DECISION AND ORDER AFFIRMING DENIAL


On November 5, 2018, the Office of Administrative Law Judges received a letter (“Appeal Letter”\(^1\)) from Employer requesting review a denial of long term extension request made in the above-captioned H-2A temporary alien labor certification matter. This matter was assigned to me on November 8, 2018. On November 9, 2018, I issued a Notice of Docketing and Pre-Hearing Order (“Nov. 9 Order”). In that Order, I granted the parties three days from the date of receipt of the AF or the Nov. 9 Order in which to file briefs. Nov. 9 Order at 1. As of December 3, 2018, I have received no such briefs.

On November 16, 2018, Employer sent a facsimile copy of the Appeal Letter. On November 29, 2018, I received the Administrative File (“AF”). Pursuant to 20 C.F.R.

\(^1\) All pages in the Appeal Letter are unnumbered.
§ 655.171(a), this decision and order is based on the written record and is issued within five calendar days of the receipt of the AF.

BACKGROUND

Employer filed ETA Forms 790 and 9142A on February 20, 2018. AF at 79, 85. The Form 790 listed the anticipated period of Employment to span from “04/15/2018” through “02/11/2019.” AF at 80 (emphasis omitted). The Form 9142A, however, listed the period of intended employment as “04/15/2018” through “11/02/2018.” AF at 71. In its statement of temporary need (section B.9) on the Form 9142A, Employer noted that it would “need the workers from 04/15/2018 thru 02/01/2019.” AF at 71 (capitalization omitted).

On February 28, 2018, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). The NOD, in relevant part, highlighted the date discrepancy on the forms ETA 790 and ETA 9142. AF at 59. The CO requested that Employer “clarify dates of need and give permission to CNPC to amend appropriate forms.” Id. Employer sent an email on March 1, 2018, requesting that the CO “please amend the application as needed and amend the dates to 04/15/2018 to 11/02/2018.” AF at 55 (capitalization omitted).

On March 20, 2018, Employer’s application was accepted for processing. AF at 46. On April 12, 2018, the CO certified Employer’s temporary labor certification. AF at 31. On October 17, 2018, Employer filed an email requesting that the dates of stay in its application be amended or corrected. AF 12. Employer explained:

We are now asking for a correction or modification and also maybe known as extension. You can see in eta 790 that the start date in page 1 item 9 shows the start date of 04/15/2018 and the end date is 02/11/2019. This is the correct time for the workers. Attached is also the eta 9142 that shows the time start date of 04/15/2018 thru 11/02/2019[2] this is due to a mix up of the Spanish version and the American version as it is reversed month and day.[3] This office did not catch the error until now as the employer has brought this to our attention. We are now asking the department of labor to extend modify or amend the time frame to the correction of 04/15/2018 thru 02/11/2019. Workers will remain in this employment of the same employer and preform [sic] the same duties. The 2 workers are in the United States working now.

AF at 27.

On October 30, 2018, the CO issued a Denial of Long Term Extension Request (“Denial”). AF at 6. The CO quoted 20 C.F.R. § 655.170(b), which governs extensions of time

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2 The document included in the letter shows this date as “11/02/2018.” AF at 19. As far as I am aware, no document in the application contains a date of 11/02/2019.
3 Employer does not explain why 11/02/2018 the only date is reversed on the ETA Forms. Employer further does not explain why, if the month and day were switched to match Spanish date notation, the date reads 11/02/2018 instead of 11/02/2019. Employer also does not explain why its agent, a company apparently familiar with H2A applications, would accidentally use Spanish date notation instead of United States date notation.
In the Denial, the CO stated that “the employer has failed to provide any explanation or supporting documentation to substantiate the claim that the long-term extension request is related to factors beyond the control of the employer as required by the regulation.” AF at 7. The CO also noted that the discrepancy had been highlighted in the NOD, and that the Employer had specifically corrected the discrepancy to choose November 2, 2018 as the ending date for employment. AF at 7-8. The CO concluded that, “[s]ince the employer has not provided documentation or an explanation of the factors beyond the control of the employer and the need could not have been reasonably foreseen by the employer supporting the request, the employer’s extension request has been denied.” AF at 8.

In response to the Denial, Employer filed his Appeal Letter.

**DISCUSSION**

**I. Legal Standard**

The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. During the application process, the regulations for the H-2A program permit limited modification and amendment to an Employer’s application for certification. See 20 C.F.R. §§ 655.142, 655.145. Once certification is granted, the regulations allow for extension of certification under specific circumstances. *Id.* § 655.170.

There are two kinds of extensions covered under the regulations. For short term extensions (i.e. extensions of two weeks or less), an employer applies directly to DHS for approval. 20 C.F.R. § 655.170(a). For all other extensions (labelled “long-term extensions” under the regulations), an employer must specifically petition the CO for an extension. *Id.* § 655.170(b).

The CO’s ability to grant long term extensions is fairly limited. The regulations allow for long-term extensions due to “weather conditions or other factors beyond the control of the employer.” *Id.* The employer bears the burden of supporting requests for extension with “documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer.” *Id.* Further, the extension cannot result in a certification for twelve or more months of work (absent extraordinary circumstances). *Id.; see also* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (explaining that certifications are granted for “agricultural labor or services . . . of a temporary nature.”).

**II. Analysis**

As an initial matter, Employer seeks an extension from November 2, 2018 to February 11, 2019. AF 4. As such, Employer’s request for extension falls within the bounds of 20 C.F.R. § 655.170(b). In support of his request for extension, Employer wrote:
I had from the beginning, planned on marketing our perishable produce until February 11, 2019. This is not an extension rather a correction on a clerical error. When we applied for help through the H2A program ETA form 790 was filled out correctly with an employment date from 04/15/2018 until 02/11/2019. On form I-129 the dates we accidentally reversed with a final day of employment of 11/02/2018. Form ETA-9142A was also reversed with an end date of 11/02/2019.

I am a small potato farmer that has had no experience hiring anyone through the H2a program and would have no ability to have done so myself without the help of an agent . . . . I still have produce to ship regardless and have no other way to do so without the help of our H2a workers, as there is no local labor available. I do not have the ability to wait another 45-75 days to apply for new workers as my window of shipment dates through the holidays will be passed.

Id.

While I sympathize with Employer’s plight, I do not find that Employer has provided sufficient reasoning to justify an extension. I do not doubt that Employer’s period of need for the shipment of potatoes extends beyond November 2, 2018, as he has stated in his Appeal Letter. However, Employer failed to establish that the need for an extension is due to matters outside of Employer’s control. Employer admits without hesitation that the November 2, 2018 date is due to a clerical error. Whether caused by miscommunciation by Employer to his agent, or by mere typographical error, such events are within Employer’s or his agent’s control.

Moreover, when Employer was advised of the discrepancy in dates by the CO, Employer still provided the earlier, incorrect date. Even were I to find that the first clerical error was outside Employer’s control, which I do not, Employer’s second submission was clearly within his control.

As the extension request is due to a factor within the Employer’s control, the request is not justified under 20 C.F.R. § 655.170(b). Accordingly, the CO properly denied the request for extension.

Employer also argued that his request is a clarification, not an extension. The regulations do not allow an employer to clarify its labor certification after the fact. Once an application is granted, employers may only request certain enumerated changes (such as extension, changes in meal pricing, and withdrawing job orders). See 20 C.F.R. §§ 655.170, 655.172, 655.173. Moreover, the CO approves labor certifications based on the averments in the ETA Forms, not on the internal intent of the applicant.

ORDER

Given the foregoing, it is clear that Employer does not meet the grounds for extension outlined in 20 C.F.R. § 655.170(b). The CO’s Denial is AFFIRMED.
I am requesting that this order be served by fax in addition to by regular mail.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge