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Issue Date: 11 December 2019

BALCA Case No.: 2020-TLC-00019

ETA Case No.: H-300-19186-353065

In the Matter of:

GULICK FRUIT FARMS,
Employer.

DECISION AND ORDER GRANTING 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 November 21, 2019, the Board of Alien Labor Certification Appeals (BALCA) docketed the request for administrative review filed by Employer Gulick Fruit Farms (Employer) of the Certifying Officer's Denial of Long Term Extension Request in the above-captioned matter. This matter was assigned to the undersigned on December 4, 2019, and a briefing order issued the same day allotting the parties three business days to submit briefs. Neither the CO nor Employer submitted a brief in this matter. This Decision and Order is based upon the written record and is issued within five business days of the undersigned's receipt of the Administrative File (AF). 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On July 5, 2019, Employer submitted its Form ETA 9142 for fifteen farm workers to assist in the harvesting and maintenance of its apple orchard with stated dates of need from September 5 to November 10, 2019. AF 69-97. On July 11, 2019, the CO noticed one deficiency, which Employer cured on July 12, 2019. AF 50-61. On July 17, 2019, the CO issued the Notice of Acceptance letter, instructing Employer on matters of

recruitment and insurance coverage. AF 44-49. Employer provided the requested information, and the CO issued certification on August 9, 2019. AF 32-43.

On October 7, 2019, Employer requested an extension of the ending date for one worker to May 31, 2020. Specifically, Employer stated:

> We would like to request an extension for 1 worker to stay until May 31, 2020. After harvest is over we would like to keep this worker to help with orchard cleanup and orchard maintenance, consisting of trimming apple trees and spring planting. This work all has to be completed by the end of May before the next crop starts to grow. We would then send this worker home and bring in workers again for the next harvest.

AF 31. The CO denied Employer's request on October 17, 2019. In the denial, the CO provided the following explanation:

> In accordance with Departmental Regulations at 20 CFR § 655.170, the employer is requesting to extend one Farmworker and Laborer, Crop, Nursery, and Greenhouse job opportunity in order to, "help with orchard cleanup and orchard maintenance, consisting of trimming apple trees and spring planting." The employer's certified application contains duties that differ from the noted duties in the employer's extension request. The employer is requesting an extension for duties outside of the scope of its certified application.
>
> Moreover, the regulations require that requests for extensions "…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." There is no indication that any of the duties covered by the request could not have been foreseen by the employer. Indeed, they appear to be of the sort that would be annually recurring and therefore foreseeable at the time of filing.
>
> The employer's extension request for one Farmworker and Laborer, Crop, Nursery, and Greenhouse worker is denied due to the extension being based on job duties not listed on its application and the request not

> being weather related or other factors beyond the control of the employer.

AF 27-30.

Employer replied to the CO by letter dated October 21, which Employer emailed on October 22, 2019. In its reply, Employer conceded that it did not fully explain its request for the extension. Employer stated:

> I have recently lost one of my full time employees who would normally help with this work and therefore that was the main reason for me asking for this request, and the fact that these workers have become very familiar with my farm, I should have explained that better in my original request. It was also [mentioned] that the duties differed from the noted duties in the employer's extension request yet I had said orchard maintenance in my request and after that had described a few things that fall under this category and on my original certified application I did have orchard maintenance listed in the job description.

AF 24-26. The CO acknowledged Employer's letter, which it considered a request to reconsider the denial of the extension, and informed Employer that it could appeal the decision. AF 20-21. The CO then forwarded Employer's letter to the Office of Administrative Law Judges for consideration as a request for administrative review of the CO's denial.

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 six 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).

The CO denied Employer's request because Employer did not explain why the extension was needed and why the need could not have been reasonably foreseen as required by the governing regulation. The CO further found the job duties described in the extension request different from those encompassed by the

certified jobs. AF 27-30, citing 20 C.F.R. § 655.170(b). When Employer responded to the CO's denial to explain its request more fully, the CO summarily and without discussion rejected Employer's explanation. AF 20-21.

Here, I find that the CO erred in denying the request for a long-term extension, particularly given Employer's responsive submission to the CO's denial. 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). Employer explained that it lost a full-time employee, which necessitated the request for extension. The regulation specifically permits an extension based on a factor "beyond the control of the employer," such as "unforeseen changes in market conditions." 20 C.F.R. § 655.170. I find and conclude that the unexpected loss of a full-time employee is such a factor.

Moreover, Employer explained that the job it sought to extend encompassed the same duties initially certified. I agree with Employer. Specifically, the certified job duties were described as follows, "Some tractor work, Climb ladders and pluck apples from trees, move from site to site, leave apples in bins, Orchard Maintaince [sic]." AF 71 (supplied). In its extension request, Employer described the following duties, "help with orchard cleanup and orchard maintenance, consisting of trimming apple trees and spring planting." AF 31 (supplied). Based upon those descriptions, I find the certified job duties substantially similar to those Employer seeks to extend.

When the record is considered in its entirety, I find that Employer sufficiently supported its need for a long-term extension and established that the need could not have been reasonably foreseen. I further find that the extended job duties are sufficiently encompassed by the job description for the certified position of farm worker. Accordingly, I find that, without further specificity or explication, the basis stated by the CO for the denial of Employer's long-term extension request is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

ORDER

For the reasons stated above, the CO's denial of the request to extend the ending date of temporary employment for one employee through May 31, 2020, is **REVERSED**, and I hereby

grant Employer's request for extension. The certification period for one farm worker is extended to May 31, 2020.

I am requesting this notice be served by email to counsel for the Certifying Officer (ETLS-OALJ-Litigation@dol.gov) and by email to Employer (dulce@usgrown.com) in addition to service on the parties by regular mail.

ORDERED this 11th day of December, 2019, in Covington, Louisiana.

LEE J. ROMERO, JR.
District Chief Judge