U.S. Department of Labor

Employment and Training Administration

OFFICE OF FOREIGN LABOR CERTIFICATION

2010 H-2A Final Rule FAQs

Round 14: H-2A Definition of Agricultural Labor or Services

October 23, 2019

AGRICULTURAL LABOR OR SERVICES

1. How does the Department of Labor (Department) define *agricultural labor or services* for purposes of the H-2A program?

The Department's regulations at 20 CFR 655.103(c) specify that, for purposes of the H-2A temporary labor certification program, *agricultural labor or services* constitute:

1) *Agricultural labor* as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g) (IRC);
2) *Agriculture* as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 at 29 U.S.C. 203(f) (FLSA);
3) The pressing of apples for cider on a farm; or
4) Logging employment.

Only those duties encompassed by the Department's definition of *agricultural labor or services* at 20 CFR 655.103(c) may be included on an H-2A application.

Important Note: For informational purposes, the Department included the IRC statutory provision in its H-2A regulations at 20 CFR 655.103(c)(1) and the FLSA statutory provision at 655.103(c)(2). The Internal Revenue Service (IRS) regulations, which interpret the IRC definition of *agricultural labor*, may be found at 26 CFR 31.3121(g)-1; and the Department's Wage and Hour Division (WHD) regulations, which interpret the FLSA definition of *agriculture*, may be found at 29 CFR Part 780. Additional information from the IRS and WHD regarding the definition and application of these terms may also be available from other sources, such as revenue rulings, opinion letters, etc.

2. May I include both agricultural and nonagricultural duties on my H-2A application?

No. An H-2A temporary labor certification is limited by statute to *agricultural labor or services*, as defined by the Department, for which an employer seeks to employ one or more foreign nationals as an H-2A worker, pursuant to the Immigration and Nationality Act at 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188. *See* 75 FR 6887-6889 (Feb. 12, 2010) (preamble discussion of 20 CFR 655.103(c) in the 2010 H-2A Final Rule).

3. **What will happen if I include both agricultural and nonagricultural job duties on my H-2A application?**

If an H-2A application presents a job opportunity with duties that are not clearly within the scope of *agricultural labor or services* as defined in the Department's H-2A regulations at 20 CFR 655.103(c), the Certifying Officer (CO) will issue a Notice of Deficiency (NOD) notifying the employer that its application cannot be accepted and provide the reason(s) why the duties do not appear to qualify as *agricultural labor or services* for H-2A program purposes. An employer may respond to the NOD with additional information or documentation establishing that the duties qualify as *agricultural labor or services* or with a request to have nonagricultural duties removed from its H-2A application. The CO has the discretion to determine whether the information or documentation presented is sufficiently detailed to conclude that the employer has met its burden of establishing that the duties qualify as *agricultural labor or services* for H-2A program purposes.

Important Reminder: Only agricultural duties may be included on an H-2A certification; conversely, only nonagricultural duties may be included on an H-2B certification. Accordingly, an H-2A application for a job opportunity that contains nonagricultural duties, or a combination of agricultural and nonagricultural duties, cannot be certified. *See* 20 CFR 655.161(a) and Board of Alien Labor Certification Appeals decisions affirming the CO's application of 20 CFR 655.103(c), *e.g.*, *Double J Harvesting, Inc.*, 2019-TLC-00057 (July 2, 2019) (citing *Carlson Orchards, Inc.*, 2004-TLC-00009 (July 23, 2004) (holding that an employer's H-2A application was properly denied where the duties of the workers included both agricultural and nonagricultural components)).

4. **Must the duties included on my H-2A application qualify as agricultural under <u>both</u> the Internal Revenue Code (IRC) definition and the Fair Labor Standards Act (FLSA) definition?**

No. Work that qualifies under <u>either</u> the IRC definition <u>or</u> the FLSA definition is *agricultural labor or services* for H-2A program purposes "notwithstanding the exclusion of that occupation from the other statutory definition." 20 CFR 655.103(c). Differences in the two statutory definitions may result in some work activities qualifying as agricultural for H-2A purposes only under IRC or only under FLSA; provided that the work qualifies under <u>either</u> IRC <u>or</u> FLSA, it qualifies for H-2A purposes. Examples illustrating certain differences between the two statutory definitions are addressed in a separate Frequently Asked Question.

