# UNITED STATES DEPARTMENT OF LABOR

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS**

**Washington, DC**

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**Issue Date: 05 June 2023**

**OALJ Case No.:** 2023-TLC-00040
**ETA Case No.:** H-300-23055-801274

*In the Matter of:*

**EARL'S FLYING SERVICES, LLC,**

*Employer.*

Certifying Officer: Srdzan Lazarevski,
Chicago National Processing Center

Appearances:

Wendel V. Hall, Esquire
Hall Global,
Washington, D.C.
*For the Employer*

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Office of the Solicitor
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*For the Certifying Officer*

Before: Steven D. Bell
Administrative Law Judge

## DECISION AND ORDER AFFIRMING DENIAL OF TEMPORARY LABOR CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States ("U.S.") on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor.[1] A Certifying Officer ("CO") in the Office of Foreign Labor Certification of the

[1] 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.[2]

## I. STATEMENT OF THE CASE

On March 8, 2023, Earl's Flying Services, LLC ("Employer") filed (1) Form ETA 9142A; (2) Appendix A to Form ETA 9142, (3) Form ETA 790, 790 A, and Addendums, (4) Statement of Temporary Need, (5) Workers Compensation Insurance Documentation, (6) Work Contracts, (7) FLC Documentation, (8) Surety Bond, (9) Proof of FEIN, (10) Agent Agreement, and (11) Covid Assurance Documentation.[3] Employer requested certification for two Pesticide Handlers, Sprayers, & Applicators,[4] from May 1, 2023 to December 1, 2023, based on an alleged seasonal need during that period.[5]

On March 15, 2023, the CO issued a Notice of Deficiency ("NOD") stating that Employer failed to establish that the job duties listed in the job opportunity were agricultural labor or services under Section 3(f) of the Fair Labor Standards Act ("FLSA") at 29 U.S.C. § 203(f) or Section 3121(g) of the Internal Revenue Code of 1986 ("IRC") at 26 U.S.C. §3121(g) as required by 20 C.F.R. § 655.103(c)(2) because it failed to establish that the primary worksite was a farm, whether the additional worksites were farms, that the duties would take place at a farm, or that the job duties met the definition of agricultural labor or specify the commodity associated with the service it provides its clients, that Employer failed to provide a properly signed surety bond as required, that it failed to describe what additional benefits would be offered to H-2A workers, and that it had used the improper occupation code to describe the position offered.[6]

In its March 16, 2023 response, Employer submitted the surety bond and gave permission to alter the application to remove the statement about additional benefits and use the recommended occupational code. It also responded that only "incidental work necessary to the duties performed at the additional worksites (like loading and unloading gear, etc." would be performed at the company owned and operated headquarters, and that most of the work would be performed at additional worksites that "meet the definition of 'farm'" and that "[t]hese airstrips are owned by farmers, on farm land, and are used solely for crop-dusting/aerial spraying, which is tied directly to the raising of an agricultural commodity."[7]

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[2] 20 C.F.R. § 655.171.
[3] AF 71-108. In this Decision and Order, "AF" refers to the Administrative File. "Emp. Post-Hg. Bf." will refer to Employer's post hearing brief, and "CO Post-Hg. Bf." will refer to the Certifying Officer's post hearing brief.
[4] SOC (O*Net/OES) occupation title "Agricultural Workers, All Other" and occupation code 45-2099.00. AF 72-78.
[5] AF 71, 78.
[6] AF 58-65.
[7] AF 53.

The CO issued a second NOD on April 6, 2023, finding that Employer's response indicated that the employer owned worksite, located at 1051 Administration Drive, Steele, MO, was not a farm, and that the work that would take place there thus would not take place on a farm and would not meet the requirements of the H-2A program as it would not take place on a farm. The CO found that Employer failed to describe the job duties to take place there as requested, despite implying that at least some duties would occur there, and that it failed to specify the commodity associated with the service it provides to its clients.[8] The CO required Employer to remove the Administration Drive worksite and provide a written attestation that no work would take place there, or to provide a detailed explanation with supporting evidence that the Administration Drive worksite is located on a farm, clearly explain each job duty to take place on this worksite, and attest that all work performed for its job opportunity will take place on a farm, and specify the commodity or commodities associated with the services it will provide to its clients.[9]

Employer's response stated that the Administration Drive worksite was the company leased and operated headquarters, including airstrip, hangers, and buildings, leased from the city, "where the airplane, chemicals, and other supplies need to accomplish the job are stored." Employer noted that the H-2A workers would meet there daily to:

> provide ground support for the agricultural aerial application business. Such as: Read and understand the load ticket, load the plane with chemicals or fertilizer, fuel the plane, and prepare it for takeoff. Once the plane returns, they will refuel/reload if necessary or clean the plane in preparation for future use. The mowing of the airstrip is also a necessary duty.[10]

Employer noted that aerial application is used to properly fertilize and pesticide the fields, that using a tractor is insufficient, and that it has been in use since 1921. It noted that farms directly border the airstrip and that it fertilizes and dusts a variety of crops on them, including corn, rice, beans, and wheat.[11]

In a May 8, 2023 Denial Letter, the CO found that Employer was a crop-dusting firm, not a farmer, and that H-2A workers will perform loading, fertilizer mixing, and maintenance duties at the Administration Drive worksite, which it found that Employer had admitted was not a farm, but simply bordered by farms. The CO found that because the workers were not working for the farmers whose fields would be treated and they were performing job duties at a non-farm location, the job opportunity was not agricultural labor under the FLSA.[12]

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[8] AF 39-45.
[9] AF 45.
[10] AF 31.
[11] *Id*.
[12] AF 16-24.

## II. ARGUMENTS OF THE PARTIES

The CO has argued that Employer has not established its job opportunity fits the definition of "agricultural labor or services" as defined in 20 C.F.R. § 655.103(c) because it has failed to establish that the Administrative Drive worksite, otherwise known as Steele Airport is a farm. It has also argued that Employer's application was incomplete and inaccurate because it failed to list every worksite at which the H-2A workers would be employed.[13]

Employer has argued that its proposed employment qualifies as agriculture under 29 U.S.C. § 203(f) and 26 U.S.C. § 3121(g), stating that the definition of agriculture under § 203(f) is intentionally very broad and a very comprehensive definition, stating that the only question is whether the H-2A workers will be performing an "activity necessary in the cultivation of crops."[14] Employer argues that the Administrative Drive worksite is a part of Harrison Farms, designated by the U.S. Department of Agriculture ("USDA") as Farm 1733.[15]

## III. DISCUSSION AND APPLICABLE LAW

I held a *de novo* hearing in this matter pursuant to 20 C.F.R. § 655.171(b). Therefore, I will independently examine the evidence and testimony to determine the Employer's eligibility for temporary labor certification.[16] The burden remains with the Employer throughout the process.[17]

To succeed on an H-2A application, the Employer must establish "the need for the agricultural services or labor to be performed on a temporary or seasonal basis."[18]

Agricultural services or labor under 20 C.F.R. § 655.103(c) refers to "agricultural labor as defined and applied in sec. 3121(g) of the [IRC] of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the…(FLSA), at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment."[19] These definitions are duplicated in §§ 655.103(c)(1)-(2).

> (1) ***Agricultural labor.***
>
> > (i) For the purpose of paragraph (c) of this section, agricultural labor means all service performed:

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[13][13] CO Post-Hg. Bf. at 4-19.
[14] Emp. Post-Hg. Bf. at 2-3.
[15] *Id*. at 3-6.
[16] *David Stock*, 2016-TLC-00040 (May 6, 2016).
[17] *Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011).
[18] § 655.161(a).
[19] Employer has acknowledged that its position does not involve the pressing of apples for cider or logging. Tr. 36.

(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;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (c)(1)(i)(E), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is

> more than 20 at any time during the calendar year in which such service is performed….
>
> (ii) As used in this section, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.
>
> (2) ***Agriculture.*** For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an 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.[20]

Employer has acknowledged that it is not an operator of a farm and that it does not produce any crops in the company's name.[21] Unlike the pilots of crop-dusters, the H-2A workers will not interact with the crops at all but will instead load and fuel the plane and mix chemicals.[22] Therefore, the definitions that will apply are those at §§ 655.103(c)(1)(i)(A) and (c)(2). As Employer is not a farmer and the workers will not be engaged in any of the named practices under § 655.103(c)(2), under both of these definitions, the work must be performed on a farm in order to qualify as agricultural.

29 CFR § 780.136 states that:

> pilots and flagmen engaged in the aerial dusting and spraying of crops are examples of the types of employees of independent contractors who may be considered employed in practices performed "on a farm." Whether such employees are engaged in "agriculture" depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular

[20] §§ 655.103(c)(1)-(2)(citing 29 U.S.C. § 203(f)). I have omitted § 655.103(c)(1)(E)-(F) as they are exceptions that only apply when the employer is a farm operator or group of operators, and Employer has acknowledged that it does not operate a farm. Tr. 33.
[21] Tr. 33, 40.
[22] AF 78.

> farm, as discussed in §§ 780.141 through 780.147; that is, whether they are carried on as a part of the agricultural function or as a separately organized productive activity (§§ 780.104 through 780.144….Other employees of the above employers employed away from the farm would not come within section 3(f). For example, airport employees such as mechanics, loaders, and office workers employed by a crop dusting firm would not be agriculture employees.[23]

The CO found that the primary place of employment listed on the application, the Administration Drive worksite, was not a farm and that thus, services required by the H-2A application were not agricultural.[24] Employer has argued that this worksite is actually part of Farm 1733 as designated by the USDA.[25] However, as pointed out by the CO, the USDA notification regarding Farm 1733, although it lists Steele Airport as the owner, uses a different address than the worksite, namely 115 Walnut St., and lists Harrison Farms as the operator.[26] Harrison Farms is not owned by Employer, nor did Employer even have a contract to work on Harrison Farms until after the application was filed.[27] The Administration Drive worksite is owned by the City of Steele, who leases the airstrip, hangers, and buildings to Employer. Employer does not lease or operate Harrison Farms, which is operated by Ben Harrison.[28] In its response to the NOD, Employer stated that farms "border the airstrip[.]"[29] The airstrip is paved and is not used to grow crops or raise stock.[30] I therefore find that the Administration Drive worksite is a separate property from Farm 1733 and is thus not a farm. Although Employer initially argued that its work at the primary place of employment was only incidental,[31] it has failed to provide any evidence regarding the proportion of the H-2A workers' time that would be spent at additional worksites that might be farms. It also failed to address how and why the workers would go to these separate worksites if the workers would not be in the crop-dusters and the fueling and loading would be accomplished at the airstrip.

I therefore find that Employer has failed to establish that the work required by the requested H-2A workers was agricultural. It has thus not met its burden of establishing it is entitled to labor certification.[32] As I have found that Employer has not established entitlement to temporary labor certification, I need not consider the other issues in this claim.

## IV. ORDER

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[23] 29 CFR § 780.136 (citations omitted(.
[24] AF 39-45.
[25] Emp. Post-Hg. Bf. at 3-6.
[26] CO Exhibit ("CX") 2, Employer Exhibit ("EX") 2.
[27] Tr. 39, 43-44
[28] Tr. 24-25, 29, 39, AF 31.
[29] AF 31.
[30] Tr. 26, 32-33.
[31] AF 53.
[32] § 655.161(a).

It is hereby **ORDERED** that the Certifying Officer's decision denying Temporary Labor Certification be, and hereby is, is **AFFIRMED**.

For the Board:

Steven D. Bell
Administrative Law Judge