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Issue Date: 02 October 2015

OALJ CASE NO.: 2015-TLC-00066

ETA CASE NO.: H-300-14363-707673

In the Matter of:

SAVINO FARMS, INC.,
Employer.

DECISION AND ORDER
GRANTING EXTENSION FOR H-2A WORKERS

This matter arises under the labor certification process for temporary agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*., and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B.

On September 18, 2015, Employer requested an administrative review pursuant to 20 C.F.R. § 655.171(a) to challenge the denial of its request for extension issued by the Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center (hereafter "ETA") on September 11, 2015. AF at 1-13. This Office received the Administrative File ("AF") from the ETA on September 25, 2015. I issued an Order allowing the parties to provide briefs on the issue due no later than October 1, 2015, at 12:00 p.m. PST. ETA filed a timely brief. Employer did not submit a brief.

As explained below, this Decision and Order grants Employer's requested extension. The Decision and Order is based on the written record, which consists of the Administrative File and the written submission of the ETA, and is the final decision of the Secretary of Labor. 20 C.F.R. § 655.171(a).

1. Background and Factual Findings

On January 23, 2015, the ETA granted certification for 30 job opportunities for agricultural workers at Employer for the period of February 13, 2015 to September 15, 2015. AF at 11, 47. On August 13, 2015, Employer requested an extension of the certification period to December 15, 2015, for 15 agricultural workers. AF at 11, 14, 31-41. On August 21, 2015, ETA notified Employer that it had not provided supporting documentation for the extension and requested additional information, specifically a letter of approval from the local Agricultural

Extension Center, noting that processing delays are not considered extraordinary circumstances for an extension. AF at 11, 14, 17, 21-22. On September 8, 2015, Employer provided additional information to the ETA, including a letter from the Agricultural Extension Office, and also reduced the request for extension from 15 to 3 agricultural workers. AF at 11, 14, 17. On September 11, 2015, ETA denied the extension request noting that the letter from the Agricultural Extension Office "failed to confirm that the need for a three months extension was due to weather conditions or any other factors beyond the employer's control." AF at 11, 14. ETA denied the request because, "[a]s it stands the employer's extension request is solely due to processing delays which is not considered an extraordinary circumstance to grant an extension." AF at 11, 14.

Extension Request

Employer requested an extension "because we have a large amount of work to be completed and it is impossible for my H-2A workers to complete the job by the expiration of their visa in [*sic*] September 15, 2015." AF at 5, 41. The request also stated that the petitions were delayed at the consulate due to "administrative reviews and system problems," and, due to the delay, workers did not arrive until late April until late June. AF 5, 41. The request continued that due to the amount of work to be done, it would be detrimental to lose the workers in September, and its business "highly depends" on the extension. AF 5, 41. Employer attached a letter from the local Agricultural Extension Office supporting the requested extension.

The local Agricultural Extension Office provided a letter to Employer dated September 4, 2015, recommending that the extension be granted. AF at 19. The letter attested to the fact that there was a major need for agricultural workers in Employer's area, and that strawberry farms suffered due to a lack of workers and that it is one of the most strenuous fruits to pick. AF at 19. The strawberry season was in full effect due to summer plantings and the extended duration of fall plantings, but the few U.S. workers were leaving to harvest less strenuous fruits, such as grapes and berries, leaving owners with fewer workers to complete the job. AF at 19. Due to the abundance of fruit, and the lack of U.S. workers, which the Agricultural Extension Center said was beyond the Employer's control, it would be appropriate to grant the three month extension as requested. AF at 19. Employer provided this letter to ETA on September 8, 2015. AF at 11, 14.

2. Discussion and Legal Conclusions

Employers may seek an extension of the period of employment pursuant to 20 C.F.R. § 655.170. Where the requested extension is more than two weeks,

> 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 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.

20 C.F.R. § 655.170(b). "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).

On administrative review, based upon the written record and after due consideration of any written submissions from the parties, the ALJ must either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. 20 C.F.R. § 655.171(a). In order to grant the extension period, Employer's request "must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions)." 20 C.F.R. § 655.170(b).

Employer contends that the information it provided, including the letter from the Agricultural Extension Center, demonstrate the need for the extension is beyond the Employer's control. The ETA denied the request maintaining that the extension application was based upon administrative delays and failed to show that the extension was due to weather conditions or any other factors beyond the Employer's control. In its brief, the ETA argued that administrative reasons are not sufficient to justify the extension, that the extension period had already expired so the request should be denied, that Employer did not provide a detailed explanation for what the workers were needed to do, and, in light of the reduction to three workers, how they would assist in the harvest, and, finally, that the letter from the local Agricultural Extension Center is meaningless as it is provides no information to support the employer's argument for the extension.

At the outset, I find that the certification employment period in this matter ran from February 13, 2015 to September 15, 2015, which is 7 months and 2 days. AF at 12, 16. Employer's request to extend the employment period for three agricultural workers to December 15, 2015, makes the total contract period 10 months and 2 days. AF at 12, 16. Therefore, the period is not beyond 12 months and Employer is not required to show extraordinary circumstances for an extension. 20 C.F.R. § 655.170(b).

Having reviewed the Administrative File and after giving due consideration to the submission from the ETA, I find that Employer has carried its burden and hereby grant the requested extension for three agricultural workers to December 15, 2015. The letter from the Agricultural Extension Center demonstrated that there was a major need for agricultural workers in Employer's area because of summer plantings and the extended duration of all planting. AF at 19. The Agricultural Extension Center explained that the abundance of fruit and a lack of U.S. workers were beyond the control of Employer and recommended granting the extension. AF at 19. The letter also noted that U.S. workers leave strawberry harvesting at this time for less strenuous harvesting of grapes and berries, which further contributes to the lack of workers in the area. AF at 19. Employer explained in its original letter requesting the extension that it had a "large amount of work to be completed" and it was impossible for the H-2A workers to complete the work prior to expiration of their visas on September 15, 2015. AF at 5, 41. Employer stated in the extension request that processing delays caused its dilemma, but also explained that the amount of work that needed to be completed would be detrimental if the workers left on

September 15, 2015, and its business "highly depends" on the extension. AF at 5, 41. Contrary to the argument made by ETA, I find that the information provided, while minimal, read together warrants granting the extension.

The ETA argues that administrative justification is insufficient to warrant an extension, but Employer does not rely upon administrative justification for the extension request. Employer articulated that it has work to be completed and provided a letter the local Agricultural Extension Center to support its request. Even though the letter attests to the lack of workers, the difficulty with the harvesting of strawberries, and the lack of U.S. workers to complete the harvest, ETA found that the letter failed to confirm the extension was needed due to weather or other factors beyond Employer's control.

ETA asserts that Employer has not provided any detailed explanation about what the workers would be doing and why only three workers are needed to complete the season and such bald assertions are not sufficient to justify the extension. *See Carlos Uy III v. Isabel Labayen*, 1997-INA-00304, slip op at 8-9 (Jan. 3, 1999) (Written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation and must be considered by the CO and given the weight they rationally deserve. However, a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Id*., citing *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).) The point is well taken, but I do not find that these are unsupported assertions. The regulation requires only that the reason for the extension be related to weather or other conditions outside the control of the employer. The information provided by the local Agricultural Extension Center, and the lack of workers in the area, demonstrated reasons other than administrative delays that were beyond the Employer's control. Had Employer provided a more thoughtful and detailed explanation initially, it might not find itself in the predicament. ETA requested support from the local Agricultural Extension Center and Employer provided the information. While Employer has been through the certification process previously, there was no indication that it had previously applied for an extension. AF at 268. Employer's explanation is minimal, but read together, the necessary justification is present.

ETA also argues that since the certification period has expired, an extension is not warranted and cites *Haiti/USA Workforce LLC*, OALJ No. 2014-TLC-0095 (June 23, 2014), to support its position. In *Haiti*, however, the employer sought an extension that was beyond one year and because the workers had not yet arrived in the U.S. *Haiti*, slip op. at 2, 4. *Haiti* is distinguishable because the workers did not arrive during the certification period and the employer was required to reapply for workers during the next cycle. Here, the H-2A workers are in place, and the employer is seeking an extension for a brief period due to work considerations, not because the workers did not arrive. Even though the certification period lapsed while the appeal was in the process, I do not find that requires denial of the extension.

In the denial, ETA appeared to fixate on the language about processing delays, but did not appear to give due consideration to Employer's other offered reasons for the extension and the letter from the Agricultural Extension Center, which recommended the extension due to reasons beyond Employer's control. Employer could have provided more information and better explained the need for workers in the original request, rather than using conclusory language, but

when the record is considered in its entirety, and particularly in light of the letter from the Agricultural Extension Center, I find that Employer has demonstrated that the extension is related to factors beyond Employer's control.

Accordingly, ETA's denial of the extension is reversed, and I hereby grant Employer's request for extension. The certification period for three agricultural workers is extended to December 15, 2015.

SO ORDERED.

Digitally signed by Richard M.Clark
DN: CN=Richard M.Clark,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

RICHARD M. CLARK
Administrative Law Judge