



**Issue Date: 15 January 2016**

**BALCA NO.:** 2016-TLC-00010

**ETA NO.:** H-300-15252-980514

*In the Matter of:*

**J.M. FARMING,**  
*Employer.*

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For Employer

**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 at 20 C.F.R. Part 655. J.M. Farming (“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, including the Employment and Training Administration’s Appeal File (AF), and the written submissions of the parties following Employer’s waiver of further hearing in the matter.

Statement of Facts

On October 2, 2015, Employer applied to the Office of Foreign Labor Certification (“OFLC”) for temporary labor certification for five Farmworker and Laborer, Crop, Nursery, and Greenhouse jobs under the H-2A temporary agricultural program (AF, pp. 46-51). On October 15, 2015, the Certifying Officer approved Employer’s application for the original dates of need, from September 25, 2015, to December 18, 2015 (AF, pp. 13, 30-35).

On December 4, 2015, after inquiring of OFLC about the proper procedure, Employer requested an extension of the temporary certification through January 31, 2016, alleging “[t]he group of workers arrived in the US late due to difficulties in processing their paperwork. The contract is due to expire December 15, 2015, but the workers are needed to finish details . . . for weeding and harvest” (AF, p. 21). Employer submitted no supporting documentation with the request.

On December 17, 2015, the Certifying Officer denied the request, noting that it lacked supporting documentation and did not meet the regulatory criteria for a long-term extension under 20 C.F.R. §655.170(b) (AF, pp. 9-12).

On December 23, 2015, Employer requested administrative review, offering a new justification: that plants Employer had ordered had arrived late, causing a delay in harvest (AF, p. 6). Documents in support of this justification were attached (AF, pp. 7-8).

### Discussion

A request for a long-term extension of a temporary agricultural labor certification must comply with 20 C.F.R. §655.170(b). The employer may request an extension 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 in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer.

The Certifying Officer contends her denial of the extension request was proper because Employer submitted no supporting documentation with its request. What is more, the request itself, in the Certifying Officer’s view, “does not indicate how the request is related to weather conditions or other factors beyond the control of the employer” (Certifying Officer’s Brief, p. 3). I agree that the invocation of “difficulties in processing . . . paperwork,” standing alone, does not support a request for a long-term extension. Depending upon who is experiencing the difficulty, and which “paperwork” is involved, this could be a circumstance entirely under Employer’s control. An employer seeking a long-term extension must give a more definite reason than that. Particularly because there is no supporting documentation with the extension request, this cursory and ambiguous justification is insufficient, and the Certifying Officer properly denied the requested extension.

On appeal from the denial, Employer raises a new justification, contending that the late arrival of plants it had ordered made the extension necessary, and submits new documentation purporting to show late delivery. The Certifying Officer contends I cannot consider that new evidence, and that even if I did, it would not support the Employer’s contention (Certifying Officer’s Brief, pp. 4-6).

Under 20 C.F.R. §655.171, subsection (a),

. . . [w]here the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file the ALJ will, *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 amicus curiae, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action (emphasis added).

Because this rule applies only to a request for administrative review, I hesitate to apply it here. Employer requested review (AF, p. 6), but not necessarily *administrative* review only, and in a telephone conference with the court and counsel, while Employer agreed to waive a formal hearing and call no witnesses, it did *not* expressly agree to a more limited administrative review, as opposed to a determination *de novo*. In requesting review, Employer unambiguously indicated an intention to rely on new evidence, and neither the court nor any party suggested in the telephone conference that by agreeing to rely on written submissions for a decision, Employer would be waiving its right to introduce such new evidence. For these reasons I am willing to consider the matter *de novo* on the record before me.

The burden of proof in alien labor certification matters is on the employer. *See, e.g., Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *Garber Farms*, 2001-TLC-6 (ALJ May 31, 2001). For two reasons, the new evidence does not compel a different result in this case. First, as the Certifying Officer argues, the new documents, Employer's Brief pp. 2-9, do not show on their face that plants were delivered to the Employer "later than promised." In fact, the "Confirmation Order" (Employer's Brief, p. 3) appears to be *dated* June 16, 2015 – indicating receipt of the order on that day – rather than to "promise" *shipment* on June 16, 2015. What is more, it requires Employer to pay a deposit of \$3,246.48 no later than August 15, 2015, and recites "NO ORDERS WILL BE SHIPPED UNTIL ABOVE DEPOSIT & SIGNED CONFIRMATION IS RECEIVED IN LCN'S OFFICE." The shipping date, under this document, accordingly could be as late as August 15, 2015, depending entirely upon when Employer paid the required deposit. Second, Employer must show, under 20 C.F.R. §655.170, subsection (b), that "the extension is needed and that the need could not have been reasonably foreseen by the employer." Here, Employer suggests that an earlier delivery date was crucial, but does not say why.<sup>1</sup> In fact, there is nothing in the supporting documents to establish that Employer reasonably anticipated a delivery date earlier than the actual one. Stated differently,

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<sup>1</sup> Employer argues the ostensibly-late delivery was "a factor out of the farmer's control, and caused a delay in harvest which is an impact on the farm's growing season" (Employer's Brief, p. 1), but does not even argue, much less demonstrate, that the delay "could not have been reasonably foreseen by the employer." The test which Employer suggests – that an event beyond the control of the employer which causes an "impact" on the employer's growing season should justify a long-term extension – appears nowhere in the regulations.

nothing in the new evidence supports any inference that delivery in mid-October, 2015, was not reasonably foreseeable at the time of the order. Consequently, I conclude Employer does not carry its burden of proof.

**ORDER**

The Certifying Officer's decision denying an Extension of Certification is affirmed.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge