



Issue Date: 08 September 2015

Case No.: 2015-TLC-00064
ETA Case No. H-300-15042-247798

In the Matter of

SHEMIN NURSERIES
Employer

DECISION AND ORDER

This proceeding 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 United States Department of Labor (“the Department” or “DOL”) at 20 C.F.R. Part 655. Unless otherwise noted, citations in this Order are to the regulations set forth in Part 655.

The H–2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(i)(A).

The Decision and Order that follows is based on the written record, consisting of the Appeal File (“AF”)¹ forwarded by the Employment and Training Administration (“ETA”), and the written submissions of the parties.

Procedural History

On February 11, 2015,² the U.S. Department of Labor’s Office of Foreign Labor Certification (“OFLC”), Chicago National Processing Center, received the named Employer’s “H-2A Application for Temporary Employment Certification,” ETA Form 9142A, (AF 55-AF 67), and Employer’s “Agricultural and Food Processing Clearance Order ETA Form 790” (AF 68-AF 74). This application included a statement of temporary need, requesting five full-time

¹ Citations to the Administrative File will be abbreviated “AF” followed by the page number. The administrative file consists of 81 pages.

² On February 18, 2015, the Certifying Officer represented that it “accepted for processing” Employer’s application. AF 36.

workers for a seven-month period of intended employment starting on March 30, 2015 and ending November 2, 2015. AF 55. There is a log entry in the administrative record that Employer had filed an H-2A application for the same period of need within both the last two calendar years. AF 47. The application also alleged that that temporary workers were needed for tasks “related to the general care of Nursery Plant Material, including but not limited to loading and unloading of plant material, plant care, watering, pruning, weeding, spraying, driving, operating farm machines, and reburlaping.” AF 57; AF 74. The Employer averred that such work would be conducted from 7:00 AM to 3:30 PM at a wage of \$11.26 per hour. AF 58; AF 59.

On February 26, 2015, an OFLC Certifying Officer (“CO”) certified Employer’s request for five laborers. AF 24.

On July 24, 2015, Employer submitted a request for extension. There, Employer requested that three of its five H-2A laborers be extended, because of an unforeseen inability to hire additional local workers. AF 22-AF 23. Employer also requested that the H-2A visas of the three remaining laborers be extended from 11/2/15 until 12/18/15: a period of less than 7 weeks. *Id.*

On August 3, 2015, a CO denied Employer’s request for extension “in accordance with Departmental regulations at 20 C.F.R. § 655.170(b) because such request must be related to weather conditions or other factors beyond the control of the employer.” The CO wrote that Employer “failed to submit any documentation to support its request” and “[s]ince the employer hired H-2A workers, the need was in fact foreseeable. Therefore the employer’s extension request has been denied.” AF 21.

On August 7, 2015, Employer wrote a second letter requesting an extension and included copies of the advertisements concerning the three available positions. In this letter Employer explained that three key staff positions remained unfilled and that these staff members are used to perform the work of its H-2A hires after they leave in November and the season winds down. AF 16 – AF 19.

On August 10, 2015, Employer wrote an e-mail to the CO noting that Employer had not been provided information on how to appeal the August 3, 2015 decision. AF 12; AF 14.

On August 11, 2015, the CO sent a second letter, which rejected Employer’s request for an extension of the three workers’ H-2A visas. There, the CO reiterated his prior findings, and also included a Notice of Appeal Rights. AF 10 – AF 11.

The following day, Employer sent a letter to the Office of Administrative Law Judges requesting a de novo hearing. AF 1. Employer averred that it had three key positions open in its permanent staff, but despite advertising, such positions remained unfilled. Employer asserted that “this was an unforeseen change in labor market condition which could not have been reasonably foreseen . . . at the time of filing for H2A [sic] workers on January 23, 2015;” and that without an extension of these three workers, the Employer “may incur substantial loss of plant material over the winter.” *Id.* Employer attached as exhibits the following documents: (1)

the CO's denial letter; (2) its July 24, 2015 and August 7, 2015 requests for extension of the H-2A workers; and (3) copies of the job announcements concerning the three vacant permanent positions. AF 2 – AF 8.

On August 21, 2015, this case was assigned to me. I immediately coordinated a teleconference with the parties. This teleconference was held on August 24, 2015. As summarized in an Order dated August 24, 2015, the Parties agreed that a telephonic hearing was not necessary, but the parties desired the opportunity to submit additional evidence and brief their positions. Accordingly, I gave the parties until August 26, 2015 to submit any additional evidence and briefs were due no later than September 1, 2015. Subsequently, Employer submitted a letter dated August 26, 2015 and a representative for the Solicitor submitted a brief on September 1, 2015.

Discussion

As an initial matter, it is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *See, e.g., Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *Garber Farms*, 2001-TLC-00006 (ALJ May 31, 2001) *citing* 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures). Therefore, in an appeal of a denial of an extension of a labor certification, it is the employer's burden to establish by a preponderance of the evidence that it meets the requirements of 20 C.F.R. § 655.170(b).³ Additionally, 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 from the parties involved."⁴

To qualify for the H-2A program, an employer must establish that it has a "need for agricultural services or labor to be performed on a temporary or seasonal basis." 20 C.F.R. § 655.161(a).⁵ On its application for an extension, the Employer stated that it required "seasonal" workers. AF 55. Thus, the only issue before me is whether the Employer has established a

³ The regulations are strict and require denial of any temporary labor certification application where the job requirements and terms and/or conditions of employment differ from those presented to U.S. workers. The labor certification procedure is a streamlined process which does not allow for continued back and forth between the CO and Employer for the purposes of amending the Employer's application. The regulatory scheme may sacrifice equity at the expense of efficiency. Employers are required to proofread and ensure consistency between all documents prior to submitting applications. The regulations are not concerned with motive or intent. They are strict and afford little, if any, room for inaccuracy or omission on the application. The burden is on employers to submit error free documents in order to save agency resources in post application corrections. *See HealthAmerica*, 2006-PER-1 (July 18, 2006) (*en banc*).

⁴ Section 655.171(b)(2) affords ALJs the ability to "either affirm, reverse, or modify the CO's decision, or remand to the CO for further action."

⁵ The Employer has the burden to establish eligibility for the H-2A program. *Altendorf Transport, Inc.*, 2011-TLC-00158, *13 (Feb. 15, 2011). Here, the CO has previously determined that the Employer is eligible and the CO has not withdrawn its earlier certification so I find that Employer has met its burden to show its eligibility for the H-2A program. AF 47.

seasonal need for the position requested in its application. The DOL's H-2A regulations provide:

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).

Per 20 C.F.R. § 655.170(b), an extension may be granted by the CO where the employer demonstrates that such an extension is needed and where it meets the regulatory requirements. Employers seeking extensions of more than two weeks "must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions)." *Id.* Therefore, for Employer to prevail the regulations require that the extension relate either to unforeseen weather conditions or factors beyond the control of Employer. As Employer did not allege unforeseen weather conditions, I will focus my discussion on whether other factors beyond the control of Employer warrant the requested extension.

The CO denied Employer's request asserting two bases:

- the Employer failed to submit any document to support its request; and,
- "[s]ince employer hired H-2A workers for its season initially, the need was in fact foreseeable."

AF 10.⁶

Here, the CO's representative argued that Employer did not make any "concrete" demonstration of its need for the requested extension and did not submit any documentation to support its request. *Solicitor's Brief* at 3. As this is a de novo proceeding, I will consider the additional documents submitted in Employer's application after the CO's decision. Employer noted in its August 26, 2015 letter that it had provided additional documentation in support of its need, including "help wanted" advertising. These documents were provided to the CO with Employer's letter dated August 10, 2015. These documents demonstrate that Employer had advertised three positions. Further, Employer represented that at the time it made the H-2A request, it had "three full time employees which they expected would continue to be employed through 2015." It is not unreasonable for an employer to expect that full-time employees would continue in its employ.

The CO's representative further argued that Employer's position is not credible because Employer filed its initial application in February and then requested an extension five months later, and four months before the end of the period certified on its original application. CO's

⁶ See also AF 21.

representative averred that Employer had many months to prepare for this need and Employer could have applied to receive a new set of H-2A visas for these positions. *Solicitor's Brief* at 3 – 4. However, rather than hurting the Employer, this very argument helps it. Employer cannot be criticized because it has the foresight to request an extension if it has identified a need based on changed circumstances. In fact, a prudent Employer would do the very thing that the CO's representative chooses to criticize. If, in fact, the labor market is as tight as represented by Employer, a prudent business owner would make such a preemptive request in the event it continued to be unable to find replacement workers. From the Employer's perspective, this makes business sense.

The CO's representative correctly pointed out that "the job opportunities for which the Employer needs this extension does [sic] not show that the extension is for the same job opportunity as certified under the H-2A application here." *Solicitor's Brief* at 4. Had Employer not explained this contradiction, this omission would be potentially fatal to Employer's argument. However, Employer's August 26, 2015 letter credibly acknowledged this discrepancy – and without prompting. There, Employer explained that its three full time employees normally conduct administrative work, but at the end of the shipping season, these employees "do closing down and general field work." These later activities are consistent with Employer's initial request for H-2A workers. Additionally, at least two of the three job announcements clearly require the successful candidate "to be able to lift/handle safely 50 – 100 lbs and be willing to work outdoors." This portion of the job description is similar to the exertional requirements set forth on Employer's H-2A application. *See* AF 58.

Moreover, Employer had also requested H-2A workers in each of the prior two years. AF 54. There is no evidence in the record that, on these prior occasions, they requested an extension of these certifications. Additionally, Employer is only seeking the extension of three of its five authorized H-2A workers. This indicates that Employer is tailoring its request to a specified need, given changed circumstances. Furthermore, Employer is only requesting a brief extension of a few weeks. These factors weigh in favor of a finding that the circumstances the Employer anticipated facing at the end of the current season were, in fact, unforeseen when it filed its initial application.

The CO's reasoning that "[s]ince employer hired H-2A workers for its season initially, the need was in fact foreseeable" is nonsensical. To follow this reasoning, any time an Employer filed a H-2A application, any future change in circumstances would be foreseeable. It is the very nature of the uncertainty of future events for which the regulations specifically permit consideration of other unforeseen factors. The regulations do not require an Employer to practice omniscience. The CO's reasoning is, therefore, arbitrary and capricious.

Finally, the CO's representative asserted that "[t]he proper course for the employer is to file a new job order and application for the three H-2A workers it professes to need for its shortage of its clerical staff." *See Solicitor's Brief* at 4. First, this misstates the purpose of the extension request. Employer has clearly asked for these workers to perform the end of season work that Employer has credibly represented was part of the duties performed by the three full-time staff that left its employ. Second, it is the Employer, not the ETA, who may determine the manner in which the Employer obtains its H-2A employees. Although the regulations do allow

the Employer to file a new job order, the regulations also specifically allow the Employer to request an extension, should unforeseen factors change the length of the need in the original certification. 20 C.F.R. § 655.170(b). Here, the Employer is attempting to comply with the regulations, not thwart them, and has, by a preponderance of evidence, established that its extension request is for “other factors beyond the control of the employer.” Accordingly, Employer has established compliance with 20 C.F.R. § 655.170(b).

Therefore, the Certifying Officer’s denial of Employer’s extension is **REVERSED**.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey