple areas of intended employment, the employer must submit the job order and all attachments (including a detailed itinerary) to the SWA having jurisdiction over the anticipated worksite(s) where the work is expected to begin.¹²

Additionally,

The Department is granting a special variance to the application filing procedures for H-2ALCs contained at 20 C.F.R. 655.132(a). Specifically, an employer engaged in multi-state custom combining activities is authorized to file an Application for Temporary Employment Certification covering one or more areas of intended employment based on a definite itinerary. An employer who desires to employ one or more nonimmigrant workers on an itinerary to provide custom combine services to fixed-site farmers/ranchers is, by definition, an H-2ALC.¹³

A FAQ from February 13, 2013 states in pertinent part that:

We recognize that, due to the unique nature of custom combine activities, a custom combine employer operating on a planned itinerary may not have fully executed work contracts for all worksites before filing an Application for Temporary Employment Certification. Custom combine operators typically travel across vast distances bringing heavy machinery not available locally to meet the needs of fixed-sited agricultural business owners. Weather, crop growth, and other factors that cannot be anticipated on such long itineraries (e.g. across multiple states) may cause an employer's anticipated work to change during the course of the season. Moreover, when the unique custom combine machinery arrives in a local area, additional local fixed-site agricultural business owners may seek the employer's custom combine services. Nevertheless, the employer must have sufficient evidence of the work it expects to perform across the itinerary at the time it submits its application in support of its request for temporary workers.¹⁴

¹² Employment and Training Administration Training and Employment Guidance Letter (TEGL) 16-06, Change 1, Attachment A, page 1 (June 14, 2011). Available at <http://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf>, last accessed July 17, 2013.

¹³ *Id.* at Attachment A, page 3.

¹⁴ H-2A Temporary Labor Certification Program (Agricultural) FAQ, "Special Procedures," (February 13, 2013). Available at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>, last visited on July 17, 2013.

Fixed-Site Employers and H-2A Labor Contractors

Under the federal regulations applicable to the temporary employment of non-immigrant agricultural workers (H-2A workers), a fixed site employer is defined as:

[a]ny person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart,¹⁵ 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, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart as incident to or in conjunction with the owner's or operator's own agricultural operation.¹⁶

An H-2ALC is any individual or a legal entity who is *not* a fixed-site employer or employee or an agricultural association or employee, but who recruits, solicits, hires, employs, furnishes, houses, or transports H-2A workers.¹⁷ This definition “broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer.”¹⁸ An employer who, for example, “does not operate a farm or other fixed-site location, but rather operates a crop dusting business to service other farms in the area[.]” does not meet the regulatory definition of a fixed-site employer and therefore is categorized as an H-2A labor contractor (H-2ALC).¹⁹

Employers categorized as H-2ALCs must satisfy additional requirements listed in 20 C.F.R. § 655.132. This includes stating with its application: the name and location of the fixed-site agricultural business to which the H-2ALC expects to provide workers; the expected beginning and ending dates it will provide the workers; a description of the crops and activities the workers are expected to perform at the agricultural worksite; copies of fully-executed work contracts with the fixed-site business; and, where the fixed-site business will be providing housing or transportation to workers, proof that such housing or transportation complies with applicable standards.²⁰

¹⁵ “A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment; (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment; and (3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).” 20 C.F.R. § 655.103(b).

¹⁶ 20 C.F.R. § 655.103(b).

¹⁷ 20 C.F.R. § 655.103(b).

¹⁸ Employment and Training Administration, U.S. Department of Labor, comments to Final Rule implementing 20 C.F.R. Part 655, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6886 (Feb. 12, 2010).

¹⁹ *Scott Aviation, Inc.*, 2011-TLC-00409, slip op. at 2-3 (June 7, 2011).

²⁰ 20 C.F.R. § 655.132(b)(1), (4), (5). *In the Matter of Lorenzo Gabriel Marquez*, 2013-TLC-00009 (Nov. 29, 2012).

EVIDENCE

Employer's records state in pertinent part:²¹

Employer was incorporated on 17 Jun 10 under the laws of the state of Colorado. M&C Anderson Farms had a mutual understanding with Employer that Employer would provide seed cleaning services on its farm site during the 2013 summer season (1 Jul 13-15 Oct 13). This was not a legally-binding contract but an assumption that since Anderson Farms had used Employer's services in the past, it would use them again in 2013.

Lee Lubbers stated in affidavit in pertinent part that:²²

He is president of Lubbers Farms, Inc., which is based in South Dakota and raises corn, soybeans, sunflowers and wheat. As they have grown, it has become increasingly difficult to find qualified labor. Hiring custom harvesters and custom grain cleaning is the only way they can complete their tasks and Lubbers Farms might not survive without them. Foreign workers are instrumental to all of their respective businesses and they have been impressed with the work ethic and professionalism of the foreign workers on custom crews. If they could not use Employer's services to clean the seeds for next year's crop, they would be out of business. Prior to working with Employer, they were unable to grow their business because they could not find a reliable and reputable grain cleaning service. Directly and indirectly, the employment of foreign workers helps to keep them in business.

