



Issue Date: 03 September 2015

OALJ Case No.: 2015-TLC-00065
ETA Case No.: H-300-15020-866454

In the Matter of:

MIGUEL PEREZ,
Employer.

Certifying Officer: Charlene G. Giles
Chicago National Processing Center

Appearances:

Monica Saavedra, Esq.
Universal AG Services
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For the Employer

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Office of the Solicitor
Washington, D.C. 20210
For the Certifying Officer

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF EXTENSION

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 at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).¹ A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies

¹ 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.²

STATEMENT OF THE CASE

Miguel Perez (the “Employer”) is a farm labor contractor in Mershon, Georgia. AF 162-163.³ On January 20, 2015, the Employer filed with the CO the following documents: (1) Form ETA 9142, *H-2A Application for Temporary Employment Certification* (“Application”); (2) Appendix A to Form ETA 9142; and (3) Form ETA 790, *Agricultural and Food Processing Clearance Order*. AF 162-190. The Employer requested certification for sixty farmworkers,⁴ from February 24, 2015 until September 10, 2015, based on an alleged seasonal need during that period. AF 162.

Thereafter, the CO issued Notice of Deficiency, followed by a Notice of Required Modification, and ultimately a Notice of Denial. AF 124-136, 101-105, 88-89. The Employer appealed the CO’s decision to deny certification, and the Office of Administrative Law Judges subsequently remanded this case the CO for further processing. AF 87. After considerable correspondence, the CO issued a Notice of Acceptance on April 14, 2015, informing the Employer that it was accepting the Employer’s Application for processing. AF 45-50.

In a letter dated August 13, 2015, the Employer requested to extend certification of its temporary workers for two additional months. AF 13-14. The Employer provided the following statement in support of its request for a long-term extension:

I am writing this letter to request an extension for my contract that was supposed to commence February 24, 2015 through September 10, 2015. I am requesting an extension of 2 months. The reason we need these workers to stay for a period of 2 months so we can finish the contract with the fixed-site grower. Being that the workers arrived extremely late it was unforeseen that the contract would not be completed in time as well as the weather factor – the rain does not allow us to work. I truly need these workers to stay for 2 extra months – until November 10, 2015.

AF 14.

On August 19, 2015, the CO rejected the Employer’s request for a two-month extension.⁵ AF 11-12. The CO explained that the Employer’s certification was delayed due to deficiencies in the Employer’s Application, which is not a basis for granting an extension request. AF 11. The CO emphasized that the Employer was in control of remedying the deficiencies in its Application in a timely manner. *Id.* Moreover, although the Employer indicated rain prevented the

² 20 C.F.R. § 655.171.

³ In this Decision and Order, “AF” refers to the Administrative File.

⁴ SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” and occupation code 45-2092. AF 162.

⁵ The CO inadvertently referred to the Employer’s request as a request for a short-term extension. The Employer sought an extension of more than two weeks, which is considered a long-term extension. *See* 20 C.F.R. § 655.170(b).

Employer's workers from working, the CO concluded the Employer "failed to explain" when the rain prevented the workers from working and failed to provide any documentation to support its claim. *Id.* Therefore, the CO denied the Employer's request for a long-term extension. *Id.*

In a letter dated August 24, 2015, the Employer requested expedited administrative review of the CO's decision to deny its request for an extension. AF 1-10. On August 28, 2015, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule permitting the parties to file briefs within three business days after receipt of the Administrative File. The same day, the Office of Administrative Law Judges received the Administrative File from the CO. In cases involving expedited administrative review, the Administrative Law Judge has five business days after receiving the Administrative File to issue a decision based on the written record.⁶ On September 2, 2015, the Solicitor filed a brief on behalf of the CO, urging the undersigned to affirm the CO's decision to deny the Employer's request for an extension. The Employer did not file a brief.

DISCUSSION AND APPLICABLE LAW

The Employer has appealed the CO's decision to deny a two-month extension of a previously approved certification. Long-term extensions are governed by 20 C.F.R. § 655.170(b), which provides:

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 §655.171.⁷

In this case, the Employer filed a letter urging the CO to grant a two-month extension for two reasons: (1) its "workers arrived extremely late;" and (2) "rain" prevented its workers from working. AF 14. Upon review of the entire record, I find that the Employer has not provided any documentation in support of either argument.

As to its first argument, the Employer alleged its certification was "supposed to commence" on February 24, 2015. AF 14. Although the CO did not issue a Notice of Acceptance until April 14, 2015, the delay in certification was due to various deficiencies in the Employer's Application, as reflected by the record. Remedying the deficiencies in a timely manner was entirely within Employer's control. Because the Employer caused the delays and the delays were

⁶ 20 C.F.R. § 655.171(a).

⁷ 20 C.F.R. § 655.170(b).

predictable consequences of the Employer's behavior, I find that the "late" arrival of the Employer's temporary workers was not a factor "beyond the control of the employer."⁸

Regarding its second reason for requesting an extension, the alleged adverse weather conditions, the Employer has failed to demonstrate that it could not have reasonably foreseen that it would rain during the certification period. Furthermore, the Employer has not shown that the rain was so severe or unpredictable as to merit an extension. Because the Employer has not provided evidence supporting its alleged need for a two-month extension, it has failed to meet the requirements of 20 C.F.R. § 655.170(b). Therefore, I conclude the CO properly denied the Employer's request for a long-term extension.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision denying the Employer's request for an extension be, and hereby is, **AFFIRMED**.

LARRY A. TEMIN
Administrative Law Judge

⁸ See 20 C.F.R. § 655.170(b).