

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 September 2020

OALJ Case No.: 2020-TLC-00117
ETA Case No.: H-300-19228-683882

In the Matter of:

WM. F. PUCKETT, INC.,
Employer.

Appearances: Carine Puckett, self-represented
Barberville, FL
For the Employer

Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION EXTENSION

This matter 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 at 20 C.F.R. Part 655, Subpart B. The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On August 26, 2020, Wm. F. Puckett, Inc. ("Employer"), filed a request for a *de novo* hearing", regarding the August 20, 2020 Denial of Long Term Extension Request issued by the Certifying Officer in the above-captioned H-2A temporary alien labor certification matter. *See* 8 U.S.C. §§ 101(a)(15)(H)(ii)(a), 1188; 20 C.F.R. § 655.171(b). The undersigned received the administrative file on September 4, 2020.

During a September 2, 2020 telephone conference call with Counsel/representatives for the parties, the parties agreed to a telephone hearing on this matter. The hearing was set for September 15, 2020.

On September 15, 2020, the undersigned conducted a telephonic hearing where all parties were afforded the opportunity to introduce exhibits, present witnesses, and cross-examine. This decision and order is based on the record consisting of the Administrative File forwarded by the U.S. Department of Labor, Employment and Training Administration (“ETA”), the parties’ exhibits, and the testimony offered at the hearing.¹ Furthermore, this Decision and Order is issued within ten calendar days of the hearing as required by the regulation at 20 C.F.R. § 655.171(b)(1)(iii).

BACKGROUND

On August 19, 2019, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A (“Application”). AF 221-275. The Employer’s Application requested certification for two fern cutters under the SOC occupation title of Farmworkers and Laborers, Crop, Nursery, and Greenhouse for the period beginning October 20, 2019, and ending August 20, 2020, under a peakload temporary need. AF 221. In regard to its statement of temporary need Employer stated:

We cannot get our fern cut quick enough to fill our orders during the high volume order months which is typically associated with the following holidays: Christmas, Valentines Day, Mother's Day, Easter and then also the Florida Wedding Season. We grow our foliage for the florist industry world wide. We grow a wide variety under artificial shade structures. We use mainly Hispanic cutters but lately these workers prefer to work in the construction industry and we get short handed during our busy times. We hope that when the construction-boom in Florida is over we will have more local fern cutters to our disposal again. We would like to apply for H-2A workers to help us fill our orders during the busiest times of the year, since demand for our product is higher than the ability to harvest it at the moment.

AF 221.

The CO issued a Notice of Deficiency in this matter as well as a Notice of Required Modifications. Employer responded to both providing additional information. The CO issued a Final Determination Denial in this matter on September 25, 2019, to which Employer filed a timely request for administrative review under 20 C.F.R. § 655.171(a). A Decision and Order Reversing Denial of Certification was issued by the undersigned on October 29, 2019. This matter was then remanded to the CO who proceeded with the certification process. A certification letter was issued by the CO on November 19, 2019, granting certification to the

¹ References to the Administrative File are designated as “AF,” Employer’s Exhibits as “EX,” Certifying Officer’s Exhibits as “CX” and references to the transcript are designated as TR.

Employer for two “Farmworkers and Laborers, Crop, Nursery, And Greenhouse” job opportunities.

On August 4, 2020, Employer submitted to the CO a request for long-term extension, requesting that its certification period be extended for the period of August 21, 2020, to June 21, 2021. (Employer’s original certification period was October 20, 2019, through August 20, 2020.) Employer’s complete statement has previously been noted.

Because of the initial health and safety restrictions caused by Covid-19 which affected our business, it is critical that since we've begun to ramp up our operation, we have all available workers.

In addition, Covid-19 forced our customers in Europe to get rid of perishable inventory (cut greens). These customers must now replenish their inventory since freight shipments by air have reopened.

The Coronavirus outbreak had implications in container shipping flows and supply chains in Europe. Logistics have faced reduced available capacity, pressure on equipment availability, congestion and extra related costs.

Particularly in the beginning of the Covid epidemic, our customers in Europe underwent strict lockdown guidelines. We have had to scramble and it is extraordinarily important that we have enough workers to carry out this year's production. Since our Spring-crop of Leatherleaf Fern hasn't been cut as usual since the beginning of the Covid outbreak the fern is forming spores on the back of the sprays. Since our customers prefer sporeless sprays the process is much more labor intensive and time consuming to select and cut sporeless fern to fill our orders ...

During the past year our company added an additional 10 acres of various Christmas Greens varieties like Carolina Sapphire & Leyland Cypress (see attachments) for cut foliage which will be ready for harvesting this upcoming Christmas season. The harvesting process is very labor intensive since the sprays are hand selected and hand cut. Part of our regular work force is not available due to self quarantine and fear of contracting Covid-19, we most certainly need the H-2A workers.

Our local U.S. clients are also starting to reopen their businesses and are dependent upon us as their supplier of cut foliage for regular shipments in order to get up and going again. We will need all the help we can get to fill our orders during the high volume months typically associated with the following upcoming holidays: Florida Wedding Season, Thanksgiving, Christmas, Valentine's Day, Easter & Mothers' Day. We grow foliage for the florist industry worldwide. We grow a wide variety of fern and cut greens under artificial shade structures.

In addition, the infinite closure of US Consulates has made travel extremely difficult for our H-2A employees.

For these reasons we request that the H-2A extension application be approved. Requested dates of validity August 21, 2020 through June 21 2021.

Wm. F. Puckett did submit Form I-129, Petition for Nonimmigrant Worker to USCIS. USCIS requested us to provide a DOL TLC Long Term Extension Letter or a one page Final Determination from DOL titled ETA-9142A.

AF-55-56.

The record reflects that after the Employer submitted its extension request to the Chicago National Processing Center (“CNPC”) the CNPC contacted the Florida State Workforce Agency by email, and inquired as to whether Employer’s extension request was supported. Specifically, CNPC asked the Florida state workforce agency: “Are you aware of the restrictions caused by the COVID 19 pandemic having such a negative impact on businesses in the employer’s area of intended employment? Also, do you find the employer’s extension request for an additional 10 months to be reasonable?” AF 53-54.

The record also reflects that Eduardo L. Torres of the Florida State Workforce Agency responded to the CNPC by email on August 20, 2020, stating: “We see no reason to deny the request. After speaking to Karen M. Stauderman with the University of Florida’s Institute of Food and Agricultural Sciences, she stated there were few growers in the area that were greatly affected by COVID-19 and she believes this employer was one of those growers.” AF 50.

On August 20, 2020, the CO issued a Final Determination denying the Employer’s extension request. AF 41-44. The CO cited the regulatory provision governing extensions of more than two weeks at 20 C.F.R. § 655.179 (b) which states:

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. The CO will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. 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. The employer may appeal a denial of a request for an extension by following the procedures in §655.171.

The CO quoted the Employer’s extension request in regard to the Employer’s stated basis for the extension request. In particular the CO quoted the Employer’s statement which is set out in full above, in regard to the workers’ duties, noting Employer stated. “Since our Spring-crop of Leatherleaf Fern hasn’t been cut as usual since the beginning of the Covid outbreak the fern is forming spores on the back of the sprays. Since our customers prefer sporeless sprays the process

is much more labor intensive and time consuming to select and cut sporeless fern to fill our orders.”

The CO compared these job duties to the Employer’s stated job duties for the H-2A workers in its original application which indicated:

Fern cutters get ready for the job by putting rubber bands around their left wrist, walk to the row of fern he/she is instructed to cut by the crew-leader select the best looking Leather Leaf sprays and cut it at the bottom with a fern clipper supplied by the owner. Keeping the sprays in their left hand until they have 20 good stems, then they will tie it with a rubber band and through it on the ground behind them and keep moving forward looking for more stems to cut.

AF 49.

The CO noted the above description of job duties differed from the one listed in the extension request. The CO noted, “In its [extension] request, the employer indicates that it is in the process of having to select and cut spores that have formed on the back of the sprays, which is apparently a different and more time consuming process than the duties listed in its original application.” The CO also noted that “[t]he employer is requesting an extension that would change its period of need from 10 months to 20 months without providing supporting documentation which would support extraordinary circumstances.” AF 44. Therefore the CO denied the request to extend the period of need. No other explanation was provided by the CO. AF 43-44.

On August 26, 2020, Employer filed a timely request for a *de novo* hearing in regard to the August 20, 2020 denial of its extension request. Along with its request for review Employer also submitted supporting documentation which included photographs, customer sales summaries for March through July 2020, a copy of the Office of Foreign Labor Certification COVID-19 Frequently Asked Questions, and a blog post authored by Karen Stauderman, entitled COVID-19 impacts on the cut foliage and flower industry. AF 1-40.

EVIDENCE AND ARGUMENT

A. Hearing Exhibits and Testimony

A *de novo* hearing in this matter was held on September 15, 2020. The Administrative File, downloaded in three parts (1B, 2B and 3B), and consisting of 275 pages was offered into evidence by the Certifying Officer as CX 1, 2 and 3, and was admitted without objection. TR 7-11. Employer offered, as Employer Exhibit 1, the September 14, 2020 statement of Brad Burbaugh, PhD, Director of the University of Florida Institute of Food and Agricultural Sciences, agricultural extension group for Volusia County, Florida. Employer Exhibit 3 consisted of 3 pages of scanned documents related to COVID 19 travel restrictions to South Africa. Employer Exhibits 1 and 3 were admitted without objection. Employer also offered as Employer Exhibit 2, a copy of emails which had been exchanged between the parties. Counsel

for the Certifying Officer objected to the admission of Employer Exhibit 2, on the grounds that these emails were confidential settlement communications between the parties, and were labeled as such. The undersigned sustained the Solicitor's objection to EX-2, which was not admitted into evidence. TR 11-14.

The Solicitor did not initially call the Certifying Officer, Ms. Alejandra Dominguez, as a witness. However, Ms. Dominguez, who was present for the teleconference hearing, was available to answer questions, as needed, and did, in fact, answer limited questions under oath. Ms. Dominguez confirmed that her office had sent an email on August 13, 2020, to Mr. Eduardo Torres, of the Florida Department of Labor and that the CNPC had asked the opinion of the Florida Department of Labor regarding the Employer's request for a labor certification extension, on the basis of the COVID pandemic. TR 18. Ms. Dominguez confirmed that an answer had been received by the CNPC. Ms. Dominguez testified that the "Florida State Workforce Agency indicated that they were aware of delays caused because of the pandemic and therefore [saw] no reason to deny the long term extension request for this particular case." *Id.* Ms. Dominguez also confirmed that later the same day, the CNPC issued the denial of the extension request. She noted that she had considered Mr. Torres' response before issuing the denial. TR 19. Regarding whether she found it persuasive, she stated:

It was not that we didn't find it persuasive. It was more that we have to look at the case holistically and ensure that the labor market was – we would be able to test the labor market again for what appeared to be a new job opportunity given the shift in the dates of need from the original certification on this case.

TR 19.

She further stated that the email from Mr. Torres was one element that was considered, in addition to other elements, and was not the sole driving force behind the decision. She noted the email mentioned that they (Florida state workforce agency) were aware of a few employers that had been affected by the COVID-19 pandemic and had suffered delays, "and that they were aware that this employer specifically, also had been impacted by the COVID pandemic." TR 19-20. In regard to the question of whether the email specified anything regarding the labor market or the Employer's labor needs, Ms. Dominguez stated, "No there was nothing related to the labor market or the need to test the labor market." TR 20. Ms. Dominguez admitted on cross examination, that she had not contacted Mr. Torres after receiving his email and prior to issuing the Final Determination denial, to ask him anything about the labor markets that employer was experiencing at this time. TR 21-22.

In response to a further question regarding what else the CO considered, Ms. Dominguez stated that the CNPC considered the original dates of need, what the duties were and what was required of the workers during that period of need, as well as during the extension period. She admitted that she may have misread the description from the Employer and assumed that the job duties were different than those originally requested. She also mentioned that guidance issued by her department in the form of Frequently Asked Questions specifically relating to the COVID 19 pandemic has "advised the agriculture community that in some instances we understand that the delays caused by the pandemic may change the employer's need for labor to such an extent

that a new H-2A application may be required, resulting in a new job opportunity, whether it be the type of work that is now needed because of the delays caused by the pandemic or the timing of the need for the labor has shifted so much so that a new labor market test is necessary.” TR 23. Ms. Dominguez stated that this was the more holistic approach, to which she had referred previously, in deciding whether or not to grant or deny this long-term extension request. *Id.*

Limited questions were also posed to the Employer, who was not represented by Counsel at the hearing, regarding the basis for the dates requested. Employer explained that it had originally requested a ten month certification and then requested an additional ten months, extending its period of need from August 21, 2020, to June 21, 2021, due to the impact of the pandemic. TR 24. Employer indicated that it did not plan on requesting two additional workers for its normal peakload period of October through August in the upcoming year (October 2020-August 2021). TR 25.

B. Argument of the Parties

At the close of the telephonic hearing the parties presented brief closing statements and were also granted leave to file written closing briefs on or before September 21, 2020. Both parties filed timely post-hearing briefs.

1. The Employer

In her oral, and then written, closing statements Employer primarily reiterated the position taken in Employer’s submissions to the CO which are contained in the administrative file, as well as those articulated at the hearing. Specifically, Employer states that the farming industry generally, and the floral greens producers specifically, were impacted greatly by the COVID pandemic. As support, Employer points to the statement in the record from the Florida Department of Labor who recommended the granting of Employer’s extension request. She asserts that the Florida Department of Labor “knows very well the legal requirements for an extension contained in Section 655.170.” TR 28. She further noted that the Florida Department of Labor statement reflects that they had conferred with the expert at the University of Florida Institute of Food and Agricultural Sciences who represented that “there is a near constant labor shortage of fern cutters in Employer’s area.” *Id.*

Regarding the destructive effects of the COVID pandemic Employer argues that the company was unable to perform its usual spring labor and harvest because it had no business during the lockdown. TR 28-29. She indicated that this is supported by the self-comparison of its 2019 and 2020 business, as submitted in the materials submitted with its request for review. Regarding its current need for labor and its extension request, Employer asserted that now that everything is opening back up, it has a dire need to replenish the floral green inventory of its clients both locally and overseas. Employer also reiterated her previous explanation as noted in the administrative file that harvesting and cutting the ferns at this time is more labor intensive because spores have begun to grow on the back of the ferns, as the ferns could not be cut during the typical spring harvest due to the impact of the COVID pandemic. TR 29. She explained that the fern cutters have to examine each spray of fern before cutting to determine whether spores have formed, and therefore this adds time to the typical labor required. TR 29-30.

In its written closing statement, Employer also specifically addressed points raised by the Solicitor at the hearing.² She argued that the effects of the pandemic were established in the record, including limitations on shipping due to the shutdown imposed during the early period of the pandemic. As support for this she again points to the email from Eduardo Torres of the State of Florida workforce agency, sent in response to the CO's inquiry, confirming the impact of the pandemic. She also notes this email specifically references the recommendation of Karen Stauderman, of the University of Florida agricultural extension office, who confirmed that this Employer was one of the employers in the area who was negatively impacted by COVID-19. In regard to the brevity of Mr. Torres' email, Employer points out that the email specifically answered the questions raised by the CNPC in the email sent to the Florida workforce agency. She also notes that the Florida agency appropriately reached out to the University of Florida agricultural extension office before giving its opinion. In regard to the number of specific workers needed by the Employer and how that need has changed, Employer asserts that although it is always in search of workers, the need has become more acute due to the extraordinary impact of the COVID crisis.

2. The Certifying Officer

The Solicitor made oral closing remarks at the hearing, and also submitted a closing brief on behalf of the CO, urging that the undersigned affirm the CO's determination denying the Employer's extension request. In his oral statement at the hearing, the Solicitor admitted that Employer had met the regulatory requirement pertaining to labor certification extensions that requires that Employer's need was related to weather conditions or other factors beyond the control of the employer, which may include unforeseen changes in market conditions." The Solicitor stated, "The global pandemic obviously was beyond the Employer's control and unforeseen, unforeseeable." TR 31. The Solicitor asserted, however, that Employer's request was not adequately supported in writing because Employer had not explained how many fern cutters they ordinarily employ, when the fern cutters were unavailable due to COVID, and what period of time they were unavailable. *Id.*

