



Issue Date: 18 October 2019

**BALCA Case No. : 2019-TLC-00090**

ETA Case No. : H-300-19151-557202

*In the Matter of:*

**AKSD ENTERPRISES, INC. ,**  
*Employer.*

**DECISION AND ORDER GRANTING EMPLOYER AKSD ENTERPRISES, INC.'S REQUEST FOR LONG-TERM EXTENSION**

The above-captioned case 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), 1188, and its implementing regulations, 20 C.F.R. Part 655, Subpart B (H-2A). The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On September 23, 2019, the Board of Alien Labor Certification Appeals (BALCA) docketed the request for review filed by Employer AKSD Enterprises, Inc. (Employer) of the Long Term Extension Request Denial issued by the Certifying Officer (CO).<sup>1</sup> This matter was assigned to the undersigned on September 27, 2019, and a briefing order issued the same day allotting the parties three business days from receipt of the Administrative File (AF) to submit briefs. The undersigned received the AF from the Employment and Training Administration on October 10, 2019, resulting in a corresponding briefing deadline of October 16, 2019. This Decision and Order is based upon the written record and is issued within five business days after receiving the AF as required by the governing regulation. 20 C.F.R. § 655.171(a).

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<sup>1</sup> As Employer did not expressly request a de novo hearing, I shall adjudicate this matter under the regulation applicable to administrative reviews.

## STATEMENT OF THE CASE

On May 31, 2019, Employer submitted its Form ETA 9142 for four farm laborers to assist in the harvesting and cultivating of hay with stated dates of need from June 1 to October 31, 2019. Employer requested expedited consideration, citing a delay of nearly two months (April 3 to May 29, 2019) before receiving approval from the Pennsylvania Department of Agriculture. Employer indicated that its harvest was scheduled to begin in mid-June. AF 151-69. On June 6, 2019, the CO noticed two deficiencies, which Employer cured on June 12, 2019.<sup>2</sup> AF 106-40. On June 19, 2019, the CO identified additional issues not previously noticed that required modification. Employer resolved these issues on June 21, 2019. AF 91-105. The CO issued the Notice of Acceptance letter on June 24, 2019, instructing Employer on matters of recruitment and insurance coverage. AF 85-90. Employer provided the requested information on July 2 and July 10, 2019. AF 67-84.

On July 11, 2019, the CO granted certification for four farm laborers covering a period of employment from June 1 through October 31, 2019.<sup>3</sup> AF 61-64. On September 10, 2019, Employer requested an extension of the ending date to December 31, 2019, due to the late arrival of workers. AF 6. The CO denied Employer's request on September 16, 2019, finding that the request "is not related to weather conditions or other factors beyond the control of the employer..." AF 3-5.

Employer requested review on September 23, 2019. In its request, Employer explained that it initially filed its Form ETA 970 on January 26, 2019, requesting nine farm workers for a beginning date in April 2019. After a housing inspection, only four workers were approved until Employer modified housing specifications. Employer proceeded with its application for four workers under the impression from the State of Pennsylvania that the request could be amended to the initial nine requested workers once construction completed. Due to the delay caused by

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<sup>2</sup> Specifically, the CO required Employer to submit the state workforce agency approved ETA Form 790, with written assurances, and to verify its federal employer identification number. AF 139-40.

<sup>3</sup> After this initial approval, Employer and the CO exchanged several emails about the addition of five foreign workers to the approved labor certification. See AF 7-60. Those communications are not detailed here but support Employer's explanation of events detailed in its request for review. See, e.g., AF 26-32, Employer's prior ETA Form 790 dated March 21, 2019.

the inspection process, Employer's beginning date of need shifted to June 1, 2019. Employer further indicated in its request for review that it experienced a delay of 27 days after it received approval for the visas (on July 18) to obtain an appointment with the embassy to get the individual visas. Employer explained that this delay "pushed back our first harvest, which in turn is causing our second harvest to be delayed." Employer stated that the second harvest will not be mature until the beginning of November, thus leading to the necessity of an additional two months' employment of its four temporary farm laborers. AF 1-2. Neither the CO nor Employer submitted a brief in this matter.

#### **STANDARD OF REVIEW**

The scope of an administrative review in H-2A cases is limited to consideration of the written record and any written submissions from the parties, which may not include new evidence. 20 C.F.R. § 655.171(a). The decision on administrative review must specify the reasons for the actions taken and must affirm, reverse, or modify the decision of the CO, or remand to the CO for further action. *Id.* The regulation is silent as to the appropriate standard of review to be applied on administrative review of a CO's decision. *Id.* I find informative the standard of review applied by the regulations to administrative reviews in the labor certification process for temporary employment in the Commonwealth of the Northern Marianas Islands (CW-1 workers). In such cases, the presiding administrative law judge "must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 20 C.F.R. § 655.461(d)(2). Several presiding administrative law judges have applied a similar standard in H-2A cases. *See, e.g., Jonathan Vega*, 2020-TLC-00001, slip op. at 3 (Oct. 9, 2019) (Almanza, J.); *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016) (Clark, J.); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015) (Price, J.); *T.A.F. Shearing Co.*, 2012-TLC-00095, slip op. at 1 (Sep. 19, 2012) (Rosenow, J.).

Accordingly, in this H-2A administrative review, I consider whether the written record establishes that the CO's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

## DISCUSSION

An H-2A employer may apply for an extension of the certified period of employment. 20 C.F.R. § 655.170(b). Here, Employer has requested a "long-term" extension of two months. The applicable regulation provides, in pertinent part:

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...

20 C.F.R. § 655.170(b) (emphasis supplied). While the regulation does not specify the type of necessary documentation, this requirement has been interpreted liberally. See Carlos Uy III v. Isabel Labayen, 1997-INA-00304, slip op at 8-9 (Jan. 3, 1999) (Vittone, J.), quoting Gencorp, 1987-INA-00659 (Jan. 13, 1988) (en banc) (written assertions that are reasonably specific and indicate their sources or bases shall be considered documentation and must be considered by the CO and given the weight they rationally deserve).

Here, I find that the CO erred in denying Employer's request for an extension. The regulation allows for an extension when the request is "related to... other factors beyond the control of the employer (which may include unforeseen changes in market conditions)." 20 C.F.R. § 655.170(b). The CO summarily and without discussion denied Employer's extension request. Specifically, in the denial, the CO cited the applicable implementing regulation, quoted Employer's statement in support of its extension request, and stated:

In accordance with Departmental Regulations at 20 C.F.R. § 655.170, it has been determined that the employer's extension request is not related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions).

Therefore, the employers' [sic] extension request has been denied.

AF 3-5.

Although some of the delays Employer experienced through the course of its application process were within its control, the delays occasioned by its conduct were short (i.e., Employer provided full proof of its workers' compensation insurance eight days after it provided recruitment documentation). The other, longer delays were occasioned by governmental agencies responsible for the expedited processing of temporary agricultural labor certifications. Employer's approved labor force did not arrive until August 29, 2019, ninety days after its adjusted beginning date of need (June 1, 2019) and fifty days after it obtained certification (July 11, 2019). Although an employer may reasonably foresee some delay, I find the delay in the arrival of the approved workforce in this case outside of Employer's control and beyond the scope of reasonable foreseeability. An employer cannot foresee or control the speed at which the embassy issues visas for approved temporary foreign laborers to travel.

When the record is considered in its entirety, particularly in light of the CO's summary denial and conclusory language, I find that Employer sufficiently supported its need for a two-month extension and established that the need could not have been reasonably foreseen. Accordingly, I find that the basis stated by the CO for the denial to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

#### **ORDER**

For the reasons stated above, the denial of Employer ASKD Enterprises, Inc.'s request to extend the ending date of temporary employment by two months is **REVERSED**, and I hereby grant Employer's request for extension. The certification period for four farm laborers is extended to December 31, 2019.

I am requesting this notice be served by email to counsel for the Certifying Officer ([ETLS-OALJ-Litigation@dol.gov](mailto:ETLS-OALJ-Litigation@dol.gov)) and by facsimile to Employer (570-876-4002) in addition to service on the necessary parties by regular mail.

**ORDERED** this 18th day of October, 2019, in Covington,  
Louisiana.

**LEE J. ROMERO, JR.**  
District Chief Judge