Letter from Steve Knox, Secretary/Manager of Nebraska Crop Improvement Association states in pertinent part:²³

The Nebraska Crop Improvement Association is a recognized authority for seed production, performance, and quality analysis that operates as an independent non-profit organization and enhances the value of seed and crops through professional, personalized services that meet seed producer and industry partners' needs. Seed and grain conditioning companies are subject to weather, crop growth, and other factors that cannot be anticipated in advance and which cause those companies' work schedules to change during the season. Recruiting workers for this short time period is difficult. Due to the nature of their business, seed and grain conditioning companies are unable to produce a detailed progression of their operations in advance of the work season. Therefore, in his opinion, it is not necessary for those conditioning companies to operate as farm labor contractors.

²¹ EX-1, EX-5.

²² EX-3.

²³ EX-4.

DISCUSSION

At the outset I note that there is little disagreement as to the fundamental facts of this case. The record indicates that Employer essentially provides a service that completes the job begun by the combines, which cut, thresh, and clean the grain (but not sufficiently for its ultimate use). In that regard, almost all of the considerations that weigh in favor of allowing the combine operators to operate under special conditions would, in my view, equally apply to Employer.²⁴ Employer makes that point in arguing that it is either within the definition of a custom combine operator or should otherwise be allowed to come within the special conditions provisions. The real question is not whether the CO's interpretation and application of the regulations make good policy or are unassailable in their logic, but whether they are clearly contrary to any reasonable reading of the regulations or statute.

Employer bears the burden of establishing that its application is entitled to special procedures. In its response to the CO's original NOD, it included various certifications as an approved conditioner of certified seed, its membership certification in the Nebraska Crop Improvement Association, advertisements for its seed cleaning services, and two letters of intent. Its advertisements promised on-farm, high-capacity grain cleaning, up to 1,000 bushels per hour.²⁵

In its second NOD, the CO summarized Employer's shortcomings as follows: the cleaning and conditioning of grain at various worksite locations "does not encompass the activity which has been described above as agricultural labor (the operating of farm machinery to plant, cultivate, harvest and store grain crops such as wheat, oats, rye and corn)[;]" Employer did not submit the 2013 harvesting itinerary and indicated it was unable to provide fully executed work contracts because customers were unwilling to sign contracts in advance; that it was "unclear if the work is taking place on a farm[;]" and that "grain cleaning activity (solely) which is 85% of the job duties would not be considered within the umbrella of the custom combine activities."²⁶

Special Procedures

Employer asserted that grain cleaning is recognized by the U.S. Department of Agriculture as an agricultural service in connection with the production and harvest of grains, and it performs an essential function "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."²⁷ Because there is no definition in the regulations or guidance documents of "custom combine harvester," Employer supplied the following from the Oxford Dictionary: "[a] custom

²⁴ The CO's argument that Employer could clean the product anywhere and does not necessarily require a presence at the site is true of every part of the process, save the actual cutting of the grain.

²⁵ AF 75-76.

²⁶ AF 52-53.

²⁷ AF 81, citing 7 U.S.C. § 1622(a); 20 C.F.R § 655.103(c)(1)(i)(C).

combine harvester cuts, threshes, and cleans a grain crop in one operation to prepare the grain for storage and/or transport.”²⁸ Employer stated:

A custom combine harvester is generally used for harvesting and cannot clean the grain to the purity necessary for production of seed or to meet the standards of overseas markets. In most scenarios, Greenbank’s customers have hired a custom combine harvester for harvesting and then hire Greenbank to finish the work necessary to clean the grain for market. The product of the custom combine and the grain cleaning machine are similar, seed or grain ready for transport, storage, or use.²⁹

Because it often works in tandem with custom combine harvesters, Employer asserted, it faces the same difficulties in that its itinerary is subject to weather, crop growth variances, and other factors that cannot be anticipated. Employer conceded that its machines’ sole function is to clean grain.

The CO asserts that Employer has not established its entitlement to the special procedures granted custom combine harvesters. It set forth the following distinctions:

- Custom combine harvesters must harvest the grain/seed on-site, but Employer can perform its seed-cleaning virtually anywhere the harvested grain/seed has been transported
- The custom combine performs multiple tasks, while Employer’s machinery performs only one
- A farmer may choose to arrange for Employer’s services; by contrast, if he cannot harvest the grain himself, and cannot employ the services of a custom combine harvester, his agricultural product will not get to market

The CO asserts that for the last two reasons, Employer’s services are not significant enough to the U.S. economy that special procedures are justified. Finally, the CO notes that waivers to standard requirements for H-2A applications are rare and narrowly-construed.

It is difficult to determine if Employer falls within the definition of a custom combine harvester when there is no working definition of the same and the CO does not specify his methods for designating such employers. Moreover, the CO’s rationale that farmers could decide to clean the grain themselves or ship it to a central location for cleaning seems to be also true of the threshing and cleaning functions performed by the combines. Of course, the harvesting function of the combine cannot be separated from the other two functions, whereas Employer only undertakes the single function of cleaning.

Because the burden falls on Employer to show its entitlement to special procedures, however, it must show that its services are so closely related to those of custom combine harvesters that it falls within the same category. Employer provided no evidence of custom combine harvesters who have been granted H-2A certification, nor did it cite any case law where employers similarly situated to it qualified for those special procedures. The exhibits Employer included with its appeal that described patents for grain cleaning machines did little to advance

²⁸ AF 82, internal quotations omitted.

²⁹ AF 82.

its argument because I could not compare them to custom combine harvesters to see if there was sufficient overlap. In any case, while it appears that grain cleaning is *part* of the several services custom combine harvesters provide, the reason they have been granted special procedures is that the threshing and cleaning operations of the combines are inextricable from the harvesting, which clearly must be done onsite and allow the harvesting and processing of grain for farms that would otherwise have no means to get their products to market. Grain cleaning, while beneficial, is only one part of the processing used to get the grain to market, and the CO determined that was insufficient to require a variance from the requirements for H-2ALCs. Moreover, I cannot find that the CO abused his discretion when he issued the NOD to that effect.

H-2ALC Requirement

Employer indicated in its application that it is an H-2ALC.³⁰ Employer conceded that it was not the owner or operator of the worksites upon which it would be undertaking its grain cleaning operations. The very nature of a mobile grain-cleaning service precludes Employer from being considered a fixed-site employer. However, because Employer had been granted certification in the past,³¹ it clearly believed the regulatory requirements for H-2ALCs did not apply, as it sought certification under special procedures.

The second NOD found that because the CO deemed Employer to not be a custom combine owner/operator, it had to limit its application to a single area of intended employment, file separate applications for each state, and provide letters of intent or work contracts from its customers to confirm it has seasonal work, in accordance with the H-2ALC regulatory requirements.³² The regulations state that an H-2ALC must limit its application to a single area of intended employment.³³ In its application, Employer stated that while the place of employment would be Fort Morgan, Colorado, work would be performed at multiple worksites in Colorado, Kansas, South Dakota, Wyoming, Oklahoma, and Nebraska.³⁴ The regulations also clearly state that an H-2ALC must provide copies of fully-executed work contracts with each fixed-site agricultural business identified.³⁵ Employer initially provided copies of letters from several entities stating a non-binding intent to use Employer's services the prior year, in 2012, and, after the first NOD, submitted more letters of intent and a harvest itinerary.³⁶ Because it expected to be designated a custom combine operator, Employer relied on TEGL 16-06, which states "[a]n employer engaged in custom combine activities is allowed to submit a single [job order] and all appropriate attachments covering a planned itinerary of work in multiple states,"³⁷ and on the 2013 FAQ, which stated "[g]iven the unique characteristics of custom combine activities, the Department will consider an employer to have effectively satisfied the intent of the H-2A Labor Page 2 of 8 Contractor (H-2ALC) work contract documentation requirement if it

³⁰ AF 182.

³¹ See Joint Stipulation of Facts at ¶ 20. In its statement of position, the CO "comprehensively repudiates, as mistaken, any previous decisions to certify H-2A applications from [Employer] under the special procedures for custom combines." CO's Position Statement, July 10, 2013 at page 6, n. 5.

³² AF 53; 20 C.F.R. § 655.132.

³³ 20 C.F.R. § 655.132(a).

³⁴ AF 181-194.

³⁵ 20 C.F.R. § 655.132(b)(1), (4).

³⁶ AF 211-17; 115; 100-101; 77-78.

³⁷ TEGL 16-06, *supra* at n. 9. It is noted that Employer did not submit an itinerary with its initial application.

provides alternative evidence of agreements to perform custom combine work for fixed-site agricultural business owners, such as letters of intent.”³⁸

Because the CO had determined that Employer was not a custom combine operator, the special variances were not available to Employer and the regulations for H-2ALCs applied. Employer’s application clearly did not meet the regulatory requirements for H-2ALCs.

Because evidence supports the CO’s grounds for issuing his second NOD, they are sustained. The appeal is **DENIED** and the file is **REMANDED** to the CO for further processing consistent with this decision. It is hoped that the CO and Employer can reach a resolution that is mutually-agreeable, as only four employees are involved, Employer expressed a desire to pursue special procedures in its own right, and has received H-2A certification in the past.

So ORDERED.

PATRICK M. ROSENOW
Administrative Law Judge

³⁸ H-2A Temporary Labor Certification Program (Agricultural) FAQ, “Special Procedures,” *supra* at n. 11.