

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 December 2018

Case No.: 2019-TLC-00007
ETA Case No.: H-300-17276-472403

In the Matter of

HOPEWELL VALLEY VINEYARDS
Employer

DECISION AND ORDER

This proceeding 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 promulgated by the United States Department of Labor (“the Department” or “DOL”) at 20 C.F.R. Part 655. Unless otherwise noted, citations in this Order are to the regulations set forth in Part 655.

The H–2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(i)(A).

The Decision and Order that follows is based on the written record, consisting of the appeal file (“AF”)¹ forwarded by the U.S. Department of Labor Employment and Training Administration.

Procedural History

On December 13, 2017, the U.S. Department of Labor’s Office of Foreign Labor Certification (“OFLC”), Chicago National Processing Center, received the named Employer’s “H-2A Application for Temporary Employment Certification,” ETA Form 9142A, (AF 118–129), and Employer’s “Agricultural and Food Processing Clearance Order ETA Form 790” (AF 130–144). This application included a statement of seasonal temporary need, requesting one

¹ Citations to the appeal file will be abbreviated “AF” followed by the page number. The appeal file consists of 149 pages.

full-time worker for the position of “vineyard worker” for the period February 8, 2018 to December 8, 2018. (AF 119–121.)

On December 18, 2017, a Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). (AF 102–117.) Employer made the corrections required of the NOD by email dated December 20, 2017. (AF 86–93.) On February 6, 2018, the CO issued a Notice of Acceptance. (AF 41–85.)

On September 27, 2018, Employer submitted an extension request for the foreign worker “who arrive[d] at my farm on April 19, 2018 on an H2-A visit which expires on December 8, 2018.” (AF 39.) Employer requested an extension “to replace plants that have died in the past [two] years due to inclement weather.” (Id.) Employer noted a twenty-percent loss of plants due to “the cold winter of 2017 together with the constant rain and humidity” of the summer of 2018. (Id.) Employer requires “heavy preparation work” during the winter of 2018 to remove the dead plants, condition the soil, and replace trellises in time for the planting season of March 2019. (Id.) In a separate communication to the CO, Employer requested an extension of the temporary labor certification until December 1, 2019. (AF 19.)

On September 28, 2018, a CO wrote to a New Jersey Department of Labor employee who confirmed the “unusual winter this year.” The employee provided two news articles that confirmed the “unusual” weather in March and August of 2018. (AF 34–37.) Notably, New Jersey experienced “four straight Nor’easters in three weeks” in March 2018. (AF 36.) New Jersey also experienced a warm summer, including the “second warmest August since 1895.” New Jersey had its thirty-second wettest August since 1985. (AF 34–35.)

On October 9, 2018, Employer provided additional information concerning the extension request. (AF 29–30.) Employer stated that it grows sixteen acres of grape vines, which annually produces an average of “28/30 tons of grapes.” (AF 30.) Due to the “extremely low temperatures of the 2015 winter,” many of Employer’s vines died or experienced “severe distress.” (Id.) The “extreme[ly] humid and rainy” weather of the summer of 2018 “took another toll on the plants.” (Id.) “Black rot” reduced Employer’ yield in 2018 to thirteen tons (“30%”). (Id.) “Additional plants have died due to the disease caused by the rainy and overcast weather (see attached yield data report).” (Id.) Due to the “unforeseen weather conditions,” Employer required “act[ion]” to “re-establish production and yield,” which necessitated an extension of the employee currently on an H2-A visa. (Id.)

On November 30, 2018, the OFLC denied Employer’s extension request. (AF 16–17.) The OFLC noted the information contained in Employer’s request, but denied the request, reasoning:

[T]he weather conditions for the years 2015 through 2017 cited in [Employer’s] extension request took place prior to its filing of this application. [Employer’s] request is premised not on unforeseen events arising during the current application, but instead on a need to undo the damage done by weather dating to 2015.

(AF 14, 17.)

On December 1, 2018, Employer appealed the OFLC's denial to the Office of Administrative Law Judges ("OALJ"). (AF 9–10.) Employer recognized the OFLC's reasoning that the conditions of the "last few years might have been a contributing factor to the ultimate death of the grapevines," but argued that "the major loss was due to the unforeseen extreme precipitation and humidity of the current growing season of 2018, which caused a severe black rot infection of the plants and ultimately caused the loss." Employer stated that he could not have foreseen such a loss prior to the current growing season and if he had suffered a loss of his grapevines in prior growing seasons he would have replanted at that time. (AF 9–10.)

