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Office of Administrative Law Judges
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Issue Date: 14 October 2015

BALCA Case No.: 2016-TLC-00001
ETA Case No.: H-300-15024-866662

In the Matter of:

BUHLER FAMILY, LLP,

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. Buhler Family, LLP (“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 March 18, 2015, 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 one worker under the job title “Farmworker.” AF 57. Employer stated that it had a temporary need for a worker from March 20, 2015 to November 1, 2015. AF 55. Employer identified its temporary need as “Seasonal.” Section F.5 of the ETA Form 9142A stated that the job duties were to drive trucks and tractors; perform a variety of crop raising duties; field ready implements and equipment; harvest crops; plant and cultivate crops using tractor drawn machinery; and operate and repair farm implements. AF 57.

On January 29, 2015, Employer was informed that its application had been accepted for processing. AF 36-41. On February 24, 2015, the Certifying Officer (CO) issued a Certification Letter to Employer for one “Agricultural Equipment Operator” for the period of March 20, 2015 to November 1, 2015. AF 9, 23-26. The letter explained to Employer that it “may request to extend (by more than two (2) weeks) the period of employment on certified H-2A applications in writing” to the Chicago National Processing Center (Chicago NPC). AF 25.

On September 11, 2015, Employer requested an extension of the H-2A temporary labor certification to December 15, 2015. AF 21. Employer stated the following as reasons for its request:

Less than half of the wheat crop in South Dakota is in good condition. The remaining wheat is deteriorating. In order to make up for the decrease in wheat production, the employer planted more fall crops. As a result, the employer will need additional labor later into the fall than originally anticipated to complete fall harvest.

AF 21.

Also on September 11, 2015, the CO wrote the South Dakota State Workforce Agency (SD SWA) regarding the extension request. Specifically, the CO asked the SD SWA whether it agreed with Employer’s reason for requesting the extension. The SD SWA initially responded by stating, “Yes. We agree.” AF 17. On September 16, 2015, the CO requested confirmation that the conditions Employer stated as the reasons for the extension request regarding the South Dakota wheat crop were indeed correct. *Id.* Also on September 16, 2015, the SD SWA changed its opinion and stated the following:

No, I was incorrect, the evidence does not support an extension for the reason provided.

In April 2015, planting of spring wheat was well ahead of the previous year and the average.

At the end of August 2015, spring wheat harvested was at 95 percent, well ahead of last year, and ahead of the average.

Winter wheat was planted at 5 percent, near last year and the average.

AF 17.

On September 29, 2015, the CO denied Employer's request for an Extension of Certification. AF 11-14. 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. The CO found that Employer failed to demonstrate a need for an extension. Specifically, the CO found that Employer's request "is based on spring wheat deteriorating and extra fall wheat being planted" for the fall harvest, and that Employer's claims are contradictory to the facts presented by the South Dakota SWA, which reported the spring wheat crop in South Dakota as being ahead and above the average of last year. AF 13-14. Therefore, the CO continued, "a desire to plant extra fall wheat does not appear to be premised on weather conditions or other factors beyond the control of the employer, but rather a request to extend its season." AF 14. Hence, Employer's request was deemed not valid and denied by the CO.

On September 29, 2015, Employer requested administrative review of the denial of the extension request, pursuant to 20 C.F.R. §§ 655.170(b) and 655.171. AF 1-10. Employer explained the sequence of events leading up to the extension request in much greater detail than the one-paragraph statement noted above. Employer's wheat acres were damaged, and, in an attempt to generate farm income, Employer opted to plant farm crops, specifically corn and sunflowers, in place of the wheat. Corn and sunflowers are harvested in the fall, and planting these crops nearly doubled and extended Employer's workload for the fall harvest. AF 1-2.

Regarding the CO's consultation with the SD SWA, Employer noted that the SD SWA's report centered on *spring* wheat; Employer plants *winter* wheat, which is planted in the fall and harvested the following summer (emphasis in original). AF 2. The below average temperatures and below average rainfalls in central South Dakota in the winter, coupled with below average rainfalls in the spring, contributed to a "total failure" of Employer's wheat crop. *Id.* Employer attached a letter from its insurer, BankWest Insurance, corroborating the events. BankWest reported that Employer had 4,372.5 acres of winter wheat fail in the spring of 2015 due to a "drought in [the] fall of 2014 and harsh winter of 14/15 [sic]." AF 6. With the corn and sunflower planted, Employer now has "an additional 4,732 acres of these two crops to harvest this fall that they were not expecting," and their workload has essentially doubled. *Id.*

On October 5, 2015, the Chicago NPC sent this matter to the Office of Administrative Law Judges for administrative review. On October 6, 2015, the Court invited Employer and the CO to submit briefs supporting their position.

On October 8, 2015, the CO filed her brief. The CO maintains that the denial should be affirmed because Employer provided no information which demonstrates its need and why the extension is needed. The CO cited *Dry Creek Cattle Co., Ltd.*, 2009-TLC-48 (June 2, 2009) for support of her contention that Employer failed to provide detail about its alleged need for an extension, and thus its request should be denied. Further, Employer is an experienced farmer with a history of utilizing the H-2A program and should be familiar with the process and the utilization of H-2A workers. Employer's failure to give any information about how the weather affected its crop is a "fatal flaw" in its extension request. (CO Br., p. 6).

Also on October 8, 2015, Employer filed its brief, which duplicated the content from its request for an appeal and renewed the request to have the extension approved.

II. DISCUSSION

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). "[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," and "[e]mployment 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.

The burden of proof in alien labor certification process matters remains with the employer. *See, e.g., Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); *Garber Farms*, 2001-TLC-6 (ALJ May 31, 2001). 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). Additionally, when considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding administrative law judge may only render a decision “on the basis of the written record and after due consideration of any written submissions from the parties involved.”

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, if the requested extension would increase the total period of certification to beyond 12 months, Employer must also demonstrate “extraordinary circumstances.” *See Dry Creek Cattle Co., Ltd.*, 2009-TLC-48 (June 2, 2009).

At the outset, I find that the certification employment period in this matter ran from March 20, 2015 to November 1, 2015, which is 7 months and 11 days. AF 23-26. Employer’s request to extend the employment period for one agricultural worker to December 15, 2015, would make the total certification period 8 months and 25 days. 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).

Yet I do not find that Employer demonstrated weather conditions or other factors beyond its control to the CO to meet the H-2A regulatory requirements. Employer gave no information on *why* less than half of the wheat crop is not in good condition and *why* the remaining wheat is deteriorating. AF 21. Employer also failed to explain the type of fall crops it planted and the extent to which they were planted and sufficient detail on the adjustments to its plans for the fall harvest.

The undersigned acknowledges that the CO, who added words and descriptions of wheat not supplied by Employer, could have done a better job of writing the denial of the Extension of Certification. (Emp. Br. at 1-2). At the same time, Employer, in its request for the Extension of Certification, could have done a better job of explaining that 1) the wheat crop failure was due to weather conditions or factors beyond its control as required by 20 C.F.R. § 655.170(b); 2) the wheat at issue was “winter wheat,” which is distinguishable from “spring wheat” in terms of planting and harvest periods; 3) it had switched to different crops, corn and sunflower, to replace the income lost by the wheat failure; and 4) corn and sunflower are harvested in the fall, thus requiring more labor during that season.

All of the above items were described in detail as part of Employer’s request for an administrative appeal, and a letter from its insurance company corroborated the request. However, documents submitted with the employer’s appeal cannot be considered at this time by BALCA in an administrative review. 20 C.F.R. § 655.171; *Jared Adrian Sod Service*, 2010-TLC-35 (June 11, 2010).

Had the CO been in possession of such detailed information, particularly the weather conditions in central South Dakota as described by Employer, the letter from the insurance company corroborating the conditions and reasons for the request, the type of wheat at issue, and the fact that new crops other than wheat were planted and set for the fall harvest, her correspondence with the SD SWA might have yielded a much different result. As stated by the CO, “any alleged misunderstanding resulted from Employer’s failure to clearly articulate and explain its need for the extension and its failure to supply documentation to support it” at the time of the extension request. (CO Br. at 7). Instead, Employer submitted a vague extension request to the CO and waited until the administrative appeal stage to adequately explain its position.

III. ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision denying an Extension of Certification is **AFFIRMED**.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE