



**Issue Date: 07 March 2016**

**OALJ Case No.:** 2016-TLC-00023  
**ETA Case No.:** H-300-15099-183812

*In the Matter of:*

**YB FARMING, INC.,**  
*Employer.*

**Certifying Officer:** Charlene G. Giles  
Chicago National Processing Center

**Appearances:** Mike Sethi, Esq.  
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*For the Employer*

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Washington, D.C.  
*For the Certifying Officer*

**Before:** Steven D. Bell  
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.<sup>1</sup> 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 certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.<sup>2</sup>

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

<sup>2</sup> 20 C.F.R. § 655.171.

## STATEMENT OF THE CASE

YB Farming, Inc. (“Employer”) is a farm located in Santa Maria, California. AF 266.<sup>3</sup> On March 18, 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 265-292. The Employer requested certification for twenty farmworkers<sup>4</sup> to harvest strawberries from May 25, 2015 until February 26, 2016, based on an alleged intermittent or other temporary need during that period. AF 265. Thereafter, on April 14, 2015, the CO issued a Notice of Deficiency. AF 243-250. Following the Employer’s response to the Notice of Deficiency, the CO accepted the Employer’s Application on June 4, 2015. AF 177-182.

In an e-mail dated January 15, 2016, the Employer asked to extend certification of its temporary workers for three additional months, from February 27, 2016 until May 26, 2016, in order to continue harvesting crops. AF 70-107. The Employer explained that the optimal time to harvest strawberries “starts in February each year,” so that the fruit is ready in the spring and summer. AF 75. Moreover, in its statement of emergency need, the Employer explained that because the strawberry crop is seasonal and “best harvested through June of each year,” it “continues to have a need for H-2A workers to harvest.” AF 77. In support of its request for a long-term extension, the Employer submitted the following exhibits:

1. Statement of Need, signed by Yolanda Chavez, the owner of YB Farming;
2. Table G-13, a listing of California’s Agricultural Commodities;
3. Renewed Agricultural Sublease Agreement;
4. Transportation Service Agreement;
5. Vehicle Registration and Written Assurance of Renewal;
6. Room Rental Agreement;
7. Certificate of Workers’ Compensation Insurance and Assurance of Renewal;
8. Certificate of Liability Insurance and Assurance of Renewal;
9. Farm Labor Contractor Certificate of Registration for H-2A Placement Services; and
10. FLCE Certificate of Registration for Jose Carmen Martinez de La Rosa.

AF 74-107.

On January 28, 2016, the CO rejected the Employer’s request for a long-term extension. AF 68-69. The CO determined that the Employer failed to provide “documentation which describes or substantiates either extraordinary circumstances or weather conditions or other factors beyond” its control, as required by 20 C.F.R. § 655.170(b). AF 68. Moreover, the CO explained it would not grant an extension where the total work contract under the Application and extension would amount to twelve months or more, “except in extraordinary circumstances.” *Id.* The CO emphasized that if it granted the Employer’s request to extend the original work

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

<sup>4</sup> SOC (O\*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” and occupation code 45-2092. AF 265.

contract by three months, the Employer's total work contract would be for twelve months. *Id.* According to the CO, the Employer did not show that it faced extraordinary circumstances that merited approving a twelve-month work contract. *Id.* Finally, the CO emphasized that harvesting crops in a different season, spring, is "a different job opportunity and seasonal need altogether, which would require the employer to file a new job order with the local" State Workforce Agency. *Id.* For all of the abovementioned reasons, the CO denied the Employer's request for a long-term extension. AF 68-69.

On February 4, 2016, the Employer appealed the CO's decision to deny its request for a long-term extension. AF 4-67. On February 29, 2016, I issued a Notice of Docketing and Order Setting Briefing Schedule, acknowledging the Employer's request for expedited administrative review and permitting the parties to file briefs within two business days after receipt of the Administrative File. On March 2, 2016, counsel for the Certifying Officer ("Solicitor") filed a brief, urging the Court to affirm the CO's decision denying the Employer's request for an extension. The Employer did not file a brief.

## DISCUSSION AND APPLICABLE LAW

The Employer bears the burden to establish eligibility for temporary labor certification.<sup>5</sup> In this case, the Employer has appealed the CO's decision to deny its request for a three-month extension of its previously approved Application. Because the Employer sought an extension of more than two weeks, its request is considered a request for a long-term extension.<sup>6</sup> Therefore, the Employer bears the burden to establish by a preponderance of the evidence that it meets the requirements of 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.

In its request for an extension, the Employer alleged that it still needs temporary workers to harvest strawberries. AF 74. Moreover, the Employer explained that the optimal time to harvest strawberries is from February through June of each year. AF 74-78. Having reviewed the record and the applicable law, I find that the Employer has not provided sufficient documentation supporting its request for a long-term extension.

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<sup>5</sup> See e.g. *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); see also *Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015).

<sup>6</sup> See 20 C.F.R. § 655.170.

As previously discussed, the Employer bears the burden of establishing that it needs a three-month extension and that it could not have reasonably foreseen the need. In its request for a long-term extension filed with the CO, the Employer explained that because the strawberry crop is seasonal and “best harvested through June of each year,” it “continues to have a need for H-2A workers to harvest.” AF 77. Although the Employer submitted ten exhibits with its request, none provided evidence of weather conditions or other unforeseen circumstances that prevented the Employer from harvesting strawberries from May 25, 2015 until February 26, 2016, the period for which its Application was certified.

Furthermore, although the Employer submitted additional information in its request to appeal the CO’s decision, such as Santa Maria’s local weather in December 2015, it did not submit those exhibits to the Certifying Officer. AF 4-67. Pursuant to 20 C.F.R. § 655.171(a), the Administrative Law Judge “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 amici curiae, either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” Therefore, in accordance with the regulations, the exhibits the Employer filed with its appeal are inadmissible. Even assuming, *arguendo*, that the exhibits were admissible, the Employer has failed to demonstrate that it could not have reasonably foreseen inclement weather from May 2015 until February 2016. Furthermore, the Employer has not shown that the weather was so severe or unanticipated that it prevented the Employer’s temporary workers from harvesting strawberries.

In addition to claiming a continued need for temporary workers to harvest strawberries, the Employer alleged that because its temporary workers did not begin working until September 2015, a three-month extension would not extend its total work contract to twelve months. AF 6. The regulations provide that 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.”<sup>7</sup> Although the CO did not issue a Notice of Acceptance until June 4, 2015, the delay in certification was due to various deficiencies in the Employer’s Application, as reflected by the Notice of Deficiency. AF 243-250. Remedying the deficiencies in a timely manner was entirely within Employer’s control. Consequently, I find that the late arrival of the Employer’s temporary workers was not a factor “beyond” the Employer’s control.<sup>8</sup>

Finally, in order to be eligible for temporary labor certification, the Employer had to establish in its initial Application that it had a temporary or seasonal need for agricultural services or labor.<sup>9</sup> The regulations provide that “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.”<sup>10</sup> Moreover, 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

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<sup>7</sup> 20 C.F.R. § 655.170(b).

<sup>8</sup> *See id.*

<sup>9</sup> 20 C.F.R. § 655.161(a).

<sup>10</sup> 20 C.F.R. § 655.103(d).

than 1 year.”<sup>11</sup> The basis of the Employer’s request for a three-month extension, to harvest strawberries in February, is inconsistent with the statement of temporary need it submitted with its Application. AF 265. Both in its Application and addendum to Form ETA 790, the Employer alleged it needed twenty temporary workers to harvest and pick strawberries from May 2015 until February 2016. AF 265, 283. In contrast, in its request for a three-month extension, the Employer stated that the optimal time to harvest strawberries “starts in February each year,” so that the fruit is ready in the spring and summer. AF 75. I agree with the CO that harvesting strawberries in February, as opposed to May, is a different temporary or seasonal need entirely, which requires the Employer to file a new Application for Temporary Employment Certification.

In light of the foregoing, I conclude that the Employer has failed to demonstrate that weather conditions or other factors beyond its control existed to justify extending its contract for temporary labor certification. Therefore, the CO properly denied the Employer’s request.

### **ORDER**

It is hereby **ORDERED** that the CO’s decision denying the Employer’s request for a long-term extension be, and hereby is, **AFFIRMED**.

Steven D. Bell  
Administrative Law Judge

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<sup>11</sup> *Id.*