In the Matter of:

U.S. DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, DIVISION OF FOREIGN LABOR CERTIFICATION,

PETITIONER,

v.

BARRY'S GROUND COVER; EATON FARMS; ERNST CONSERVATION SEEDS; WM. F. HAMMELL NURSERIES, LLC; LAKE FOREST GARDENS; ROBA TREE FARM, LLC; E.G. RALL, JR. LANDSCAPE DESIGN; QUALITY GREENHOUSE & PERENNIAL FARM; CLOVERDALE FARMS, INC.; KRETSCHMAN FARM; PETE'S PRODUCE FARM, LTD; FRANTANGELO GARDENS LANDSCAPE & NURSERY; and YARNICK FARM,

RESPONDENTS.

ARB CASE NO. 12-079

ALJ CASE NOS. 2012-TLC-011, -23,-26,-30,-32,-34,-35,-37,-38,-39, -42,-46,-50

DATE: January 16, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Respondents*:**

Monte B. Lake, Esq. and Wendel V. Hall, Esq.; *CJ Lake, LLC;* Washington, District of Columbia

For the Petitioner:

Erin Mohan, Esq.; Matthew Bernt, Esq.; Harry L. Sheinfeld, Esq.; Gary M. Buff, Esq.; and M. Patricia Smith, Esq.; *U.S. Department of Labor,* Washington District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Equal Access to Justice Act (EAJA), 5 U.S.C.A. § 504 (Thomson Reuters 2013), and 29 C.F.R. Part 16 (2013). Petitioner Administrator, Employment and Training Administration, Division of Foreign Labor Certification (the Administrator) petitions the Administrative Review Board (ARB) for review of a Department of Labor Administrative Law Judge's order awarding legal fees to Respondents under EAJA.[1] The Administrative Law Judge (ALJ) issued the Order Awarding Legal Fees after reversing a decision of the Certifying Officer, Employment and Training Administration, Division of Foreign Labor Certification (Certifying Officer) that had denied Respondents' applications for temporary employment certification to hire temporary agricultural workers (H-2A workers) under the Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(15)(H)(ii)(a) (Thomson Reuters 2013), and its implementing regulations, 20 C.F.R. Part 655, Subpart B (2013).[2]

On July 18, 2013, the ARB ordered supplemental briefing on whether EAJA applied to the H-2A temporary employment certification proceeding before the ALJ. The Board held oral argument on October 30, 2013. For the following reasons, the Board vacates the ALJ's award of attorney's fees.

BACKGROUND

Respondents, employers in Pennsylvania at all times relevant to this action, separately applied to the Department of Labor's Employment and Training Administration (ETA) for temporary employment certifications requesting approval to temporarily employ foreign, non-immigrant, seasonal, nursery workers as H-2A temporary agricultural workers. As required, these employers filed job orders with the Pennsylvania state workforce agency (SWA). *See* 20 C.F.R. § 655.121. In their job orders, the employers indicated that applicants must have between one and three months prior experience. Based on the SWA's survey showing that the majority of non-H-2A respondents did not require prior work experience,[3] the ETA's Certifying Officer asked the employers to remove that requirement or prove that it is normal and accepted under 20 C.F.R. § 655.122(b). Two of the employers[4] submitted additional evidence,[5] which the

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1 Order Granting Employers' Joint Application for Award of Fees and Costs (Order Awarding Legal Fees), ALJ Nos. 2012-TLC-011 *et seq*. (May 21, 2012).

2 Decision and Order Reversing the Certifying Officer's Denial of Certification (D & O Reversing Certifying Officer), ALJ Nos. 2012-TLC-011 *et seq*. (Feb. 23, 2012).

3 Administrative Record (AR) Tab A at 138; AR Tab D at 8-115.

4 Those employers are Respondents Barry's Ground Cover and Ernst Conservation Seeds.

5 AR Tab A at 15-127, 516-629.

Certifying Officer found irrelevant and/or insufficient,[6] and thus the Officer denied those applications.[7] Those two employers requested a hearing before the ALJ, while the remaining eleven employers, Respondents herein, instead of responding to the Certifying Officer's notice of deficiency, elected to appeal directly to the Office of Administrative Law Judges.[8]

