



Issue Date: 02 June 2009

**OALJ Case No.:** 2009-TLC-00048  
**ETA Case No.:** C-08098-09090

*In the Matter of*

**DRY CREEK CATTLE COMPANY, LTD.,**  
*Employer*

Certifying Officer: Robert E. Myers  
Chicago Processing Center

### **DECISION AND ORDER**

On April 22, 2009, Dry Creek Cattle Company, Ltd., (“the Employer”) filed a request for review of the Certifying Officer’s (“the CO”) determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1). During a May 11, 2009, conference call, the Employer agreed to have the appeal decided de novo on an expanded administrative record in lieu of a live hearing. *See* 20 C.F.R. § 655.112 (describing the two types of review offered in H-2A cases).<sup>1</sup> On May 15, 2009, the Employer filed a brief and some additional documentation. On May 20, 2009, the CO filed his brief. On May 27, 2009, after receiving leave from my office, the Employer filed a reply.<sup>2</sup> In de novo review cases, the administrative law judge must render a decision within ten working days after the hearing. 20 C.F.R. § 655.112(b)(1)(iii). Since the Employer waived a live hearing, I will treat the date the Employer submitted its additional documentation—May 15, 2009—as the date of the hearing’s closure.

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<sup>1</sup> On December 18, 2008, the Department of Labor published new rules governing this process that became effective January 17, 2009. *See* 73 Fed. Reg. 77,110 (Dec. 18, 2008); *see also* 74 Fed. Reg. 25,972 (May 29, 2009) (suspending the new rules for nine months as of June 29, 2009). Since the Employer filed its initial application before the new regulations took effect, I will apply the regulatory provisions in effect at the time the Employer filed its application.

<sup>2</sup> When granting the Employer leave to file a reply, my staff told the Employer that I would not accept new evidence. During a subsequent telephone conversation, the Employer sought clarification of this instruction. In particular, the Employer stated an intent to submit another document to clarify a statement from the May 15, 2009, filing. My staff informed the Employer that I would decide whether any additional submissions violated the reply instructions and would not consider documents that constituted “new evidence.” In turn, the Employer’s May 27, 2009, filing contained several previously submitted documents as well as a May 26, 2009, affidavit from Sana Alexander, Chief Deputy of the Lipscomb County Sheriff’s Department, and a May 26, 2009, letter from Hemphill County Sheriff Gary Henderson. These two documents address the unusual severity of the March 27, 2009, blizzard at issue in this appeal. The expanded record already contained evidence on this issue. Nevertheless, since I would affirm the CO’s decision regardless of whether I considered these documents, I will include them in the expanded record.

## Statement of the Case

On April 22, 2008, the Department of Labor's Employment and Training Administration ("ETA") received the Employer's application for temporary labor certification. *See* AF 22-35.<sup>3</sup> The Employer requested certification for a fencer to work on the Employer's cattle ranch. AF 22. Specifically, the Employer explained that the fencer would build and repair fences while also performing windmill and "general ranch" maintenance. AF 22, 25, 26. After the Employer made several requested modifications to the application, ETA accepted the application for processing and directed the Employer to recruit domestic workers. AF 16-21. Once the Employer reported that its recruitment proved unsuccessful, ETA granted certification for one fencer from June 30, 2008, to April 30, 2009. *See* AF 7-10. On April 2, 2009, the Employer sent an e-mail requesting that ETA extend the certification through April 30, 2010. AF 6. In response to ETA's request to submit a statement including, *inter alia*, the Employer's reasons for requesting the extension and "any documentation to support the reasons presented," the Employer replied, in pertinent part:

Due to the recent decline in America's financial markets, Dry Creek Cattle Company has decided to increase their livestock production without the acquisition of new ranch land. This inner expansion will take place thru a 500 acre irrigated pivot for livestock to graze out, which will be wheat and maze [sic]. Having put in this pivot system we are having to make several changes. One of the main changes will be 10 plus miles of new fences, and a new set of corrals. We will also be adding new windmill towers with the water tanks.

Then, on March 27, 2009 the Texas Panhandle was hit with a winter blizzard. During this storm the ranch had major damages to the fences. This will take months to repair these fences, that hold the livestock.

As for documentation to support the reasons, I will be glad to send you pictures of the pivot system, and the weather report for March 27, 2009. I'm not forsure [sic] what you need, but please let me know.

AF 5.

On April 13, 2009, the CO denied the Employer's extension request. AF 4. Citing 20 C.F.R. § 655.100(c)(2), the CO explained that "the job opportunity must be temporary or of a seasonal nature." AF 4. Observing that the original period of need was ten months and that the Employer requests a one-year extension, the CO found that "[i]t appears that the increase of cattle has created a permanent job opportunity rather than a temporary need." AF 4. The Employer's appeal followed.

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<sup>3</sup> Citations to the 35-page Administrative File will be abbreviated as "AF" followed by the page number.

## Discussion

The Employer has requested an extension of its temporary labor certification. 20 C.F.R. § 655.106(c)(3)(ii) governs long-term extensions, and permits an employer to request

. . . an extension of the period of temporary alien labor certification, for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and could not have been reasonably foreseen by the employer. The OFLC Administrator shall not grant an extension where the total work contract period, including past temporary alien labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. . . .

The Employer must therefore demonstrate that it requires the extension due to “reasons related to weather conditions or other external factors.” Furthermore, as the requested extension would increase the total period of certification to 22 months—10 months longer than the ordinary maximum period—the Employer must also demonstrate “extraordinary circumstances.”

In its brief, the Employer estimated that the fencer will spend between four and five months constructing new fences in support of the expansion project and between six and seven months repairing existing fences that were damaged by the March 2009 blizzard.<sup>4</sup> The Employer wrote that it planned the expansion of its cattle production activities “to create alternatives to offset unforeseen [sic] changes that recently occurred in the cattle and grain markets.” The Employer added that the expansion included the pivot system “to add more flexibility in methods of production” and that the completed expansion “would add additional options to offset the unpredictable market conditions created by pending agriculture legislation and the recent downturn in the economy.”

In its reply, the Employer explained that “[t]here were no plans to build a pivot system until the economy and markets started dropping in October, November, and December of 2008.” Employer’s Reply Brief at 3. The Employer wrote that it planned the expansion due to “the unforeseen market conditions, and not the employer’s desire to expand the status quo.” *Id.* The Employer further argued, “The expansion cannot be defined as anything but unforeseen because a 30% reduction in net value as a result of unforeseen market conditions cannot be construed as a factor within the control of the employer.” *Id.* The Employer then contended that “the farmers and ranchers are uncertain as to the future of pending agriculture legislation . . . that has the potential to greatly alter the outcome of agriculture production,” that “[n]o one can guarantee . . . that Congress is going to continue the current agricultural subsidies, or that previously legislated farm programs are not going to be eliminated.” *Id.* In light of the foregoing, the Employer reasoned that “[t]he versatility created by the expansion is an attempt to negate the uncertainty that belies our current economy.” *Id.*

Ultimately, the Employer has not established that its expansion project qualifies as a reason “related to weather conditions or other external factors beyond” its control. The

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<sup>4</sup> The brief contains no page numbers to cite.

Employer has alleged that the project relates to general uncertainty about agricultural laws, recent unspecified and undocumented changes in the cattle and feed markets, and an unspecified and undocumented 30% reduction in the net value of an unspecified asset. First, potential changes in law that the Employer merely fears might occur cannot serve as the basis for extending a temporary labor certification. In addition, the Employer has not explained with sufficient detail how the project relates to the current economic downturn. In particular, it is unclear how the expansion will “create alternatives to offset” unspecified and undocumented changes in the cattle and feed markets. It is equally unclear how this project relates to an undocumented 30% reduction in the value of an unspecified asset. While the CO might grant temporary labor certification for a worker to complete such a project, obtaining an extension of an existing certification requires a greater showing than would a new certification. The Employer has not satisfied this increased burden with respect to its claimed temporary need for a worker to build fences in support of its expansion project. The Employer must therefore file a new application and undergo domestic recruitment to attempt to fill this need with a U.S. worker.

The Employer also estimated that the fencer would spend the remaining seven months of the extension period repairing fences damaged by a March 2009 blizzard. Assuming *arguendo* that the Employer established that these repairs are “related to weather conditions,” and that “extraordinary circumstances” existed so as to permit a combined certification period longer than 12 months, it is not clear that the regulations permit the CO to grant reduced or partial extensions. Rather, the regulations give the CO only two options when considering an extension request: grant or deny. Compare 20 C.F.R. § 655.106(c)(3)(ii) (directing the CO to either grant or deny the extension request), with § 655.106(b)(1) (permitting the CO to grant certification for fewer than the number of job opportunities requested in an initial application based on recruitment results). It is therefore equally unclear whether, under § 655.112(b)(2), I have the authority to grant a shorter extension than the one for which the Employer has applied.

Even if I could grant a reduced or partial extension, the record lacks sufficient information for determining the proper length of such an extension. In its brief, the Employer stated that a qualified worker “is capable of producing approximately one mile [of fence] in four (4) or five (5) weeks of labor.” Using that formula, the Employer provided estimates for building new fences for the pivot system and for repairing the fences that the blizzard damaged or destroyed. In particular, the Employer asserted that repairing the six to seven miles of damaged or destroyed fences would take seven months. The CO noted that, in its original application, the Employer stated that it would employ one domestic worker and one H-2A worker in the occupation and that the ranch manager would assist these workers. CO’s Brief at 3; see AF 35. The CO disputed the Employer’s computation by asserting that the Employer could at least halve the time required for completing both projects by using the domestic fencer and the ranch manager’s assistance. CO’s Brief at 3. In its reply, the Employer wrote that it currently has no second fencer to use for these projects. Employer’s Reply Brief at 2.<sup>5</sup> The Employer also wrote that the second “anticipated” worker mentioned in the application would have been the qualified fencer’s unskilled assistant. *Id.* Defending its computation, the Employer then explained how “one single qualified fencer, without a helper, cannot build a mile of fence.” *Id.* The Employer added that the manager could assist with the fencing projects only

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<sup>5</sup> It is unclear from the language used whether the Employer ever hired a second worker in the occupation. See Employer’s Reply Brief at 1-2.

by providing guidance and supplies. *Id.* In support of its extension request, the Employer also submitted 19 current photographs of its fences. Some of the photographs show bent sections of wire fences; others show sections with wire that needs to be restrung or replaced.

While the Employer's estimates are consistent with the formula provided, the Employer used the same formula for estimating the time required to construct new fences as it did to estimate the time required to repair or replace the same amount of damaged or destroyed fences. Judging by the photographs provided, it appears that many of the repairs would require only a fraction of the time necessary to build the same amount of new fence. Indeed, some of the repairs required (e.g., restringing a single line of wire) appear to involve but one step in building a new fence. The record provides no other basis for determining the length of time required to repair the damage caused by the blizzard. Furthermore, any alternative formula I might create using this record would be arbitrary. Accordingly, even if I could grant a partial or reduced certification, I must affirm the CO's denial of the entire extension request because the Employer has not established the length of time required to complete its repair project.

**Order**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

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**JOHN M. VITTONI**  
Chief Administrative Law Judge