Employers seeking H-2A workers to perform labor or services other than pressing cider for apples or logging are encouraged to review the IRC and FLSA definitions closely—as set forth in 26 U.S.C. § 3121(g) and 29 U.S.C. § 203(f), respectively; the statutes' implementing

regulations, and other interpretive guidance—to ensure that all duties included on the H-2A application qualify as "agricultural" under either the IRC or FLSA.

5. What type of information can I provide in my H-2A application to assist the Certifying Officer's (CO) review under 20 CFR 655.103(c), which incorporates IRC and FLSA definitions of *agricultural labor* and *agriculture*?

For H-2A program purposes, *agricultural labor or services* includes work that qualifies as *agricultural labor* as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g) (IRC); *agriculture* as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 at 29 U.S.C. 203(f) (FLSA); the pressing of apples for cider on a farm; or logging employment. Determining whether the employer is "the owner or operator of the farm" is key to the CO evaluating whether certain activities qualify as *agricultural labor* under the IRC. Similarly, determining whether the employer is "the farmer" is key to the CO evaluating whether certain activities performed "as an incident to or in conjunction with such farming operations" off of the farm qualify as *agriculture* under the FLSA definition. In addition, the nature of the location(s) where the work will be performed (e.g., on or off the farm) and the crop or product involved (*e.g.*, a crop the employer produced or other farmers produced) are important facts for the CO to evaluate whether certain activities qualify as agricultural under the IRC and/or FLSA. Employers are encouraged to clearly describe key facts regarding the nature of the job opportunity presented on the H-2A application and job order, including:

(1) the nature of the location(s) where the work will be performed (*e.g.*, on a farm[1]);
(2) the employer's relationship to the location(s) where work will be performed (*i.e.*, whether the employer is the owner or operator of each location); and
(3) the duties to be performed, including how those duties are related to the agricultural activities and/or crop(s) produced on the farm and/or other farms.

[1] The IRS regulations that interpret and apply the IRC define the term "farm" as including "stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities" and excluding "[g]reenhouses and other similar structures used primarily for other purposes (for example, display, storage, and fabrication of wreaths, corsages, and bouquets)." 26 CFR 31.3121(g)-1(a)(2); 20 CFR 655.103(c)(1)(ii). The WHD regulations that interpret and apply the FLSA define a "farm" as "a tract of land devoted to the actual farming activities included in the first part of section 3(f)," *i.e.*, "primary agriculture." 29 CFR 780.135; 20 CFR 655.103(c)(2).

6. How does the Certifying Officer (CO) apply the definition of *agricultural labor or services* to an H-2A application that lists both harvesting and hauling duties?

When analyzing a job opportunity involving two activities—harvesting and hauling—each of the activities must be examined to determine whether that activity qualifies either as *agricultural labor* under sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g) (IRC) or as *agriculture* under sec. 3(f) of the Fair Labor Standards Act of 1938 at 29 U.S.C. 203(f) (FLSA); and, therefore, qualifies as *agricultural labor or services* for H-2A program purposes. As addressed in a separate Frequently Asked Question, the CO cannot certify an H-2A application that contains nonagricultural duties, or a combination of agricultural and nonagricultural duties. *See* 20 CFR 655.161(a).

Analysis of workers' harvesting duties

Harvesting duties generally qualify as *agricultural labor or services* for H-2A program purposes and may be included on an H-2A application. The FLSA definition of *agriculture* encompasses two types of agricultural activities: primary agriculture and secondary agriculture.[1] Primary agriculture includes, among other operations, "harvesting of any agricultural or horticultural commodities." 29 CFR 780.105(b); *see also* 29 CFR 780.118. Therefore, while engaged in harvesting crops, the workers' duties qualify as primary agriculture under the FLSA definition.

Accordingly, because the harvesting duties qualify as *agriculture* under the FLSA definition, separate analysis under the IRC definition may not be required. As addressed in a separate Frequently Asked Question, work included in either the IRC definition or the FLSA definition is *agricultural labor or services* for H-2A program purposes. Nevertheless, to provide full analysis for informational purposes, the IRC definition of *agricultural labor* also encompasses "[s]ervices performed on a farm by an employee of any person in connection with [the harvesting of any other agricultural or horticultural commodity]." 26 CFR 31.3121(g)-1(b)(1)(iii); *see also* 20 CFR 655.103(c)(1)(i)(A).

Analysis of workers' hauling duties

Determining whether hauling duties qualify as *agricultural labor or services* for H-2A program purposes depends on various factors, including the nature of the employer (*e.g.*, whether it is the farmer/farm operator or an H-2A Labor Contractor (H-2ALC)), where the work will be performed (*e.g.*, on or off the farm), and who produced crop involved (*e.g.*, the employer or some other person or entity).

Example 1: The employer owns or operates the farm where its workers will harvest watermelons. The employer's workers also will haul the harvested watermelons away from the farm, to storage or market.

In this example, the workers' hauling duties do not qualify as primary agriculture under the FLSA definition and must be evaluated under the secondary agriculture branch of the FLSA's definition. Secondary agriculture includes delivery to storage or to market; provided that the delivery activities are performed by a farmer (including the farmer's employees) or on a farm as an incident to or in conjunction with such farming operations. 29 CFR 780.105(c), 780.128; *see also* 29 CFR 780.152-780.155. In this example, the workers are the farmer's employees and will haul a crop their employer produced in its farming operation. Therefore, the workers' hauling duties qualify as secondary agriculture, even when they occur off of the farm.

Because the hauling duties qualify as *agriculture* under the FLSA definition, they constitute *agricultural labor or services* for H-2A program purposes and separate analysis under the IRC definition may not be required. Nevertheless, to provide full analysis for informational purposes, the IRC definition of *agricultural labor* encompasses "delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity [as] agricultural labor if … performed by the employee in the employ of an operator of a farm or in the employ of a group of operators of farms (other than a cooperative organization); (ii) [s]uch services are performed with respect to the commodity in its unmanufactured state; and (iii) [s]uch operator produced more than one-half of the commodity with respect to which such services are performed during the pay period, or such group of operators produced all of the commodity with respect to which such services are performed during the pay period." 26 CFR 31.3121 (g)-1(e)(1); *see also* 20 CFR 655.103(c)(1)(i)(D)-(E). In the example, the workers are the farm operator's employees and the farm operator produced 100 percent of the crop the workers will haul. Therefore, the workers' hauling duties qualify as *agricultural labor* under the IRC definition "because the operator produced more than one-half of the commodity with respect to which such service is performed." *Id.*

Example 2: The employer owns or operates the farm where its workers will harvest watermelons. The employer's workers also will haul to storage or market both the watermelons produced on their employer's farm and purchased watermelons produced on a neighboring farm.

As in Example 1, the workers' hauling duties do not qualify as primary agriculture under the FLSA definition and must be evaluated under the secondary agriculture branch of FLSA's definition. Secondary agriculture includes delivery to storage or to market; provided that the delivery activities are performed by a farmer (including the farmer's employees) or on a farm

as an incident to or in conjunction with such farming operations. 29 CFR 780.105(c), 780.128; *see also* 29 CFR 780.152-780.155. In the example, because the workers are the farmer's employees, their work hauling the crop their employer produced in its farming operation qualifies as secondary agriculture. Notwithstanding, because the workers are also hauling crops that their employer purchased from a neighboring farm, further analysis is required. Here, the purchased crops were not produced in the employer's farming operation. Therefore, hauling them to storage or market is not "as an incident to or in conjunction with" the employer's farming operation and these hauling duties, as described, do not qualify as secondary agriculture. *See* 29 CFR 780.137.

As these hauling duties do not qualify as *agriculture* under the FLSA definition, separate analysis under the IRC definition is required. The IRC definition of *agricultural labor* includes hauling duties if the farm operator that employs the workers "produced more than one-half of the commodity with respect to which such services are performed during the pay period." 26 CFR 31.3121 (g)-1(e)(1)(iii); *see also* 20 CFR 655.103(c)(1)(i)(D). In the example, the workers are a farm operator's employees and the farm operator produced *some* of the crop the workers will haul to storage or market. Based on the information provided, it is not clear whether the workers' duties qualify as *agricultural labor* under the IRC definition and the CO would require additional information and/or documentation from the employer to evaluate whether the total crop to be hauled is more than 50 percent the employer's own (*i.e.*, produced on its farm) in each pay period of work. As addressed in a separate Frequently Asked Question, the CO would issue a Notice of Deficiency.

Example 3: The employer is an H-2ALC, not the owner or operator of the farm(s) where its workers will harvest watermelons. The H-2ALC's workers also will haul the harvested watermelons away from the farm, to storage or market.

As in Examples 1 and 2, the workers' hauling duties do not qualify as primary agriculture under the FLSA definition and must be evaluated under the secondary agriculture branch of FLSA's definition. Secondary agriculture includes delivery to storage or to market; provided that the delivery activities are performed by a farmer (including the farmer's employees) or on a farm as an incident to or in conjunction with such farming operations. 29 CFR 780.105(c), 780.128; *see also* 29 CFR 780.152-780.155. In the example, the workers are the employees of an H-2ALC that provides labor or services to the farmer; the H-2ALC is not the owner or operator of the farm, and the workers will haul the crop off of the farm. Therefore, the hauling duties, as described, do not qualify as secondary agriculture.

As these hauling duties do not qualify as *agriculture* under the FLSA definition, separate analysis under the IRC definition is required. As noted above, the IRC definition of *agricultural labor* encompasses "delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity [as]agricultural labor

if … performed by the employee in the employ of an operator of a farm or in the employ of a group of operators of farms (other than a cooperative organization); (ii) [s]uch services are performed with respect to the commodity in its unmanufactured state; and (iii) [s]uch operator produced more than one-half of the commodity with respect to which such services are performed during the pay period, or such group of operators produced all of the commodity with respect to which such services are performed during the pay period." 26 CFR 31.3121(g)-1(e)(1); *see also* 20 CFR 655.103(c)(1)(i)(D)-(E). In the example, the workers are employees of an H-2ALC that provides labor or services to the farm operator; the H-2ALC is not the owner or operator of the farm. Further, the H-2ALC did not produce any of the crop to be hauled. Therefore, the workers' hauling duties, as described, do not qualify as *agricultural labor* under the IRC definition.[2]

Example 4: The employer is an H-2ALC, not the owner or operator of the farm(s) where its workers will harvest watermelons. The H-2ALC's workers also will haul the harvested watermelons from the field to a storage building on the farm.

As in Examples 1-3, the workers' hauling duties do not qualify as primary agriculture under the FLSA definition and must be evaluated under the secondary agriculture branch of FLSA's definition. Secondary agriculture includes delivery to storage or to market; provided that the delivery activities are performed by a farmer (including the farmer's employees) or on a farm as an incident to or in conjunction with such farming operations. 29 CFR 780.105(c), 780.128; *see also* 29 CFR 780.152-780.155. In the example, the workers are the employees of an H-2ALC that provides labor or services to the farmer; the H-2ALC is not the owner or operator of the farm. Here, the work is limited to on—not off—the farm. Therefore, the workers' hauling duties, as described, qualify as secondary agriculture.

Because the hauling duties qualify as *agriculture* under the FLSA definition, they constitute *agricultural labor or services* for H-2A program purposes and separate analysis under the IRC definition may not be required. Nevertheless, the IRC definition of *agricultural labor* encompasses "delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity [as]agricultural labor if … performed by the employee in the employ of an operator of a farm or in the employ of a group of operators of farms (other than a cooperative organization); (ii) [s]uch services are performed with respect to the commodity in its unmanufactured state; and (iii) [s]uch operator produced more than one-half of the commodity with respect to which such services are performed during the pay period, or such group of operators produced all of the commodity with respect to which such services are performed during the pay period." 26 CFR 31.3121 (g)-1(e)(1); *see also* 20 CFR 655.103(c)(1)(i)(D)-(E). In the example, the workers are employees of an H-2ALC that provides labor or services to the farm operator; the H-2ALC is not the owner or operator of the farm. Further, the H-2ALC did not produce any of the crop to be hauled. Therefore, the

workers' hauling duties, as described, do not qualify as *agricultural labor* under the IRC definition.

Important Note: *The examples provided are for illustrative purposes only. The Department evaluates each application on its merits and based on the information available during processing.*

[1] Primary agriculture encompasses "farming in all its branches … [including] specific farming operations such as cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals or poultry." 29 CFR 780.105(b). Secondary agriculture includes "any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with 'such' farming operations." 29 CFR 780.105(c); *see, e.g.,* 29 CFR 780.150 (preparation for market), 780.152 (delivery to storage or to market or to carriers for transportation to market).
[2] *See, e.g., Double J Harvesting, Inc.*, 2019-TLC-00057 (July 2, 2019) (finding an H-2ALC's employees engaged in hauling crops from the farm to another location were not performing agricultural labor or services under either the FLSA or IRC definition).