On December 10, 2018, the undersigned received Employer's appeal. The undersigned received the appeal file on December 13, 2018. On December 17, 2018, the undersigned issued a Notice of Assignment and Expedited Briefing Order, which set December 19, 2018 as the deadline to file briefs in this matter. As of the issuing date of this Decision and Order, the undersigned received no briefs.²

Standard of Review

As an initial matter, it is settled that, throughout the labor certification process, the burden of proof in alien certification 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 (ALJ May 31, 2001) citing 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures). 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). Additionally, when considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge ("ALJ") may only render a decision "on the basis of the written record and after due consideration of any written submissions from the parties involved." Section 655.171 affords ALJs the ability to "either affirm, reverse, or modify the CO's decision, or remand to the CO for further action."

Specific to Employer's appeal, the regulations allow an employer to apply for an extension of an H-2A visa of more than two weeks. § 655.170(b). The regulations require an ALJ to determine whether the CO erred in rejecting Employer's request for a long term extension of a temporary labor certification. § 655.170(b). "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)." Id.; Judy L. Best Billy F. Ledford d/b/a Family Farm, 2015-TLC-00059 (July 27, 2015) (finding that substantial crop damage due to a freeze that altered the season length and yield, as documented by a letter from a state agricultural official,

² On December 21, 2018 at 10:00 a.m., Sergio Neri, "Owner and Manager" of Employer called a member of the undersigned's staff. Mr. Neri informed the staff member that he did not receive the December 17, 2018 Notice of Assignment and Expedited Briefing Schedule until December 20, 2018, because he did not receive it via email. Mr. Neri confirmed his email address to the staff member but made no additional legal argument, stating that the undersigned may use the arguments and evidence contained in the appeal file.

established extraordinary circumstances that justified an extension that would cause the certification period to exceed twelve months). But see YB Farming, Inc., 2016-TLC-00023 (Mar. 7, 2016) (finding that the late arrival of workers who missed the “optimal time to harvest strawberries” did not constitute good cause to extend a labor certification). An extension is required only when the Employer cannot have “reasonably foreseen” the need for an extension of the temporary labor certification. Unless the Employer shows “extraordinary circumstances,” a temporary labor certification cannot extend beyond twelve months. Id.

Discussion

The CO’s decision to deny Employer’s request for an extension of the temporary labor certification is not reasonable and merits reversal. In the Extension Request Denial Letter, the CO stated that the purpose of Employer’s extension request is “to assist with replacing plants that had died in the last [two] years due to inclement weather.” (AF 13.) The CO denied because the:

[T]he weather conditions for the years 2015 through 2017 cited in [Employer’s] extension request took place prior to its filing of this application. [Employer’s] request is premised not on unforeseen events arising during the current application, but instead on a need to undo the damage done by weather dating to 2015.

(AF 14, 17.) Employer responded that “the major loss was due to the unforeseen extreme precipitation and humidity of the current growing season of 2018, which caused a severe black rot infection of the plants and ultimately caused the loss,” which Employer could not have foreseen. (AF 9–10.)

The BALCA case titled Judy L. Best Billy F. Ledford d/b/a Family Farm, 2015-TLC-00059 (July 27, 2015) is instructive here. In Family Farm, the Board found that substantial crop damage due to a freeze that altered the season length and yield, as documented by a letter from a state agricultural official, established extraordinary circumstances that justified an extension that would cause the certification period to exceed twelve months. Likewise, here, Employer has established through a letter from a state agricultural official that in 2018, New Jersey experienced extreme weather in March 2018, including “four straight Nor’easters in three weeks.” (AF 36.) New Jersey also experienced a warm summer, including the “second warmest August since 1895.” New Jersey had its thirty-second wettest August since 1985. (AF 34–35.) Therefore, like the employer in Family Farm, here, Employer has provided sufficient weather-related evidence to establish extraordinary circumstances during the 2018 growing season that justify his request for an extension of the temporary labor certification until December 1, 2019. (AF 19.)

That Employer experienced inclement weather in the past does not make foreseeable the extraordinary weather—and the resulting black rot and infection—that necessitates an extension of the temporary labor certification for the purpose of replanting the vines Employer lost substantially in 2018. Because Employer’s need was not reasonably foreseeable when he requested the initial temporary labor certification, Employer has shown “extraordinary

circumstances” sufficient to grant the extension request. Therefore, the Certifying Officer’s denial of Employer’s extension is **REVERSED**.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey