UNITED STATES DEPARTMENT OF LABOR

BOARD OF ALIEN LABOR CERTIFICATION APPEALS

Washington, DC

_____

Issue Date: 27 April 2023

BALCA Case No.: **2023-TLC-00031**
ETA Case No.: **H-300-22362-663826**

In the Matter of:

GREAT NORTHERN HONEY CO.,
Employer.

Certifying Officer: Marcella Campbell

Appearances:

Thomas P. Bortnyk, Esq., Vice President and General Counsel, MAS Labor H2A, LLC,[1]
For the Employer

Monica Berry, Esq., U.S. Department of Labor, Office of the Solicitor of Labor, Employment and Training Legal Services, Washington, D.C.,
For the Certifying Officer

DECISION AND ORDER REMANDING FOR FURTHER ACTION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188, and its implementing regulations at 20 C.F.R. Part 655, Subpart B, as amended on October 12, 2022. 87 Fed. Reg. 61,660 (Oct. 12, 2022). The temporary agricultural labor certification (H-2A) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On March 31, 2023, Employer Great Northern Honey Co. requested administrative review of the March 27, 2023 denial of its H-2A temporary labor certification application by a Certifying Officer (CO) within the Office of Foreign Labor Certification (OFLC), Employment and Training Administration (ETA), United States Department of Labor (DOL or the Department).

[1] Mr. Bortnyk is acting as a non-attorney agent for Employer in this proceeding.

(OFLC Administrative File (AF) 6); *see* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188; 20 C.F.R. § 655.171(b).[2]

I. Background

The Employer is a commercial beekeeper. AF 104 *et seq*. On January 6, 2023, Employer submitted a Form ETA-9142A, Application for Temporary Employment Certification (Form 9142 or Application) for three itinerant commercial beekeepers for the period of March 10, 2023, through November 1, 2023. AF 140-59. On January 12, 2023, the CO issued a Notice of Deficiency (NOD). AF 127-33. Employer responded on January 13, 2023. AF 121-26. On January 24, 2023, the CO issued a Notice of Acceptance. AF 113.

However, on February 23, 2023, the CO issued a second NOD. AF 72-76. The second NOD identified, among other deficiencies, the following: "In accordance with the 8 Cal. Code Regulations 3456(b-c), the employer indicates in the ETA 790A, Section A, that the workers will 'weed fields' however, the employer did not expand on the details involving the job activity of weeding." AF 75. Employer filed a response on February 23, 2023, which the CO deemed incomplete and resulted in a Minor Deficiency Email (MDE) to Employer on March 2, 2023. AF 68-69, 62. The MDE informed Employer that "[t]he [State Workforce Area] SWA serving the area of intended employment has informed the Chicago NPC that '[b]efore the SWA is able to create a job order for this case, we ask that the CNPC request the employer to remove the General ag duties from the Beekeeping duties.'" AF 62.

Employer responded to the MDE on March 2, 2023. AF 60-61. Employer stated in response:

> We are confused, bewildered, and baffled by the request below. Your emails states [sic] that the SWA has requested that the employer "remove the General ag duties from the Beekeeper duties" as a condition of approval. It is unclear why this would be necessary, or even why the SWA believes this to be a deficiency. To be clear, there is no regulatory prohibition on the inclusion of "General ag duties" in an H-2A job order. To the contrary, ANY ACTIVITY OF ANY KIND that meets the definition of "agricultural labor or services" under the H-2A regulatory framework (which includes "agriculture" under the Fair Labor Standards Act and Internal Revenue Code) is permissible in the program. The SWA has not identified any duties that are outside the scope of the legal definition of agriculture. To the contrary, the SWA itself *admits* that the duties in question are "ag duties."

[2] Although the Board of Alien Labor Certification Appeals (BALCA or the Board) received the AF on April 7, 2023, the undersigned did not receive the AF until April 10, 2023. Accordingly, the Board has used April 10, 2023 as the start date for all deadlines in this proceeding that start to run from receipt of the AF.

* * *

> The SWA has identified no actual deficiencies, therefore there is no basis for withholding approval on this case because this alleged "deficiency" does not satisfy the requirements at 20 C.F.R. 655.141. To answer your deficiency in sum, the employer declines to remove agricultural duties from its H-2A application and requests that you promptly inform the state of California to read the H-2A regulations and promptly proceed with the processing of this case.

AF 60.

On March 10, 2023, the CO issued a Notice of Required Modification (NRM) and identified two deficiencies. AF 42-46.

Regarding deficiency 1, "Scope and Purpose Beekeeping," the CO stated:

> The regulations are clear that the duties are for beekeeping only when filing an itinerant beekeeping application in multiple areas of intended employment. In this case, the employer lists worksites in both California and Montana and job duties outside of those directly related to commercial beekeeping. . . As the [E]mployer includes job duties outside of those directly related to commercial beekeeping the job opportunity does not fall within 20 CFR § 655.300-301 and therefore, the worksites must be within a single area of intended employment.

AF 45. The CO informed the Employer that it must "provide the Chicago NPC written permission to amend the application to include only duties that fall under the definition of Beekeeping." *Id*.

Regarding deficiency 2, "Job Order Filling Requirements," the CO stated "[t]he SWA has informed the Chicago NPC that it is unable to open a Job Order without the removal of the general agricultural duties from the beekeeping duties." AF 45-46. The CO informed the Employer that it "must work with the California SWA to satisfy this requirement in order for the California SWA to open the Job Order." *Id*.

Employer filed a response on March 13, 2023. AF 38-40. Employer stated that "the 'generalized' activities identified in your deficiency may appear to be unrelated to commercial beekeeping, [but] they are indeed within the scope of 'activities associated with the care or husbandry of bee colonies' and are therefore permitted under the regulations." AF 39. Employer gave the CNPC permission to amend the job description to state:

> Mow, cut, grade, and weed bee yards to comply with fire safe guidelines and prevent tripping hazards when working in the bee yards, per state/federal regulations and workers compensation guidelines. Perform ditching, shoveling, hoeing, hauling, ground preparation, and other manual tasks necessary to

> ensure adequate drainage and flood control in order to maintain the health of bees and comply with good animal husbandry guidelines. Bending, stooping, and kneeling required to perform tasks. Use hand tools including but not limited to hoes, shovels, shears, clippers, loppers, and saws to maintain the bee yards and prevent the growth of unwanted or harmful vegetation around the hives. Lift, carry, and load/unload products or supplies to support the beehives and or product of the beehives. Use power equipment including but not limited to tractors, mowers, sprayers, shears, chain saws, forklifts, skid loaders to provide care of the hives and the surround areas to make an optimal bee environment. Must operate agricultural equipment safely, with or without direction. Apply pesticides, herbicides, fungicides, and other honeybee protectants to control pests, fungus, and other external factors that may harm the bees or the health of the hive. Mix and apply chemicals, conditioners, and other related treatments at the correct times depending on type, growth, climate, and conditions. Assist with farm building/field maintenance and repairs as required by FDA and county sanitarians. Build/repair fences to exclude livestock and bears as required by USFW and Montana FWP.

AF 39-40, 32.

On March 27, 2023, the CO issued a Final Determination denying Employer's Application and identified two deficiencies. AF 17-25.

Regarding deficiency 1, "Scope and Purpose Beekeeping," the CO stated, "[o]n March 13, 2023, the Chicago NPC received the employer's response to the NRM. The employer failed to remove all **job duties outside of the scope of beekeeping**, nor had the employer secured an active Job Order with the California SWA. Therefore, this application is denied for three beekeeper job opportunities." AF 19 (bold added). "As the employer includes job duties outside of those **directly related to commercial beekeeping** the job opportunity does not fall within 20 CFR § 655.300-301 . . . ." AF 21 (bold added). The CO explained, "[t]he [E]mployer includes job duties such as farm building and field maintenance, [which] **are not found in the definition of commercial beekeeping activities permitted to file under the procedures at 20 CFR 655.300 through 655.304**. Therefore, the [E]mployer's job opportunity must fully comply with all of the requirements of 20 CFR 655.100 through 655.185, which requires the job opportunity to be within a single area of intended employment. *See* 20 CFR 655.130(e)(1). Therefore, as the job opportunity includes job duties outside of those **directly related to beekeeping** . . . the application is denied." AF 23 (bold added).

Regarding deficiency 2, "Job Order Filling Requirements," the CO stated, "[t]he SWA has informed the Chicago NPC that it is unable to open a Job Order without the removal of the general agricultural duties from the Form ETA-790A. The employer was to work with the California SWA to satisfy this requirement in order for the California SWA to open the Job Order. However, the issue has not been resolved. The California SWA has not opened a Job Order, and therefore, the application is denied." AF 24-25.

The CO concluded that Employer "**includes job duties that fall outside of the definition of itinerant beekeeping found at 20 CFR 655.300 and 655.301**, and the California SWA has not opened a Job Order," and on these bases denied the application for three beekeeper job opportunities. AF 25 (bold added).

In its request for administrative review of the CO's determination, Employer "asserts that the Denial is legally insufficient and constitutes an arbitrary and capricious action by the CO, contrary to the plain language of the law." AF 3. Employer requests that the Board reverse the CO's decision. AF 6.

II. The Applicable Regulations

The CO correctly explains that: "The H-2A program ordinarily requires a job opportunity to be limited to one [area of intended employment]. 20 C.F.R. § 655.130(e)(1). Certain agricultural occupations that require movement across the U.S., however, are exempt from that requirement by the special procedures established in 20 C.F.R. §§ 655.300-304." Br. at 5. The purpose of 20 C.F.R. §§ 655.301 - 655.304 is to establish certain procedures for employers who apply to DOL to obtain labor certifications to hire temporary agricultural foreign workers to perform animal shearing, commercial beekeeping, and custom combining. The procedures in §§ 655.301 - 655.304 apply to job opportunities for animal shearing, commercial beekeeping, and custom combining, as defined in § 655.301, where workers are required to perform agricultural work on a scheduled itinerary covering multiple areas of intended employment. 20 C.F.R. § 655.300(a). Hence, commercial beekeeping, as defined in Section 655.301, is one of the agricultural occupations exempt from the one area of intended employment rule.

The definition of terms in Section 655.301 explain that "[t]he following terms are specific to applications for labor certifications involving . . . commercial beekeeping:"[3]

> **Activities associated with the care or husbandry of bee colonies** for producing and collecting honey, wax, pollen, and other products for commercial sale or providing pollination services to agricultural producers, **including** assembling, **maintaining**, and repairing **hives**, frames, or boxes; inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; feeding and medicating bees to maintain the health of the colonies; installing, raising, and moving queen bees; splitting or dividing colonies, when necessary, and replacing combs; preparing, loading, transporting, and unloading colonies and equipment; forcing bees from hives, inserting honeycomb of bees into hives, or inducing swarming of bees into hives of prepared honeycomb frames; uncapping, extracting, refining, harvesting, and packaging honey, beeswax, or other products for commercial sale; cultivating bees to produce bee colonies and

[3] 20 C.F.R. § 655.301.

queen bees for sale; and maintaining and repairing equipment and other tools used to work with bee colonies.

20 C.F.R. § 655.301 (bold added).

The exemption to the one area of intended employment for commercial beekeeping predates the current regulations. On June 14, 2011, OFLC issued Training and Employment Guidance Letter No. 33-10.[4] "The Special Procedures [outlined in the Letter] permitted commercial beekeeping employers, such as Great Northern Honey, to file a single H-2A application covering multiple areas of intended employment in order to facilitate industry-wide standards in which beekeepers transport honey bee colonies to farms and orchards throughout the U.S. on an itinerary." AF 4. Many or all of the special procedures in the Letter are now codified in the regulations at 20 C.F.R. §§ 655.300 - 655.304. But, the definition of "commercial beekeeping" in Section 655.301 was not included in Letter No. 33-10 or the Letter's Attachment "A."

III. Scope and Standard of Review

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *see Garrison Bay Honey*, LLC, 2011-TLC-00054 (Dec. 2, 2011). The presiding administrative law judge can either affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. 20 C.F.R. § 655.171(a). Further, the judge "must uphold the CO's decision unless shown by the Employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 20 C.F.R. § 655.171(d).

IV. Discussion

A. The Parties' Arguments

Employer asserts that "[t]he CO's Denial hinges on a legal theory that an H-2A application for an itinerant beekeeper must exclusively contain discrete job duties that each independently fall within the scope of the regulatory definition of 'commercial beekeeping.'" AF 13. Employer argues that the CO's interpretation of the regulations ignores the plain language of the text and is arbitrary and capricious; the Board should not defer to the CO's interpretation because the CO did not explain the reason for her interpretation; the CO failed to consider the nexus Employer provided between the requested job duties and commercial beekeeping; and no statute or regulation prevents application of the exemption to the one area of intended employment rule because an application includes general agricultural job duties not expressly enumerated in Section 655-301's definition of commercial beekeeping. For these reasons, Employer concludes that the CO's denial of its application was arbitrary and capricious and cannot stand. AF 7-14.

[4] Available at https://www.dol.gov/sites/dolgov/files/ETA/advisories/TEGL/2011/TEGL33-10.pdf.

The CO argues that "[w]hether the[] job duties [listed by Employer] relate to beekeeping, however, is not the question under sections 655.300 and 655.301. Rather, the question is whether these job duties are associated with itinerant commercial beekeeping." Br. at 7. The CO explains that:

> "[t]he offending job duties are ones that any fixed-site commercial beekeeper would have to perform. Those duties, however, are not ones inherent in itinerant commercial beekeeping. Thus, these duties must either be performed by the Employer's permanent workers (of which it has two, *see* AF at 147) or must be applied for in a separate, traditional H-2A application limited to one AIE."

Br. at 7.

In a nutshell, the CO argues that the definition of commercial beekeeping in 20 C.F.R. § 655.301 (quoted above) sets forth the only job duties that an itinerant commercial beekeeper may perform. Stated another way, the definition sets forth an exhaustive list of the job duties associated with itinerant commercial beekeeping. So, if a commercial beekeeper is required to perform general agricultural duties not enumerated in Section 655.301, then the position is not exempt from the one area of intended employment rule. The CO argues that she "properly denied Employer's application because the job duties did not fit the itinerant nature required to qualify for the exemption from the generally applicable one-AIE rule." Br. at 6.

In support of her interpretation of Section 655.301, the CO argues that:

> When the Department adopted this definition of commercial beekeeping, it did so in recognition of the fact these duties are a 'necessary part of performing this work on an itinerary.' *See* 87 Fed. Reg. at 61685. The Department was clear that the job duties were to reflect work that would need to take place in a transient nature between multiple AIEs.

Br. at 6.

She also disputes that differences in the definitions of commercial beekeeping and custom combining, both found in Section 655.301, indicate an intent by the Department to broaden the definition of commercial beekeeping. She argues that the Department deleted the terms "associated with" and "including" from the definition of custom combining "in response to specific comments urging the Department to expand the definition of that term by covering certain types of equipment beyond that used in combining, and additional worksites beyond those covered by the definition of agriculture. *See* 87 Fed. Reg. at 61771." Br. at 8.

The CO concludes that her decision was rational because "Employer's attempt to explain the relevance of the job duties to beekeeping[, which she did consider,] was insufficient to establish that they qualify for coverage under section 655.301." Br. at 7.

B. The Arbitrary and Capricious, Abuse of Discretion, and Otherwise Not in Accordance with the Law Standard

Under the arbitrary and capricious standard, if there is any rational basis for the CO's determination, it must be sustained. *See Dellew Corp. v. United States*, 108 Fed. Cl. 357, 368 (Fed. Cl. 2012); *Erinys Iraq Ltd. v. United States*, 78 Fed. Cl. 518, 525 (Fed. Cl. 2007); *see also Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 669, n.11 (9th Cir. 1980).

In *Three Seasons Landscape Contracting Service*,[5] the Board explained this standard of review as follows:

> Under this standard of review, courts "retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making." Judulang v. Holder, 132 S. Ct. 476, 483-84 (2011). Thus, courts must satisfy themselves that the agency has examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the agency's explanation, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. (citations and internal quotation marks omitted). If the agency has
>
> > relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,
>
> then it is arbitrary and capricious. Id. An agency's decision is also arbitrary and capricious when it fails to "cogently explain why it has exercised its discretion in a given manner." Id. at 48. Inquiry into these factual issues "is to be searching and careful." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

2016-TLN-00045, PDF at 19 (underlining in original).

[5] 2016-TLN-00045 (June 15, 2016).

Under the arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law standard, courts "must give substantial deference to an agency's interpretation of its own regulations. [A court's] task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given ' 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ' In other words, [a court] must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.' This broad deference is all the more warranted when . . . the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (internal citations omitted); *see Forsyth Memorial Hospital Inc. v. Sebelius*, 667 F.Supp.2d 143, 147 (D.C. 2009) ("When an agency interprets its own regulations, the interpretation has 'controlling weight unless it is plainly erroneous or inconsistent with the regulation'").

Courts treat the "abuse of discretion" and "arbitrary and capricious" standards as similar, if not the same. *Rizzo v. Paul Revere Ins. Grp.*, 925 F. Supp. 302 (D.N.J. 1996) (stating that the "arbitrary and capricious" standard of review is essentially one and the same as the "abuse of discretion" standard). The phrases are interchangeable, and both are understood to require a reviewing court to affirm, unless an underlying interpretation was unreasonable, irrational, or contrary to language of the statute. *Fabyanic v. Hartford Life and Accident Ins. Co.*, No. 02:08-cv-0400, 2009 U.S. Dist. LEXIS 21777, 2009 WL 775404, at *5 (W.D. Pa. Mar. 18, 2009).

C. The CO Abused Her Discretion; the Final Determination Was Arbitrary and Capricious.

The Board need not decide how to interpret the definition of commercial beekeeping under Section 655.301 to decide this appeal. The CO abused her discretion regardless of the proper interpretation of Section 655.301.

In her Final Determination, the CO requires job duties to be "directly related to" commercial beekeeping and that job duties be "found in the definition of commercial beekeeping activities." The terms "associated with," which are found in the regulation, and the terms "directly related to," which are not found in the regulation, are not the same. In common language, the most appropriate definition of the term "associated" is "**related**, connected, or combined together."[6] By adding the term "directly" immediately before the term "related," the

[6] Merriam-Webster's online dictionary found at https://merriam-webster.com/dictionary/associated (emphasis added).

CO has made the definition of commercial beekeeping more limited or restrictive than the plain text of the regulation. The CO has not explained the purpose of this interpretation or why it is reasonable.

Further, the CO has not explained how her interpretation reconciles the first part of the definition of commercial beekeeping, "[a]ctivities associated with the care or husbandry of bee colonies . . . ," with the remainder of the definition, "including assembling, maintaining, and repairing hives, frames, or boxes; inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; . . . ." She does not assert that the most general part of the definition, i.e., "[a]ctivities associated with the care or husbandry of bee colonies . . . ," include only the enumerated activities that follow. If, this is her interpretation, then the first part of the definition becomes meaningless surplus that is not saved by substituting the terms "directly related to" for "associated with." Other than stating that "[t]he Department was clear that the job duties were to reflect work that would need to take place in a transient nature between multiple AIEs," the CO has not explained the purpose of this possible interpretation or why it is reasonable. And, the CO's statement is no explanation at all.

Alternatively, if the CO's interpretation of the definition of commercial beekeeping in Section 655.301 is that it includes activities "directly related to" the care or husbandry of bee colonies plus the other enumerated activities in the definition, then the CO has not provided a reasonable explanation for why mowing, farm building, and field maintenance are not directly related to the care or husbandry of bee colonies in any case or in this particular case. The CO also has not provided a reasonable explanation for why mowing grass is not included within the activity of maintaining hives in any case or in this particular case.[7]

Nothing in the current regulations or preamble to the current regulations supports the CO's interpretation that itinerant commercial beekeepers are precluded from performing duties "that any fixed-site commercial beekeeper would have to perform." To the contrary, the regulations state that the procedures in §§ 655.300 - 655.304 "apply to job opportunities for . . . commercial beekeeping . . . , as defined under § 655.301, where workers are required to perform **agricultural work** on a scheduled itinerary covering multiple areas of intended employment." 20 C.F.R. § 655.300 (bold added). The CO has not provided a reason for interpreting the regulations to prohibit itinerate commercial beekeepers from performing general agricultural work. Absent express regulatory support for this interpretation, the CO

[7] The Board can envision a CO reasonably finding that mowing grass immediately adjacent to a beehive, e.g., three feet around each hive, is an activity of maintaining a hive or at least an activity associated with or directly related to the care or husbandry of bee colonies. The Board can also envision a CO reasonably finding that building or maintaining a fence within a reasonable perimeter around a bee yard, in which the hives are spaced apart in accordance with industry practice, is an activity associated with or directly related to the care or husbandry of bee colonies. Employer did not provide this level of detail to the CO in the application process and the CO did not ask for such detail.

By comparison, the Board can envision a CO reasonably finding that mowing 100 acres of grass and building or repairing a perimeter fence around a 100-acre farm, on which a 1/2-acre bee yard is located, is not an activity associated with or directly related to the care or husbandry of bee colonies.

needs to provide a reasoned explanation for her interpretation. *See Brook Ledge, Inc*., 2016-TLN-00033, at 4-6 (panel decision) ("Should the OFLC explain its 'longstanding' definition, or issue guidance, BALCA will review such a policy under the abuse of discretion standard, and will 'defer to the program agency where its actions, interpretative or otherwise, are reasonable and consistent with law, even where its choice is not compelled by law or regulation, and its choice may not be the best one among reasonable alternatives'").

Lastly, the CO appears to have merely deferred to California SWA's interpretation of the regulations. In neither OFLC's first nor second NOD did OFLC ask Employer to remove general agricultural job duties from its application. Instead, in the second NOD, OFLC asked Employer to expand on the details involving the job activity of weeding. But, weeding is not an expressly described activity in the definition of commercial beekeeping under Section 655.301. It was not until "[t]he SWA serving the area of intended employment . . . informed the Chicago NPC that '[b]efore the SWA is able to create a job order for this case, we ask that the CNPC request the employer to remove the General ag duties from the Beekeeping duties,'"[8] that the CO required Employer to remove general agricultural job duties not expressly enumerated in Section 655.301 from its application. Nothing in the record leads the Board to believe that the CO did not abrogate her responsibility to interpret the applicable regulations in the first instance. The CO's interpretation of the regulations certainly does not appear to be thorough, searching, or thoughtful. The CO's interpretation of the regulations, whatever that interpretation may actually be, is hardly entitled to deference.

The CO has failed to clearly articulate her interpretation of the definition of commercial beekeeping under Section 655.301. The inconsistencies or lack of clarity in her interpretation makes the interpretation unreasonable and clearly erroneous. She has failed to explain the purpose of her interpretation or why it is reasonable. She has failed to adequately explain why the job duties listed by Employer, including mowing, farm building, and field maintenance are not associated with or directly related to the care or husbandry of bee colonies in any case or in this particular case. And, she has failed to cite any statutory or regulatory authority or provide any reason for her interpretation that the regulations prohibit itinerate commercial beekeepers from performing general agricultural work. For all these reasons, the CO abused her discretion in denying Employer's application. Her decision was arbitrary and capricious.

Deficiency 2 in the Final Determination is based, in part, on the CO's arbitrary and capricious interpretation and application of Section 655.301. Hence, the CO's decision based on deficiency 2 cannot be affirmed.

V. Order

It is hereby **ORDERED** that the Certifying Officer's denial of Employer's Application for Temporary Employment Certification is **REVERSED** and that this matter is **REMANDED** for further action.

[8] AF 62.

The Board has not interpreted Section 655.301 because it is a new regulation and the OFLC should have an opportunity to reconsider and clearly articulate its interpretation of the regulation before the Board determines whether such interpretation is reasonable or clearly erroneous. On remand, the CO should reconsider: (1) her interpretation of the definition of commercial beekeeping under 20 C.F.R. § 655.301; (2) whether general agricultural duties not expressly enumerated in Section 655.301 may be included in an application for itinerate commercial beekeepers for multiple areas of intended employment; and (3) whether the general agricultural duties listed in Employer's application are also activities included in Section 655.301.

If the CO denies Employer's application again, she should include in her Final Determination: (1) a clear, internally consistent interpretation of Section 655.301; (2) all the reasons for her interpretation of Section 655.301, including the purposes such interpretation is intended to serve; (3) a statement of whether general agricultural duties not expressly enumerated in Section 655.301 may be included in an application for itinerate commercial beekeepers for multiple areas of intended employment; (4) if such duties may not be included in an application, all the reasons for such interpretation of the regulations, including the purposes such interpretation is intended to serve; (5) an explanation of why each general agricultural duty listed in Employer's application does not fall within the definition of commercial beekeeping under Section 655.301 based on her interpretation of that section; and (6) if the CO's interpretation of Section 655.301 includes non-enumerated activities associated with or directly related to the care or husbandry of bee colonies, an explanation of why each general agricultural duty listed in Employer's application is not such an activity.

For the Board:

Jason A. Golden
Administrative Law Judge