The ALJ determined that the Certifying Officer "failed to present any credible or reliable evidence to rebut the Employers' case, for a need of one to three months of experience for workers as contained in their applications for temporary labor certification."[9] Accordingly, the ALJ reversed the Certifying Officer's findings and remanded all of Respondents' applications "for expeditious processing in accord with the H-2A regulations."[10]

In light of the ALJ's reversal of the Certifying Officer's denial of certification, Respondents filed a joint petition for the award of legal fees and costs with the ALJ, claiming entitlement to an award of attorney's fees under the EAJA as the prevailing party. Determining that the Certifying Officer's position in denying Respondents' applications for temporary employment certification "was not substantially justified in fact," though it "may have been substantially justified in law," the ALJ awarded Respondents $23,254.94 in attorney's fees and $671.03 in expert witness fees for a total of $23,925.97, payable by the Labor Department.[11]. It is from the ALJ's award of legal fees that the Administrator appeals.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction over this appeal pursuant to 5 U.S.C.A. § 504, 29 C.F.R. § 16.306, and Secretary's Order No. 02-2012, 77 Fed. Reg. 69378 (Nov. 16, 2012) (delegating to the ARB the Labor Secretary's authority to issue final decisions under the EAJA). The Board exercises de novo review of legal issues. *See* 5 U.S.C.A. § 557(b) (Thompson Reuters 2013); *Zappala v. Nemias Perez, a/k/a Nemias Perez-Rollero,* ARB No. 04-047, ALJ No. 1997-MSPA-009-P, slip op. at 4 n.11 (Apr. 28, 2006) (citing *Zappala Farms,* ARB No. 01-054, ALJ No. 1997-MSP-009 slip op. at 6 (ARB Aug, 29, 2001)).

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6 AR Tab B at 30-35 (Certifying Officer's deposition); AR Tab C at 26-27.

7 AR Tab A at 10-13, 510-515; AR Tab B at 35-37; AR Tab C at 26-27.

8 AR Tab A.

9 D & O Reversing Certifying Officer, slip op. at 18.

10 *Id*. The ALJ's Decision and Order on the H-2A foreign labor certification applications constituted final agency action, from which there is no appeal to the Administrative Review Board. 20 C.F.R. § 655.171(b)(2) ("The ALJ's decision is the final decision of the Secretary.").

11 Order Awarding Legal Fees, slip op. at 6.

DISCUSSION

A. Statutory Framework

The Equal Access to Justice Act (EAJA), at 5 U.S.C.A. § 504(a)(1), provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

The ALJ determined that Respondents were entitled to the award of EAJA legal fees on the ground that the Certifying Officer's position in denying the certifications (i.e., because the job orders included a prior work experience requirement) "was not substantially justified in fact. Specifically, that based on the facts presented to the [Certifying Officer], a reasonable person could not think the position taken to be correct."[12]

The United States Supreme Court has defined "substantially justified" to mean "justified in substance or the main – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). To meet this test, "the government must show that its position had a reasonable basis in both law and fact." *Federal Election Comm'n v. Political Contributions Data, Inc.,* 995 F.2d 383, 386 (2d Cir. 1993). In challenging the ALJ's fee award on appeal, the Administrator initially argued that the ALJ erred in finding the Certifying Officer's position not substantially justified in fact.[13] Respondents disagree, arguing that the ALJ properly found that the government's labor certification denial was not substantially justified.

We do not, however, reach the question of whether the Certifying Officer's position was, or was not, substantially justified. Following initial briefing by the parties, the ARB determined that this case presents a more fundamental question – whether EAJA applies to proceedings before a Department of Labor Administrative Law Judge who is called upon to review the denial

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[12] Order Awarding Legal Fees, slip op. at 4.

[13] The Administrator did not dispute before the ALJ that Respondents are prevailing parties within the meaning of EAJA, and does not do so on appeal. Nor has the Administrator taken the position that special circumstances exist that make the fee award unjust.

by a Certifying Officer of an application for temporary employment certification under the H-2A program. For the following reasons, we conclude that it does not and that, because the issue of coverage is dispositive, all other issues raised by this appeal are moot.

