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Office of Administrative Law Judges
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Issue Date: 23 June 2014

CASE NO.: 2014-TLC-00095

ETA CASE NO.: H-300-13178-521938

In the Matter of

HAITI/USA WORKFORCE, LLC
Employer

Certifying Officer: Charlene G. Giles
Chicago National Processing Center

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF EXTENSION

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), and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655. Employer has appealed the denial of a long-term extension of a previously approved certification. This Decision and Order is based on the written record, consisting of the Appeal File (AF) forwarded by the Employment and Training Administration, and the written submissions of the parties.

I. BACKGROUND

On June 27, 2013, Employer filed an *Application for Temporary Employment Certification* with the U.S. Department of Labor (DOL), Employment and Training Administration (ETA). In the application, Employer requested H-2A temporary alien labor certification for ninety-six (96) workers under the job title "Farm Labor, Farm Work, Crops." AF 110. Employer stated that it had a temporary need for workers from August 17, 2013 to

May 20, 2014. AF 115. Employer identified its temporary need as “Seasonal” and attached an addendum describing its business and need:

Haiti/USA Workforce, LLC is a farm labor contractor that transplants, cultivates, harvests, and packs vegetables from August through May during the growing season in Georgia. This work is done every year at the same approximate time of year. The nature of the temporary job opportunities and number of workers being requested reflect a temporary need because the work is performed exclusively at a certain (sic) seasons and the performance of the work is of short duration and will not continue indefinitely.

AF 119.

On July 17, 2013, Employer was informed that his application had been accepted for processing for the employment period of August 17, 2013 to May 20, 2014. AF 48-49. On July 31, 2013, a Certification Letter was issued to Employer for 96 farm laborers for the employment period of August 17, 2013 to May 20, 2014. AF 34.

On May 12, 2014, Employer requested an extension of the H-2A temporary labor certification. AF 31. The farmer, Marvin Ingram, had extended the contract for workers from Employer from May 2014 to November 2014. Employer sent his bond reinstatement and extension for the requested period, an attachment from the U.S. Department of Homeland Security (DHS), a list of 96 workers, and additional documentation supporting an extension. AF 13-31. Employer also included the extended contract from Mr. Ingram dated April 7, 2014, which described the reasons for the extension. The workers had not yet come to the United States, and Mr. Ingram needed the workers to start working from May 2014 to November 2014 because “the [h]arvest is close.” AF 19.

On May 16, 2014, the CO notified Employer that its request for an extension had been denied. AF 9-11. Generally, under 20 CFR § 655.170(b), an extension of more than two weeks may be granted if the request is related to weather conditions or other factors beyond the control of the employer, but will not be granted where the total work contract period for the application for certification and extension would be 12 months or more, except in extraordinary circumstances. AF 11. Here, Employer requested an extension of six months, and when combined with the certification period of nine months, would total 15 months. AF 11. Since Employer did not explain an extraordinary circumstance in the extension request to justify the total work contract period exceeding 12 months, the extension of certification was denied. AF 11.

On or about May 18, 2014, Employer requested administrative review of the denial of the extension request, pursuant to 20 C.F.R. §§ 655.170(b) and 655.171. AF 4-5. Employer explained the sequence of events leading up to the extension request. On August 7, 2013, Employer received approval from the United States Citizenship and Immigration Services (USCIS) to bring 96 farm workers to the United States. AF 13. On or about August 14, 2013, Power Meus, Employer's President, went to the "Port of entry" in Port-au-Prince, Haiti and dropped off 96 passports at the Haitian Consulate's "Non-Immigrant Tourist Department." AF 4. On or about September 14, 2013, Mr. Meus was informed by e-mail that his case was in process. On January 8, 2014, Mr. Meus had an appointment "for an interview and fingerprints of the 96 workers." AF 4. He was told by "the council" that his bond insurance was cancelled and was "sent back" to renew it. AF 4. Since he "came back in January," there was no work because of the "winter in Georgia." On April 1, 2014, Mr. Meus called DHS for an extension. On April 7, Mr. Meus secured the extension from the farmer, Mr. Ingram. AF 4, 19. On May 12, the insurance was reinstated. AF 4, 18.

Thus, Employer contends that he is not at fault because 1) there was no work due to the winter in Georgia and 2) the port of entry in Port-au-Prince, Haiti "took five months." AF 4-5. Mr. Meus stated that \$80,000 was spent for three trips to Haiti, application fees, and visa fees (\$216 per person plus \$80 for medical tests).

On June 11, 2014, the Chicago National Processing Center sent this matter to the Office of Administrative Law Judges for administrative review. This Court received the matter on June 16, 2014. The Court invited Employer and the CO to submit briefs supporting their position.

On June 18, 2014, the CO filed a Statement of Position regarding this matter. The CO maintains that the request should be upheld because Employer has not explained an extraordinary circumstance as to why the total work contract period should exceed 12 months. (Stat. of Pos., p. 1). The CO contends that the extension is actually a request for "a new certification for a new and discrete period of employment." (*Id.*). The CO also took issue with Employer's statement that, when the workers were finally available, Employer could not put them to work because "there was no work available because of the winter in Georgia." If nothing else, the CO continued, "the employer cannot be seeking an 'extension' when the original job opportunity ended months ago." *Id.* The employer is free to submit a new application for the 2014 season, but cannot short-cut the recruitment and other obligations under the artifice of an extension. *Id.*

II. DISCUSSION

"[E]mployment 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).

Employer has requested an extension of its temporary labor certification. Long-term extensions are governed by 20 C.F.R. § 655.170(b). The employer seeking an extension may apply to the CO, and such requests must be for reasons related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions). The employer's need for an extension must be supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will not grant an extension where the total work contract period under that *Application for Temporary Employment Certification* and extensions would be 12 months or more, except in extraordinary circumstances.

Employer must therefore demonstrate that it requires the extension due to "reasons related to weather conditions or other factors beyond the control of the employer." Furthermore, as the requested extension would increase the total period of certification to 15 months—three months longer than the ordinary maximum period—Employer must also demonstrate "extraordinary circumstances." See *Dry Creek Cattle Co., Ltd.*, 2009-TLC-48 (June 2, 2009).

In requesting the extension, Employer stated that "there was no work because of the winter in Georgia." AF 4. "Winter" occurs annually in the state of Georgia.¹ Employer has not demonstrated that unforeseen weather conditions existed to justify an extension.

Employer stated that the "Port of entry at Port-au-Prince took five months," resulting in a delay. Apparently, processing problems with the USCIS or a situation in Haiti resulted in the workers not being allowed entry into the United States until a later date. And once the workers were allowed entry, "there was no work because of the in winter Georgia." While the processing could be construed as a situation beyond the control of Employer, the employment opportunity originally applied for had ended; thus, an extension would not be appropriate in this matter.

Finally, even if Employer were to establish a weather event or circumstances beyond its control, it has not presented an "extraordinary circumstance" that would justify extending the total period of certification to 15 months—three months longer than the ordinary maximum period. 20 C.F.R. § 655.170(b). While the circumstances as stated by Employer appear

¹ See *Georgia Climate*, Georgia Department of Economic Development, available at: <http://www.georgia.org/competitive-advantages/lifestyle/georgia-climate/> ("While climate varies among the state's six land regions, all areas of the state are colored by four well-defined seasons.... Winters are brief, with average temperatures in the low 40s and light snowfall several times a year in the north.") (last visited June 18, 2014).

unfortunate, they have not been proven to be extraordinary as to justify extending certification beyond the original period requested in the application for this job opportunity.

Employer is free to move forward with a **new application** for the 2014 season, just as it had applied and successfully secured H-2A temporary labor certification in 2013. However, granting an extension for the reasons described in this matter would circumvent DOL requirements such as recruitment, advertisements, and other prerequisites, and thus would be inappropriate.

III. ORDER

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

**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**