The Solicitor argues that the email from Mr. Torres from the Florida workforce agency and the letter submitted from the University of Florida agricultural extension should be deemed inadequate support for the extension request because they do not address the specific number of workers requested. The Solicitor argues that payroll records should be required to document when the workers were unavailable because of quarantine and how COVID restrictions affected the employer. TR 32-33. The Solicitor also argues that Employer has not proven extraordinary circumstances to justify an extension that would amount to a total period of certification (with the extension) of over twelve months. TR 34-35.

In the written closing statement, the Solicitor again attacks the adequacy of the documentation provided by the Employer. The Solicitor argues that the email from Eduardo

² In its email to OALJ-Pittsburgh submitted on September 21, 2020, Employer also attached an additional letter, dated September 18, 2020, from Eduardo Torres. As this letter was not admitted into evidence at the September 15, 2020 hearing and the record in this matter was closed at that time, the September 18, 2020 letter has not been considered by the undersigned.

Torres and the letter from Dr. Burbaugh deserve little weight because they are vague and because the unrepresented Employer did not call these individuals as witnesses at the hearing.

The Solicitor again argues that payroll information or attendance records should have been offered by the Employer to document its extension request, although the CO fails to note that no specific documentation was requested by the CO in this case. The Solicitor asserts that Employer has failed to meet its burden of proof in documenting its extension request and therefore urges the undersigned to affirm the CO's denial of Employer's request for an extension of its labor certification for the period of August 21, 2020, to June 21, 2021.

ISSUE

Whether the Employer has met its burden of proving its need for an extension of its temporary labor certification for two workers for the period of August 21, 2020, to June 21, 2021, under the applicable regulation at 20 C.F.R. § 655.170.

SCOPE OF REVIEW

The current case arises from the Employer's request for a *de novo* hearing in regard to the CO's denial of the Employer's application for an extension of its temporary alien labor certification under the H-2A program for the period of August 21, 2020, to June 21, 2021. Employer's original temporary labor certification was for October 20, 2019, to August 20, 2020. The regulation pertaining to appeals of the CO's determinations in H-2A labor certification matters states that in cases where a *de novo* hearing has been requested, the procedures in 29 C.F.R. Part 18 apply and that the ALJ will schedule a hearing within 5 business days after receipt of the administrative file, if the employer so requests. 20 C.F.R. § 655.171(b)(ii).

In pertinent part, the regulations further provide that after a *de novo* hearing "the ALJ must affirm, reverse, or modify the CO's determination, or remand to the CO for further action, except in cases where the Secretary has assumed jurisdiction pursuant to 29 C.F.R. § 18.95. The decision of the ALJ must specify the reasons for the action taken... 20 C.F.R. § 655.171(b)(2).

Since neither the Immigration and Nationality Act, nor the regulations applicable to H-2A claims, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO, I will review the evidence presented in this case *de novo*, but will also review the CO's decision for abuse of discretion. *T. Bell Detasselling, LLC*, 2014 TLC 00087, slip op. at 3, fn. 7 (May 29, 2014), citing *RP Consultant's, Inc.*, 2009-JSW-00001, slip op. at 8 (June 30, 2010), and *Hong Video Technology*, No. 1988-INA-202 (BALCA Aug 17, 2001). See also *David Stock*, 2016-TLC-0040 (May 6, 2016) (where "Employer requested *de novo* review, the Administrative Law Judge must independently determine if the employer has established eligibility for temporary labor certification").

DISCUSSION

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and
- (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural labor or services. 20 C.F.R. § 655.161. Employment is “temporary” where the employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). A “seasonal” need occurs if employment 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. 20 C.F.R. § 655.103(d).

In determining temporary need for purposes of the H-2 temporary alien labor certification program it is well settled that it is “not the nature of the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). *See Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999) (It is appropriate to determine if the employer’s needs are seasonal, not whether the duties are seasonal). *See also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009).