B. EAJA does not apply to H-2A temporary employment certification proceedings

EAJA authorizes the award of legal fees to a prevailing party (other than the United States) in connection with an "adversary adjudication." 5 U.S.C.A. § 504(a)(1). "Adversary adjudication" is defined under EAJA as "an adjudication under section 554 of [the Administrative Procedure Act] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication . . . for the purpose of granting or renewing a license." 5 U.S.C.A. § 504(b)(1)(C)(i); see also 29 C.F.R. § 16.102(b). Because the ALJ awarded EAJA fees without addressing whether the proceedings before the ALJ constituted an "adversary adjudication," and because the parties did not raise this issue as part of their initial briefing, the ARB ordered supplemental briefing on the question of EAJA coverage. The supplemental briefing was followed by oral argument.[14]

Having reviewed the parties' briefs and upon consideration of the parties' oral arguments, we conclude that the merits argument initially raised by the parties need not be addressed. The issue of whether the Certifying Officer's position was substantially justified is foreclosed by the EAJA coverage question, which we consider dispositive of the appeal before us.[15]

The Administrator concedes that a Department of Labor hearing before an ALJ on a denial of an application for temporary employment certification is an "adjudication" within the meaning of the Administrative Procedure Act, but that it nevertheless falls outside of EAJA's definition of an "adversary adjudication" because it falls within the licensing exemption to EAJA coverage. The Administrator argues that (1) temporary employment certifications are "certificates," and (2) that the hearing is a step or a part of a larger process through which the Federal Government permits employers to bring foreign workers into the United States. Therefore, these hearings are conducted for the express purpose of granting "a license." As such, the Administrator argues, the ALJ proceedings fall into a type of adjudication specifically

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[14] At oral argument, the parties were also asked to address the issue of Respondents' eligibility to seek an award of EAJA legal fees, and whether the Department of Labor's current regulations adopted in 1981 or the intervening 1985 amendments to EAJA were controlling in light of the Secretary of Labor's delegation of authority to the ARB requiring adherence to the Department's regulations. See Secretary's Order No. 02-2012, 77 Fed. Reg. 69378 (Nov. 16, 2012). The evidence of record failed to demonstrate that any of Respondents were eligible to seek EAJA fees under the current regulations, 20 C.F.R. §§ 16.201, 16.202 (e.g., assets of the employer may not exceed $5 million), whereas the 1985 EAJA amendments provide more expansive eligibility requirements (for example, employers must attest to assets that do not exceed $7 million, 5 U.S.C.A. § 504(b)(1)(B)(ii)).

[15] For the same reason, we do not reach the question of Respondents' eligibility to seek EAJA legal fees.

excluded from application of EAJA under 5 U.S.C.A. § 504(b)(1)(C)(i). See also 29 C.F.R. § 16.104(a).

Respondents contend, on the other hand, that EAJA applies to the ALJ's review of the Certifying Officer's denial of its H-2A applications because it is a statutorily-provided de novo administrative hearing (citing 8 U.S.C.A. § 1188(e)(1)). As such, Respondents argue, the proceedings before the ALJ constitute an "adversary adjudication" for which a prevailing party, such as Respondents, may be awarded fees.

The Immigration and Nationality Act (INA) provides that to hire H-2A workers, an employer must initially obtain a temporary employment certification from the Department of Labor as a condition precedent to approval by the United States Attorney General (now approved by the Department of Homeland Security) of the I-129 Petition for a Nonimmigrant Worker. *See* 8 U.S.C.A. § 1101(a)(15)(h)(ii)(A); 8 U.S.C.A. § 1188(a)(1). The Department of Homeland Security may not approve an H-2A petition unless the Department of Labor certifies that: (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C.A. § 1188(a)(1); 20 C.F.R. §§ 655.100, 655.103.

If the Department of Labor initially denies a temporary employment certification, the INA mandates that the Department provide the potential H-2A employer with a "de novo administrative hearing respecting the denial" upon the employer's request. 8 U.S.C.A. § 1188(e)(1); *see* 20 C.F.R. § 655.171. The H-2A program regulations provide that, with certain exceptions, the Rules of Practice and Procedure for Hearings before the Office of Administrative Law Judges, at 29 C.F.R. Part 18, apply to such hearings. 20 C.F.R. § 655.171(b). In turn, 29 C.F.R. § 18.26 provides that unless required by statute or regulation, "hearings shall be conducted in conformance with the Administrative Procedure Act, 5 U.S.C. 554." 29 C.F.R. § 18.26. Based on these provisions, the H-2A temporary employment certification proceeding constitutes an "adjudication" within the meaning of the APA.

However, the EAJA's definition of an "adversary adjudication" excludes an adjudication "for the purpose of granting or renewing a license." 5 U.S.C.A. § 504(b)(1)(C)(i); *see also* 29 C.F.R. § 16.102(b). The Administrative Procedure Act, applicable to H-2A temporary employment certification proceedings before an ALJ, defines a "license" to include the "whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C.A. § 551.[16] A review of the statutory and regulatory scheme relevant to H-2A temporary employment certification, demonstrates that the Department of Labor's certification process is part of, and indeed an integral pre-condition to, the approval by another federal agency of an employer's request "to bring non-immigrant workers to the U.S. to perform agricultural work." 20 C.F.R. § 655.103(a). Specifically, under the INA's section entitled "Conditions for approval of H-2A petitions," a "petition to import an alien as an H-2A worker . . . may not be approved by the Attorney General *unless* the petitioner

[16] The EAJA specifies that the "definitions provided in section 551" apply to the EAJA. 5 U.S.C.A. § 504(b)(2).

has applied to the Secretary of Labor for a [temporary labor] certification." 8 U.S.C.A. § 1188(a)(1)(emphasis added). The INA further provides that the Secretary of Labor "shall make . . . . the certification" if "the employer has complied with the criteria for certification" and "the employer does not actually have, or has not been provided with referrals of, qualified" U.S. workers." 8 U.S.C.A. § 1188(c)(3)(A). The Department of Labor "makes such a determination and certifies its determination to the Department of Homeland Security (DHS)." 20 C.F.R. § 655.103(a). Thus, this statutory and regulatory scheme establishes that the Department of Labor's H-2A temporary employment certification adjudicatory hearings before an ALJ are held as part of a multi-agency process of granting permission or a license to hire foreign workers and as such are expressly exempted from EAJA's definition of "adversary adjudications."

Consistent with the foregoing, DHS's relevant regulations provide that the "temporary agricultural labor certification process determines" the statutory criteria set forth in 8 U.S.C.A. § 1188(a)(1). 8 C.F.R. § 214.2(h)(5)(ii). DHS regulations specifically instruct that an employer filing a petition for a nonimmigrant H-2A worker with DHS, "must" file the petition "with a single valid temporary agricultural labor certification." 8 U.S.C.A. § 214.2(h)(5)(i)(A). In fact, such a petition "will be automatically denied" "if filed without the certification." 8 U.S.C.A. § 214.2(h)(5)(i)(D). Further confirming the intrinsic part that labor certification plays in the approval process, DHS regulations also provide that "approval of an employer's H-2A petition is immediately and automatically revoked if the Department of Labor revokes *the labor certification upon which the petition is based.*" 8 C.F.R. § 214.(h)(5)(xii) (emphasis added). These statutory and regulatory provisions belie Respondents' position, asserted at oral argument,[17] that an employer need only apply for, rather than attain, certification from the Labor Department to bring an H-2A temporary agricultural worker to the United States.

For the foregoing reasons, we conclude that EAJA does not apply to H-2A temporary labor certification denial hearings before an ALJ. Such hearings although "adjudications" within the meaning of the APA, are not "adversarial adjudications" for EAJA purposes as they are conducted as part of the H-2A licensing process. The H-2A labor certification proceedings conducted before an ALJ in review of a Certifying Officer's initial denial of certification are part of a multi-agency process that culminates with the approval of the Attorney General and the Department of Homeland Security permitting an employer to bring into the United States a temporary agricultural worker. Therefore, we conclude that the Labor Department's H-2A labor certification process falls within the APA's definition of a "license" proceeding. Accordingly, we view the hearing held by the ALJ in this case as an adjudication held for the purpose of granting or denying a license, to which EAJA does not apply. Because the proceedings before the ALJ fall under the licensing exception to EAJA coverage, Respondents are not entitled to EAJA fees for having prevailed against the government in connection with those proceedings. In sum, we conclude that an adjudicatory hearing regarding a denial of an H-2A temporary employment certification is not adversarial in nature and thus is not an "adversary adjudication" entitling a prevailing party to EAJA fees. Consequently, we vacate the ALJ's order awarding EAJA fees to Respondents.

[17] Oral Argument before ARB (Oct. 30, 2013) Transcript at 38-43.

CONCLUSION

Accordingly, the ALJ's Order awarding EAJA legal fees is **VACATED**. Respondents' petition for the award of legal fees under EAJA is **DENIED**.

SO ORDERED:

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge