



Issue Date: 07 October 2019

BALCA CASE NO.: 2019-TLC-00086

ETA CASE NO.: H-300-19207-556838

In the Matter of:

K.S. DATTHYN FARMS, LLC,
Employer.

Appearance: Thomas P. Bortnyk
MAS Labor H2A, LLC
Non-Attorney Agent Representative
For the Employer

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL

This case arises from K.S. Datthyn Farms’ (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a seasonal or other temporary basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B (collectively, the H-2A program); *see also* 20 C.F.R. § 655.103(d).¹

Following the CO’s denial of an application for certification under 20 C.F.R. § 655.161, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.164(b). Here, the Employer requested expedited administrative review. *See* 20 C.F.R. § 655.171(a). I received the administrative file on October 2, 2019, and have considered the written record including the administrative file and the Employer’s September 18, 2019, legal brief titled Notice of Appeal and Request for Expedited

¹“(d) Definition of a temporary or seasonal nature. For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.” 20 C.F.R. § 655.103(d).

Administrative Review. The Employer's September 18, 2019, brief capably set out the issues and the Employer's position, and in the interest of speed the regulation does not extend a right to further briefing or submission of evidence for either party. *See* 20 C.F.R. § 655.171(a).

I find that the Employer is a "single employer" with Datthyn Orchards, LLC, and therefore that its alleged temporary need for H-2A workers is not temporary within the meaning of the regulations. I affirm the CO's denial of certification.

FACTS

By application dated July 26, 2019, the Employer requested a temporary labor certification for four farmworkers² with at least three months experience to "manually plant, cultivate and harvest onions" and "manually harvest apples." AF 83; *see generally* AF 74-85.³ The job offer information included paragraphs of detail as to how the requested workers would both harvest and pack both apples and onions, and perform related work. *Id.* The application was signed by Eric Tuttle as the farm's "Manager." *Id.* The application includes certifications as to the wages to be paid, hours to be worked (full-time), and non-discrimination as between US and foreign workers, all on behalf of the Employer signed by Eric Tuttle. *Id.* The application includes an attestation that the Employer would purchase workers compensation insurance, signed by Eric Tuttle. AF 114. Employer asserted a temporary need from September 15, 2019, through June 20, 2020. AF 74.

On March 25, 2019, an employer named Datthyn Orchards, LLC, received a certification for three farmworkers with at least three months experience for a temporary need from April 20, 2019 to November 15, 2019. AF 272-297. Papers for the Datthyn Orchards application, including verifications of recruiting, AF 279-80, and the application itself, AF 297, were signed by Eric Tuttle as COO (typically, Chief Operating Officer) of Datthyn Orchards. The three workers for Datthyn Orchards were approved to "manually plant, cultivate and harvest apples" and trees. AF 298. The job offer information included similar detail as to how the requested (and approved) workers would both harvest and pack apples, and perform related work; and the same set of certifications as to wages to be paid, hours to be worked, and working conditions, signed by Eric Tuttle.⁴

On August 2, 2019, the OFLC CO issued a Notice of Deficiency to the Employer, setting out two deficiencies in the Application and requesting additional information. AF 62-66. The CO found that the Employer's initial application did not sufficiently demonstrate that the job opportunity was temporary, noting the apparently close relationship between K. S. Datthyn Farms and Datthyn Orchards LLC. The CO requested that the Employer:

explain in detail the differences in business operations between K. S. Datthyn Farms and Datthyn Orchards LLC. Furthermore, the employer must explain how the similar job duties performed at the adjacent worksites for the same crops are considered seasonal or temporary in nature when they are performed year round.

² Standard Occupational Classification (SOC) Code 45-2092

³ References to the appeal file are abbreviated with an "AF" followed by the page number.

⁴ The Datthyn Orchards farmworker positions were also classified as SOC 45-2092.

On August 14, 2019, the Employer submitted a response. AF 47-60. The Employer stated in most relevant part:

First, we direct you to the Withdrawal Request submitted on behalf of Datthyn Orchards, LLC on August 14, 2019, formally requesting a withdrawal of the *Application for Temporary Employment Certification* filed by Datthyn Orchards, LLC (Case Number: H-300-19207-32892 1). The withdrawal of this application renders moot any questions of the "nature of the relationship" between the two entities for purposes of evaluating the distinct temporary labor need for K.S. Datthyn Farms.

Second, note that K.S . Datthyn Farms and Datthyn Orchards, LLC constitute legally independent business enterprises. K.S. Datthyn Farms is a New York sole proprietorship operated by Mr. Kenneth Datthyn. Datthyn Orchards, LLC is a limited-liability company organized under the laws of the State of New York. These entities have separate payroll, insurance policies, FEINs, bank accounts, credit lines, etc. While it is true that the entities share the name "Datthyn," note that Datthyn Orchards, LLC was established on property legally gifted from Kenneth Datthyn to his daughter, Suzanna Datthyn-Tuttle, who operates the farm with her husband and business partner Eric Tuttle. Kenneth Datthyn has no ownership interests in Datthyn Orchards, LLC, and neither Mrs. nor Mr. Tuttle retain ownership interests in the Kenneth Datthyn's farming operations.

The employer acknowledges that the cumulative period of need for the two legally distinct entities exceeds ten months. The period of overlap actually occurred with the Department's certification of the application filed by Datthyn Orchards, LLC for the April 20, 2019 through November 15, 2019 period of need. This application by Datthyn Orchards, LLC was filed under the good faith belief and understanding that the two entities were legally distinct and insufficiently "interlocked" for purposes of the H-2A program.

We note that the Department raised no questions or objections concerning the relationship between the entities at the time of the Datthyn Orchards, LLC filing. Given that this application was adjudicated and successfully certified, both employers proceeded to file applications that were entirely consistent with their respective periods of need. This was again done in good faith under the assumption that the Department had (1) thoroughly reviewed the facts and circumstances of each case and (2) correctly concluded that the entities were, in fact, legally distinct and independent business operations for purposes of each entity's participation in the H-2A program.

AF 48.

The CO was unmoved, and denied certification by letter dated September 17, 2019. AF 5-6. This timely appeal followed.

ANALYSIS

To obtain a certification under the H-2A program, an employer must prove that its need for labor is temporary or seasonal. *See Intergrow East, Inc.* 2019-TLC-00073 (Sept. 11, 2019) (citing 20 C.F.R. § 655.161(a)). “An employer may not circumvent the temporary need requirement by using a closely related business entity to file an overlapping application” *Id.* (collecting cases). BALCA ALJ’s have adopted the “single employer” legal test used in the NLRA and Title VII contexts⁵ to determine whether two putatively separate employers are in reality a single employer for purposes of assessing whether a need for workers is “temporary” under the H-2A program. *E.g. Intergrow East*, 2019-TLC-00073 (collecting cases); *Crop Transport, LLC*, 2018-TLC-00027 (Oct. 19, 2018); *Sugarloaf Cattle*, 2016-TLC-00033 (Apr. 6, 2016); *Pepperco-USA, Inc.*, 2015-TLC-00015 (Feb. 23, 2015).

The four-element single employer test is widely discussed in employment case law. The elements are “(1) common ownership or financial control, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations.” *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1141 (2015) (citing cases) (NLRA); *see also, e.g. Brown v. Daikin Am., Inc.*, 756 F.3d 219, 226 (2d Cir. 2014) (Title VII). While “no single aspect is controlling, and all four factors need not be present to find single-employer status,” *Spurlino Materials*, 805 F.3d at 1141 (citing cases), “control of labor relations is the central concern.” *Brown*, 756 F.3d at 227 (citation omitted).

The Employer argues that the “single employer” test was misapplied by the CO:

[T]he CO explicitly gave an inordinate amount of consideration to the sole employee that both entities share. This alleged balancing test was superficial in nature, measured unreasonably and unfairly by the Department, and resulted in an arbitrary denial of the Application. Despite the CO’s alleged position that no one factor is determinative, the CO seems to have made a determination based on one isolated factor, failing to meaningfully weigh or consider the remaining factors.

The Department alludes to the idea that because the entities share a manager, they are a single employer. The entities are, however, distinct, both legally and factually. In prior cases, BALCA spoke to the idea of shared management in the single-employer balancing test by stating that, without evidence that a manager exercises direct management authority between two entities, less weight should be given to this factor. BALCA has also held that separate labor practices are generally considered the most important factor in this balancing analysis, rather than shared management or one shared employee.

AF 3.

⁵ This is as opposed to the “economic reality” joint employment test from the Fair Labor Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, Family Medical Leave Act, and related DOL-regulated employment programs. *See generally, e.g., Torrez-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

BALCA reviews CO certification decisions in the H-2A program under an arbitrary and capricious standard. *See J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015); *see also Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016) (three-judge panel citing *J and V Farms* with approval in H-2B case).⁶ Under an arbitrary and capricious standard, the reviewer ensures that the decision-maker below 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.” *Three Seasons Landscape Contracting Service*, 2016-TLN-00045, slip op. at 19 (June 15, 2016) (quoting *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)).

Applying that deferential arbitrary and capricious standard, the CO correctly found that K. S. Datthyn Farms and Datthyn Orchards LLC are a single employer.

I address common control of labor relations first, as the most important factor. As put by the Second Circuit in the Title VII context, in examining “centralized control over labor relations — the most important prong in the four-part test — the central question is ‘[w]hat entity made the final decisions regarding employment matters related to the person claiming discrimination’” *Brown*, 756 F.3d at 227.

Here, as the Manager of K.S. Datthyn Farms and the COO of Datthyn Orchards, Eric Ferris signed the H-2A applications on behalf of both. That is not simply a ministerial task as the Employer suggests. AF 26.⁷ The H-2A applications include sixteen detailed certifications to the ETA as to the wages to be paid, hours to be worked, job tasks and qualifications, and other substantive labor relations matters, *vis à vis* the prospective H-2A workers. Those certifications were signed under penalty of perjury. AF 80-82; AF 295-97. These are fundamental labor practices, at the core of employer-employee relations for any business. Signing these documents under penalty of perjury shows at least apparent, and more likely than not actual, authority to not only decide to set the terms of employment but carry out the terms as established in the certifications and required by regulation. *See* 20 C.F.R. §§ 655.180-85.

In the cases discussed, even lesser degrees of common control were held to show common control of labor relations. In *Spurlino Materials*, “although the companies had separate managers and dispatchers who exercised day-to-day control over employees, James Spurlino ‘ha[d] the ultimate authority over the labor relations of both’ and ‘actually exercised that

⁶ As Judge Clark noted in *J and V Farms*, *see* slip op. at 3, the prior H-2A regulations specified that the decision of the ETA was to be reviewed for “legal sufficiency.” 20 C.F.R. § 655.112(a) (2008). Legal sufficiency was not defined by the regulations, had been interpreted to mean arbitrary and capricious review. *E.g. Bolton Springs Farm*, Case No. 2008-TLC-28, slip op. at 6 (ALJ May 16, 2008). The March 15, 2010 regulations removed the reference to legal sufficiency but did not substitute any other standard of review, and no comment was provided to explain the change. *See* 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). Under the current regulations, most ALJs in the BALCA context, including myself, have continued to apply the arbitrary and capricious standard of review. *E.g. J.M. Yanez Const., Inc.*, 2019-TLN-00072 (Apr. 1, 2019); *Catnip Ridge Manure Application Inc.*, Case No. 2014-TLC-00078, slip op. at 3 (ALJ May 28, 2014); *T.A.F. Shearing Co./Alejandro R. Colqui*, Case No. 2012-TLC-00095, slip op. at 1 (ALJ Sept. 19, 2012). Additionally, ETA has said that the “substance of [the appeals regulation] has remained the same since 1987.” 74 Fed. Reg. 45906, 45921 (Sept. 4, 2009).

⁷ Here, I respectfully disagree with my colleague who decided *Crop Transport*.

authority' by 'determin[ing] the initial wages and benefits for the employees of both companies.'" 805 F.3d at 1143. In *Brown*, making employee assignments, but not hiring and firing the subject employee, was found sufficient to show common control of labor relations. *See* 756 F.3d at 227-28.

The employer characterizes Mr. Tuttle as simply as a common manager, under the common management prong, and elides the common control factor. It is true, he is a common manager, and that factor also weighs in favor of a single employer finding. As noted, "the relevant inquiry is whether there is 'overall control of critical matters at the policy level.'" *Spurlino Materials*, 805 F.3d at 1142.

Regarding common ownership, the Employer explains how the two businesses, one a sole proprietorship and the other an LLC, have owners that are relatives but no truly *common* ownership. I find that this factor weighs against single employer status.

There is not sufficient evidence in the record as to the interrelatedness of the two operations to make a clear determination. Here I disagree with the CO, who found interrelatedness. The Employer states that the two entities have separate worker housing and workforces (though nearby each other). However, the Employer also states that the two entities do not have common products. AF 26. I note that both applications seek temporary workers to harvest and pack apples. That is a substantial contradiction between the Employer's argument to the CO and the signed, certified applications in the record. Nevertheless, without more evidence I cannot draw a conclusion here and find the CO's inference of interrelatedness without sufficient support in the record.

In sum, I find that the evidence of common control of labor relations *vis à vis* the prospective H-2A workers, and the common management of the two entities, is so clear and overwhelming as to be dispositive; the two entities are a single employer for H-2A purposes. As the Employer does not argue that the aggregated need is less than the one year allowed by the regulation, I uphold the CO's decision denying certification.

SO ORDERED.

EVAN H. NORDBY
Administrative Law Judge