

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 November 2016

BALCA Case No: 2017-TLC-00005

ETA Case No: H-300-15344-109896

In the Matter of:

RINEY FARMS AKA BILLY RINEY, JR.,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Sonia Col, Esquire
Sonia Col & Associates
For Employer

Vincent Costantino, Esquire
Office of the Solicitor
For the Certifying Officer

Before: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER

This matter arises out of a request for de novo review of the Certifying Officer's denial of an extension of the work contract period relating to an H-2A temporary labor certification application filed by Riney Farms aka Billy Riney, Jr.. In support of their respective positions, the parties filed briefs by November 22, 2016.

I. STATEMENT OF THE CASE

On December 18, 2015, Riney Farms aka Billy Riney, Jr. (the Employer) filed ETA Forms 790 and 9142 seeking certification for one cattle farmworker. The employment period was to begin on 02/01/2016 and end on 11/30/2016. AF 116-ff.¹ The Certifying Officer (CO) approved the Employer's application for certification on March 3, 2016, a full month after the beginning date of the contract period. AF 37-ff.

¹ AF is an abbreviation for Administrative File or Appeal File.

On October 13, 2016, the Employer requested a one-year extension of the original contract period until November 30, 2017, citing delays in processing the foreign worker's visa and a loss of domestic workers. According to Employer, the foreign worker was not able to enter the United States until April 25, 2016. The Employer had not received approval from USCIS until March 29, 2016, and could only then schedule his nonimmigrant visa interview at the U.S. Consulate in Brazil. The Employer also stated that he had to terminate several domestic workers for theft and poor performance, leaving only him and the foreign worker. He indicated that he had not been able to secure replacement workers. The Employer further stated he needs surgery, which he "can only undergo ... if [the foreign worker's] H2A is extended and [he is] able to count on [the foreign worker's] continued services...." AF 24-28.

On October 28, 2016, the CO denied the extension, finding that the Employer had not established factors beyond its control sufficient to warrant an extension and that the Employer's need is not seasonal or temporary. AF 16-20. The Employer requested de novo review of the CO's determination on November 4, 2016.² AF 1-13.

BALCA docketed the appeal on November 4, 2016, and this matter was assigned to me on November 7, 2016. At 1:30 p.m. CST on November 16, 2016, a conference call was held to discuss proceedings in this case. The parties agreed for this matter to be heard on the briefs, and the briefing deadline was set for Tuesday, November 22, 2016. In the course of the proceedings, the Employer submitted a medical report from his orthopedic physician, which indicated that Employer has a long history of bilateral ankle pain, is in need of an advanced reconstruction of his ankle, and suffers some limitations with motion and strength in his shoulder.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

II. DISCUSSION

The implementing H2A regulations provide, "[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. *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) (*supplied*). Employer has requested an extension of its temporary labor certification. Long-term extensions are governed by 20 C.F.R. § 655.170(b). Under §655.170(b), "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) (*supplied*).

Employer must therefore demonstrate that he requires the extension due to "reasons related to weather conditions or other factors beyond the control of the employer." Furthermore,

² The CO granted Employer's request for a seven-day extension in which to request an appeal. Employer's counsel was out of town and needed additional time to determine whether Employer would request administrative review or de novo hearing. AF 14.

as the requested extension would increase the total period of certification well beyond the ordinary maximum period of 12 months, Employer must also demonstrate “extraordinary circumstances.” See *Dry Creek Cattle Co., Ltd.*, 2009-TLC-00048 (Jun. 2, 2009). The burden of proof in alien labor certification process matters 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 (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).

Employer is a first-time user of the H-2A program and did not realize the complexities and time-sensitive nature of the H-2A certification process. I note the Employer did not receive approval of its application until March 3, 2016, one month after the stated date of need. Most of this delay was caused by Employer’s failure to appreciate the exacting nature of the certification process. This delay was further exacerbated by unexplained delays in processing at USCIS, and the foreign worker did not begin employment until April 25, 2016. Even if the contract period had not begun until April 25, 2016, Employer’s requested an extension through November 2017, which ultimately lengthens the contract period to nearly 22 months. If the total work contract period, including extension, would be 12 months or more, Employer must demonstrate extraordinary circumstances. 20 C.F.R. § 655.170(b).

I find Employer’s personal medical situation and loss of domestic workers constitute extraordinary circumstances. Employer has asked for the foreign worker to continue performing work that Employer has credibly represented was part of the duties performed by the domestic workers that left his employ and which Employer cannot do due to circumstances beyond his control (i.e., his medical condition). The regulations 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 has, by a preponderance of evidence, established that his extension request is for “other factors beyond the control of the employer.” He certainly cannot control the quality of domestic workers available to him, nor can he control his medical condition other than through means of surgery.

However, I find that an extension such as the one requested is unreasonable. An administrative law judge may affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. 20 C.F.R. § 655.171(b)(2). I find that an extension through March 3, 2017, which marks the one-year anniversary of the CO’s granting of the H2A application, is warranted given Employer’s medical situation and loss of domestic workers. This effectively extends the contract period three additional months, beginning from the date certification was granted (March 3, 2016). These three months should be sufficient for Employer to convalesce following surgery and hire domestic workers for his cattle farm.

III. ORDER

In light of the foregoing, the Certifying Officer’s decision denying an extension of the contract period is **REVERSED** and **MODIFIED**, and this matter is **REMANDED** to the Certifying Officer for further proceedings in compliance with this Decision and Order.

SO ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge

Covington, LA