



Issue Date: 27 July 2015

BALCA Case No.: 2015-TLC-00059

ETA Case No.: H-300-15005-940130

In the Matter of:

JUDY L. BEST BILLY F. LEDFORD DBA FAMILY FARM,

Employer.

DECISION AND ORDER
REVERSING CERTIFYING OFFICER'S REJECTION OF LONG-TERM EXTENSION
REQUEST FOR JUDY L. BEST BILLY F. LEDFORD DBA FAMILY FARM

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. On July 2, 2015, Judy L. Best Billy F. Ledford dba Family Farm ("Employer") filed a request for an administrative review of the Certifying Officer's ("CO") denial of an H-2A long-term extension pursuant to 20 C.F.R. § 655.171(b). The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

This Decision and Order is based on the written record, consisting of the Administrative File ("AF") forwarded by the Employment and Training Administration ("ETA"), and the written submissions of the parties ("Stat. of Pos.").

BACKGROUND

Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a certification 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. § 1188(a)(1).¹ The implementing regulations at 20 C.F.R. Part 655, Subpart B set forth a multi-step process by which this certification—known as a “temporary labor certification”—may be applied for and granted or denied. First, the petitioning employer must file a job order with the State Workforce Agency (SWA) serving the area of intended employment. 20 C.F.R. § 655.121. The SWA will review the job order for compliance with the regulations and, if it finds the job order acceptable, post the job order on its intrastate clearance system and begin the recruitment. 20 C.F.R. § 655.121(b), (c). If the SWA does not locate able, willing, and qualified workers to fill the positions for which the employer seeks certification, the employer may file an Application for Temporary Employment Certification (ETA Form 9142A) with the U.S. Department of Labor (Department), Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC). A Certifying Officer in the OFLC will review the application for compliance with the requirements set forth in the regulations. 20 C.F.R. § 655.140. If the application is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the Certifying Officer will notify the employer within seven calendar days. 20 C.F.R. § 655.141(a).

JURISDICTION AND STANDARD OF REVIEW

The undersigned has jurisdiction pursuant to 20 C.F.R. §§ 655.141(c), 655.171. The burden of proof to establish eligibility for a labor certification is on the petitioning Employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). An employer, therefore, must demonstrate that the Certifying Officer’s determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible.

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (“ALJ”) may only render a decision “on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or the amici curiae.”² 20 C.F.R. § 655.171(a). Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO.

PROCEDURAL HISTORY

On January 5, 2015, Employer applied for an H-2A certification of 23 individuals for the full-time job of “Farmworker.” (AF 62, 64, 105). In its application, the “Period of Intended Employment” was listed as March 15, 2015 to June 30, 2015. (AF 62). Employer identified its temporary need as “seasonal.” (AF 62). Per Employer’s application, the farmworkers’ duties included “the planting, cultivation, harvesting and packing of tomatoes, strawberries, beans, squash, zucchini and other fruits and vegetables.” (AF 77). On January 12, 2015, the Certifying

¹ The Secretary of Labor delegated the authority to make this determination to the Assistant Secretary for the Employment and Training Administration, who in turn delegated it to the Office of Foreign Labor Certification. 20 C.F.R. § 655.101.

² Section 655.171 affords ALJs the ability to “either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.”

Officer (CO) issued a Notice of Deficiency, in part because Employer did not adequately explain how the job opportunity was “temporary or seasonal in nature.” (AF 45-48). The CO stated:

The job opportunity, described on ETA Form 9142, Section B Items 5 and 6 and ETA Form 790 Item 9, indicates the employer’s dates of need are from 3/15/2015 to 6/30/15. However, the employer’s previous certifications were for 3/10/2014 to 11/1/2014 and 3/4/2013 to 11/1/2013.

...

Based on the current employer’s requested dates of need and its previously established dates of need, it is unclear how this job opportunity is temporary or seasonal in nature. (AF 47).

In a letter dated January 13, 2015, Employer responded to the Notice of Deficiency. It stated, “Due to the poor crop and market for tomatoes last year the grower has no plans at this time to plant a fall crop of tomatoes this season therefore creating a shorter contract. All other crops and work are still seasonal.” (AF 43).

On January 20, 2015, the CO accepted Employer’s application for processing. (AF 36-41). On February 11, 2015, the CO certified the application. (AF 28-31).

On May 15, 2015, Employer requested an extension to its H-2A certification from the end date of June 30, 2015 to the end date of November 1, 2015. (AF 27). Sara Frampton from Low Country Labor Company, on behalf of Employer, stated that Employer requested this extension because it “decided to plant a fall crop of fruits and vegetables. They will only need to extend 11 of the workers on their contract to complete the required tasks.” (AF 27). On May 28, 2015, the CO rejected the long-term extension request for Employer. (AF 23). The CO stated that “the employer’s decision to plant Fall crops is not related to weather conditions or other factors beyond the control of the employer. (AF 23). As such, the employer’s request does not meet the requirements of a long-term extension request.” (AF 23). The CO stated that “the preparation of crops for a different season, Fall in this case, coupled with a different number of workers needed indicates this to be a different job opportunity and seasonal need altogether, which would require the employer to file a new job order with the local SWA.” (AF 23).

On June 23, 2015, Ms. Frampton, on behalf of Employer, stated in an email to the Chicago National Processing Center (NPC) that Employer desired to appeal the Notice of Rejection for a Long-Term Extension “because the decision to plant a later crop was in fact due to weather conditions and crop loss due to bad weather.” On June 24, 2015, Employer received a response from the Chicago NPC advising that a request to appeal to an Administrative Law Judge must have been made within seven calendar days of the Rejection of Long-Term Extension Request for Judy L. Best Billy F. Ledford dba Family Farm. Therefore, the CO’s decision was final. The Chicago NPC advised that Employer could submit a new job order to the local SWA and an application to the Chicago NPC requesting emergency application procedures. (AF 21).

On June 26, 2015, Employer resubmitted its request for an extension. In this request, Employer sought to extend 11 of the farmworkers through October 1, 2015 instead of November 1, 2015 so that it could plant a fall crop of strawberries. Ms. Frampton, on behalf of Employer, stated, “A heavy freeze in the spring that was out of our control caused significant crop damage as noted in the attached letter from the Clemson Extension Horticulture Office. In order to make up for our losses we need to plant another crop.”³ (AF 20).

On June 29, 2015, in an email from the Chicago NPC to Ms. Frampton, the Chicago NPC stated:

The employer is now stating it is requesting to extend the work contract through Oct 1st instead of Nov 1st and for strawberries only and not tomatoes, however, none of the previous requests made mention of tomatoes. The employer’s request to extend the work contract for H-300-15005-940130, regardless of the new requested end date, has been denied as stated in the notice and certification for H-300-15005-940130 will end on 6/30/2015. However, the employer may file a new job order with the SWA and application with the Chicago NPC using the emergency provisions set forth a 20 CFR 655.134 in order to expedite the application process.
(AF 11).

On July 1, 2015, Ms. Frampton, on behalf of Employer, advised the Chicago NPC that they never received the Notice of Appeal Rights in the rejection letter and were therefore not notified that there was a seven day deadline to appeal. (AF 4). Ms. Frampton stated:

Generally when a partial certification or denial/rejection is received, there are explicit instructions stating the NOTICE OF APPEAL RIGHTS but those instructions were not included with the notice we received or in any subsequent emails therefore our request should be considered fairly, despite the fact that it was received more than 7 days after the determination was issued.
(AF 4-5).

On July 2, 2015, the CO sent Employer an amended rejection letter, which included a page notifying Employer about its appeal rights.⁴ (AF 9-10).

On July 2, 2015, Employer appealed the Rejection of Short Term Extension Request for Judy L. Best Billy F. Ledford dba Family Farm. (AF 1-3, AF 9⁵). In its appeal letter, Michael Todd Lalich for Low Country Labor Company on behalf of Employer, stated:

³ The referenced letter is located at page three of the administrative file and is summarized below. (AF 3). Also in evidence is a news article that noted that freeze damage from January 8, 2015 through March 9, 2015 occurred in parts of South Carolina. (AF 19).

⁴ This amended letter referred to the ending date of the extension request being November 1, 2015 rather than October 1, 2015. (AF 9).

⁵ Page nine of the administrative file was incorrectly titled as a “Short Term Extension” because Employer sought a “Long-Term Extension,” not a “Short Term Extension.”

The rejection notice states that we have been denied our request [f]or an extension due to the fact that our need is not based on weather related conditions or other factors that are out of our control. We are appealing this decision because the need is in fact due to weather conditions. The reason that the employer needs to plant a fall crop is to compensate for substantial losses incurred as a result of the inclement weather we experienced during the early growing season in South Carolina. The freeze destroyed a considerable percentage of the crop.

We have reached out to the Clemson Extension Horticulture Office in our area and have attached a formal letter documenting our losses for your review and consideration.

Please allow us to extend 11 of our H-2A workers from this case through November 1, 2015 so that the grower can plant, cultivate and harvest a fall crop. This urgent appeal is to avoid any additional losses and to mitigate any additional financial resources that would be required if we were to submit a new job order.
(AF 2).

The above-referenced June 22, 2015 letter from Andy Rollins, Upstate Commercial Fruit and Veg. Agent at Clemson Extension Horticulture, stated the following:

I am writing to ask that you reconsider Judy Bests [sic] request for her H2A workers extension to enable them to stay longer this year. I am making this request on the basis that we have had well over 50% losses reported on several large strawberry farms across the upstate of SC this year. It is known that the severe cold weather in the later part of January severely damaged the crowns of the strawberry plants regardless of what stage they were at and regardless of whether or not they had row covers over them. This damage to the crown caused premature runnering of the plants and a much earlier end to the strawberry season than any of the past 9 years. A callus tissue developing in the crowns was documented on this farm not long after that cold event.

Extending the time that the workers can stay here will enable this farm to plant the strawberry plants on time and allow them to be able to become established before this coming winter.
(AF 3).

On July 17, 2015, the Solicitor, U.S. Department of Labor, on behalf of the Certifying Officer of the Chicago National Processing Center (NPC), submitted the Certifying Officer's Statement of Position. On July 17, 2015, Michael Todd Lalich submitted Employer's Statement of Position.

On July 21, 2015, the undersigned received the full administrative file from Stephen Jones, Senior Trial Attorney, on behalf of the Solicitor.

DISCUSSION

The primary issue in this case is whether the Certifying Officer (CO) erred in rejecting Employer's request for a long-term extension under 20 C.F.R. § 655.170(b). As discussed in detail below, the CO erred in rejecting Employer's request for a long-term extension under 20 C.F.R. § 655.170(b) and, therefore, must be reversed.

The H-2A regulations state, in part, that "[t]he criteria for certification include whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis. . . ." 20 C.F.R. § 655.161(a). "Temporary or seasonal nature" is defined in the regulations as follows:

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) (emphasis added).

The regulation concerning long-term extensions, which are particularly relevant in this case, is as follows:

Long-term extension. Employers seeking extensions of more than 2 weeks may apply to the CO. Such requests must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions). Such requests 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 notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. 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. The employer may appeal a denial of a request for an extension by following the procedures in § 655.171.

20 C.F.R. § 655.170(b) (emphasis added).

Per Employer's Statement of Position received July 17, 2015, Employer's position was that it "suffered substantial crop damage due to a freeze that altered the season length and yield." (Em. Stat. of Pos. p. 1). Therefore, Employer requested a long-term extension to its certification from June 30, 2015 to November 1, 2015⁶ for 11 of the 23 workers in order to plant an additional crop of strawberries and possibly tomatoes to recoup some of its losses from the harsh winter/spring of 2015. (AF 12, 22, 27). In support of its position, Employer offered into evidence a letter from Andy Rollins, Upstate Commercial Fruit and Veg. Agent at Clemson Extension Horticulture, which confirmed that

the severe cold weather in the later part of January severely damaged the crowns of the strawberry plants regardless of what stage they were at and regardless of whether or not they had row covers over them. This damage to the crown caused premature runnering of the plants and a much earlier end to the strawberry season than any of the past 9 years. A callus tissue developing in the crowns was documented on this farm not long after that cold event.

(AF 3).

Per the CO's Statement of Position received July 17, 2015, the CO's position was that Employer did not meet its burden of establishing entitlement to a long-term extension of its certification. The CO stated:

[T]he record demonstrates that the employer has articulated two distinct job opportunities. The certified application contemplated a spring crop of tomatoes, strawberries and assorted vegetables to be planted, cultivated and harvested by 23 workers. The request for extension called for a summer/fall crop of strawberries to be planted, cultivated and harvested by 11 workers. This is not a matter for the time for performance of agricultural labor being delayed by inclement weather or other circumstances beyond the employer's control. The employer, in effect, chose to replace part of its planned spring crop with a summer/crop. Such an effort to mitigate damage to the spring crop is completely reasonable, but it is also foreseeable and, therefore, fails to qualify for extension of the period for employment.⁷

(CO Stat. of Pos. 3).

The CO stated that Employer should be required to file a new job order rather than be allowed to seek a long-term extension.

⁶ The record contains a second request for an extension to October 1, 2015. (AF 13). This second request stated that Employer was going to plant strawberries and not tomatoes. (AF 12, 13). However, Employer requested a long-term extension to November 1, 2015 in at least three documents. The three documents that referred to November 1, 2015 as the ending date of the extension were Employer's Statement of Position, the Initial Request for a Long-Term Extension, and the Appeal to the OALJ. Therefore, the undersigned holds that November 1, 2015 is the ending date Employer intended in its long-term extension request.

⁷ The period of employment under the certified application ended on June 30, 2015.

In the present case, Employer seeks to extend the certification from March 15, 2015 to June 30, 2015 (3.5 months) to March 15, 2015 to November 1, 2015 (7.5 months). This is less than the 12 month limit established in § 655.170(b). Therefore, Employer does not have to provide an “extraordinary circumstance” justification to be granted a long-term extension.

In the present case, Employer suffered from an unusually harsh winter that caused a “freeze that altered the season length and yield,” not just the fact that winter occurred. (Em. Stat. of Pos. 1). Per the regulation, Employer supported its request in writing and provided documentation showing that a long-term extension was needed and that the need “could not have been reasonably foreseen by the employer.” (AF 3, 19), 20 C.F.R. § 655.170(b). Employer Family Farm argued that the weather was unseasonably cold, which damaged a portion of its crops (particularly the strawberries). In order to mitigate this damage, Employer requested a long-term extension to plant a summer/fall crop of strawberries and possibly tomatoes, which it had not originally planned. (AF 12, 22, 27). Employer supported its argument with the letter from Andy Rollins of Clemson Extension Horticulture. (AF 3). Employer could not have foreseen that an unusually harsh winter would occur or that it would cause “premature runnering of the plants and a much earlier end to the strawberry season than any of the past 9 years.” (AF 3). Therefore, Employer established unforeseen weather conditions that were “beyond the control of the employer” and is entitled to a long-term extension. 20 C.F.R. § 655.170(b).

Finally, Employer’s need for a long-term extension is seasonal in nature pursuant to 20 C.F.R. § 655.103(d). Employer’s fruit and vegetable season, for which it requested certification from March 15, 2015 to June 30, 2015, was hindered by an unseasonably cold 2014/2015 winter as evidenced by Andy Rollin’s letter. (AF 3). Employer requested a long-term extension for a total period from March 15, 2015 to November 1, 2015 in order to plant additional strawberries and possibly tomatoes because it needed to mitigate its losses due to the unusually cold winter, i.e. “weather conditions or other factors beyond the control of the employer.” 20 C.F.R. § 655.170(b). Strawberries and tomatoes were both crops initially listed in Employer’s original application for certification. (AF 77). Employer requested to extend its growing season for two fruits into Summer/Fall due to the unseasonably cold winter that damaged its original strawberry crop contemplated under the original certification. Ms. Frampton, on behalf of Employer, stated, “Due to the overwhelming loss of strawberries that were lost, the grower has decided to plant another crop of strawberries and tomatoes later in the season to make up for their extensive loss.” (AF 15) (emphasis added). Because Employer only sought a long-term extension for two of its crops, it only requested to extend 11 workers rather than the original 23 workers that were needed to harvest all the fruits and vegetables listed in Employer’s original application for certification. (AF 77). Therefore, Employer’s request for an extension is “seasonal” in nature; it is only requesting extending its certification for a longer part of the growing season than originally requested. This extension will be used to mitigate the damage that occurred from the unexpected harsh winter in 2014-2015.

CONCLUSION

Employer’s need for a long-term extension is “seasonal” in nature because it is specifically tied to the growing season. The extension request is also the same length as the growing seasons that were approved in Employer’s previous 2013 and 2014 certifications. (AF 47). Employer’s need

is also temporary in nature because “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), see also 20 C.F.R. § 655.170(b). In this case, the need for the long-term extension is only 7.5 months. Employer’s request for a long-term extension is “related to weather conditions or other factors beyond the control of the employer,” specifically “the severe cold weather in the later part of January.” 20 C.F.R. § 655.170(b), (AF 3). Employer has met the burden of proof establishing it is entitled to a long-term extension. Therefore, the undersigned reverses the Rejection of Long-Term Extension Request for Judy L. Best Billy F. Ledford dba Family Farm.

ORDER

In light of the foregoing discussion and based on the evidence in the administrative file, it is hereby **ORDERED** that:

1. The Certifying Officer’s Rejection of Long-Term Extension Request for Judy L. Best Billy F. Ledford dba Family Farm is **REVERSED**.
2. Employer’s request for a long-term extension pursuant to 20 C.F.R. §655.170(b) from July 1, 2015 to November 1, 2015 is **GRANTED**.
3. This matter is **REMANDED** to the Certifying Officer for further processing consistent with this decision.

For the Panel:

DANA ROSEN
Administrative Law Judge

DR/ERH/ard
Newport News, Virginia