It is also well established that the H-2A program is designed to fill only temporary or seasonal labor needs and therefore the need for the particular position cannot be a year round need, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). Ten months has been viewed as an acceptable threshold to question whether an employer’s need is temporary. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008) (finding that applying ten months as a threshold, where employer is given the opportunity to submit proof to establish the temporary nature of its employment needs, is not an arbitrary rule).

In order to utilize the H-2A program it is the employer’s burden to establish that its need to fill a particular position or job opportunity is either temporary or seasonal. 20 C.F.R. § 655.161(a). In regard to a seasonal need, an employer must demonstrate when the employer’s season occurs and how the need for labor or services during the season differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op at 11 (Feb. 15, 2011).

The regulations also allow for an extension of the period of temporary or seasonal employment under certain circumstances. In cases where a “long term extension” of more than two weeks is requested, 20 C.F.R. § 655.170(b) provides:

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. The CO will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. 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. The employer may appeal a denial of a request for an extension by following the procedures in §655.171.

It is the Employer's burden to prove its need for an extension, with adequate explanation and documentation. *Savino Farms, Inc.*, 2015-TLC-00066 (Oct. 2, 2015)(reversing CO where letter from local agricultural extension office supported request for an extension; *Buhler Family, LLC*, 2016-TLC-00001)(affirming denial of extension request where the employer failed to explain why it needed an extension).

The regulations require that the extension request must be related to weather conditions or other factors beyond the control of the employer, which may include unforeseen changes in market conditions. *See* 20 C.F.R. § 655.170(b). In this case, Employer has cited conditions related to the COVID pandemic and has provided substantial support for the impact of the pandemic on its business and the market conditions related to its business.

Employer's statement included with its extension request to the CO states, in pertinent part:

Because of the initial health and safety restrictions caused by Covid-19 which affected our business, it is critical that since we've begun to ramp up our operation, we have all available workers.

In addition, Covid-19 forced our customers in Europe to get rid of perishable inventory (cut greens). These customers must now replenish their inventory since freight shipments by air have reopened.

The Coronavirus outbreak had implications in container shipping flows and supply chains in Europe. Logistics have faced reduced available capacity, pressure on equipment availability, congestion and extra related costs.

Particularly in the beginning of the Covid epidemic, our customers in Europe underwent strict lockdown guidelines. We have had to scramble and it is extraordinarily important that we have enough workers to carry out this year's production. Since our Spring-crop of Leatherleaf Fern hasn't been cut as usual since the beginning of the Covid outbreak the fern is forming spores on the back of the sprays. Since our customers prefer sporeless sprays the process is much

more labor intensive and time consuming to select and cut sporeless fern to fill our orders ...

During the past year our company added an additional 10 acres of various Christmas Greens varieties like Carolina Sapphire & Leyland Cypress (see attachments) for cut foliage which will be ready for harvesting this upcoming Christmas season. The harvesting process is very labor intensive since the sprays are hand selected and hand cut. Part of our regular work force is not available due to self quarantine and fear of contracting Covid-19, we most certainly need the H-2A workers.

Our local U.S. clients are also starting to reopen their businesses and are dependent upon us as their supplier of cut foliage for regular shipments in order to get up and going again. We will need all the help we can get to fill our orders during the high volume months typically associated with the following upcoming holidays: Florida Wedding Season, Thanksgiving, Christmas, Valentine's Day, Easter & Mothers' Day. We grow foliage for the florist industry worldwide. We grow a wide variety of fern and cut greens under artificial shade structures.

In addition, the infinite closure of US Consulates has made travel extremely difficult for our H-2A employees.

For these reasons we request that the H-2A extension application be approved.

AF-55-56.

Employer's statement cites the impact of the COVID-19 pandemic on its business as a floral greens grower, including the shutdown of the European market due to strict lockdown guidelines in the beginning of the pandemic. Employer notes that due to these factors it has had to ramp up its production and "it is extraordinarily important that we have enough workers to carry out this year's production." Employer also notes that since its spring crop of leatherleaf fern was not cut as usual due to the beginning of the COVID-19 outbreak, these ferns formed spores on the backs of the sprays. Employer asserts that since "our customers prefer sporeless sprays the process is much more labor intensive and time consuming to select and cut sporeless fern to fill our orders." Employer additionally notes that part of its regular work force is not available due to self- quarantine and fear of contracting COVID-19. Employer also cites the fact that U.S. clients are starting to reopen their businesses and are dependent on the Employer, as their supplier of cut foliage, for regular shipments in order to resume operations.

In the August 20, 2020 Final Determination denying the extension request, the CO only offered two reasons for her denial. The first reason centered on a perceived change in the work duties that would be performed by the two H-2A workers during the extension period as opposed to the original labor certification request. AF 41-44. Employer has confirmed that the job that will be performed by the two workers still involves fern-cutting and is essentially the same. At the hearing, the CO admitted that she mistakenly believed there was a change in the duties to be

performed. TR 23. The Solicitor confirmed in the brief submitted on behalf of the CO, that this grounds for denial has been withdrawn. CO's brief at 8, footnote 11.

The only other basis for denial in the Final Determination letter was that "employer did not submit any supporting documentation with its request other than photos of ferns and its Christmas Greens." AF 44. It should be noted, however that the CO did not issue a Notice of Deficiency in this matter requesting additional documentation, and no specific type of documentation was requested by the CO at any point. Since the issuance of the denial letter, Employer has submitted substantial documentation supporting its original letter explaining the effect of the pandemic on its business.

The issue before the undersigned is essentially, whether the Employer has met its burden of proving that its need for an extension of its previously certified period of need by ten months, from August 21, 2020, through June 21, 2021, has been established through adequate explanation and documentation, and whether the request for an extension that extends the entire labor certification to a period of over 12 months, is justified by "extraordinary circumstances." A review of the evidence in the record establishes that the Employer has met this burden. Employer has done so, in part, though its initial statement submitted to the CO with its extension request, citing multiple factors caused by the COVID-19 pandemic that have impacted its business of growing floral greens this year, and its current labor needs. These factors include changes in market conditions on a global level, as well as delays in its production timeframe due to strict lockdown procedures imposed due to the pandemic. Employer also cites complications due to the delay in harvesting its fern crop caused by the COVID pandemic this past spring, which has caused spore growth on the ferns, necessitating a more time- and labor-intensive harvesting process for the fern cutters. In addition, Employer asserts that its production is ramping up now as its customers are reopening businesses that were closed due to the pandemic. Accordingly, Employer is requesting a ten-month extension for its two H-2A workers who assist in the cutting of the ferns which it produces. Employer also notes, and submitted documents which support (EX-3), that travel restrictions imposed on its two previously certified H-2A workers prevent the return of these workers to their home country of South Africa at this time.

Employer's position was objectively documented, in part, by a statement from the state workforce agency. Eduardo Torres of Florida's state workforce agency responded to the CO's inquiry regarding whether the extension request made by this particular Employer was warranted. In an email to the CO, Mr. Torres stated, "[w]e see no reason to deny the request. After speaking to Karen M. Stauderman with the University of Florida's Institute of Food and Agricultural Sciences, she stated there were few growers in the area that were greatly affected by COVID-19 and she believes this employer was one of those growers." AF 50.

In addition, the Employer offered into evidence as EX-1, the September 14, 2020 statement of Brad Burbaugh, PhD, Director of the University of Florida Institute of Food and Agricultural Sciences, agricultural extension group for Volusia County, Florida. In his letter, Dr. Burbaugh states:

I am writing to give my strongest support to WM. F. Puckett, Inc. as they request an H-2A extension to support their agricultural operation in Volusia County,

Florida. My faculty team and I are familiar with their farming operation which includes, but is not limited to their practices related to production, marketing, labor, and safety.

I can attest that nearly *all* fern growing operations in our county, including WM. F. Puckett, Inc., have reported economic losses as a direct result of the COVID-19 pandemic. This coupled with the fact of near constant labor shortages of fern cutters in our area has the potential to affect the number of agricultural producers whose businesses survive and the livelihoods of many families in our industry.

As is stated in the documentary evidence, my team, specifically Karen Stauderman, was contacted by the Florida Department of Economic Opportunity (FDEO) regarding this H-2A extension request. At that time we provided our expertise and knowledge of the abovementioned challenges facing WM. F. Puckett and the overall industry in our county. Based on this information FDEO recommended the extension request be approved.

This H-2A extension request has been properly vetted by multiple professionals with firsthand knowledge of the Puckett's operation. As such, we believe approval of the request is warranted given the unique situation that we currently find ourselves in. Should you have any questions, comments, or concerns please feel free to contact me.

The above statements offer clear support for the extension request made by the Employer. No evidence has been offered by the CO which contradicts these statements. BALCA has determined that statements from local agricultural extension groups can provide persuasive support for an Employer's extension request. *Savino Farms, Inc.*, 2015-TLC-00066 (Oct. 2, 2015).

The Solicitor argues in the CO's brief that the email from Eduardo Torres and the letter from Dr. Burbaugh deserve little weight because they are vague and because the unrepresented Employer did not call these individuals as witnesses at the hearing. Thus, the Solicitor argues it was deprived of the right to cross examine them. To the extent that an objection to these documents can be inferred from the Solicitor's brief, the objection is overruled. No objection to either of these documents was made by the Solicitor at the hearing. Further, the email from Mr. Torres of the Florida state workforce agency was solicited by the CNPC and is contained in the Administrative File offered into evidence by the Solicitor. In regard to the Solicitor's assertion that the email from Eduardo Torres was vague regarding the basis for his recommendation to grant the extension, clarification could have been requested by the CNPC who sought the opinion of Mr. Torres on the extension request, if the CNPC determined that clarification was necessary.

Further, Mr. Torres appropriately contacted the University of Florida Institute of Food and Agricultural Sciences, an agricultural extension group for Volusia County, Florida, for its opinion on the effect of the pandemic in the Employer's region and the effect on this Employer specifically. All of the information in the record supports the negative impact of the COVID-19

pandemic on the industry and this Employer specifically, as well as the recommendation that the extension request be granted, given by Mr. Torres of the Florida state workforce agency.

Employer's explanation, that a delay in harvesting of its ferns in the spring caused by the pandemic (causing spore growth on the ferns) has complicated its current harvest causing it to be more time- and labor-intensive, is reasonable. Employer has also reasonably explained its acute need for labor at this time, due to the fact that the businesses it supplies had been closed during the pandemic, and are attempting to replenish their inventories of floral greens as they begin to resume operations at this time.

There is really no dispute that the pandemic was unforeseeable, nor that the impact of COVID-19 constitutes extraordinary circumstances as required by the regulation at 20 C.F.R. § 655.170(b). Based on the evidence in the record the undersigned finds these requirements have been met.

The Solicitor argues that payroll information or attendance records should have been offered by the Employer to document its extension request. Although this information may have been helpful, the CO did not specifically request this type of documentation, nor any other specific type of documentation in this case. The Solicitor also fails to cite any cases in support of its position regarding the necessary documentation or other established standard required to support an extension request, other than the standard stated in the regulation.

The CO testified at the hearing that her "holistic view" of the extension request had involved questions of whether there was a need to test the labor market through a new application. She stated that this was not addressed in the email from Mr. Torres. However, a general labor shortage was confirmed by the letter from Dr. Burbaugh of the University of Florida Institute of Food and Agricultural Sciences, who states:

I can attest that nearly *all* fern growing operations in our county, including WM. F. Puckett, Inc., have reported economic losses as a direct result of the COVID-19 pandemic. This coupled with the fact of near constant labor shortages of fern cutters in our area has the potential to affect the number of agricultural producers whose businesses survive and the livelihoods of many families in our industry.

EX-1.

It should be noted that the issue of testing the labor market was not mentioned by the Certifying Officer in the August 20, 2020 Final Determination letter. One would question whether a limited extension until October 20, 2020, and a new certification beginning October 21, 2020, could have better addressed the concerns of both parties in this case. It would appear that better communication between the parties could have facilitated this result.

However, that is not the issue before the undersigned. The only issue before the undersigned is whether the Employer has submitted sufficient documentation and explanation to support its request for an extension between August 21, 2020, and June 21, 2021 and whether it has established extraordinary circumstances to justify a request that would extend the total work

contract period under the original certification and the extension to more than 12 months. Based on the evidence in the record and for the reasons stated above, the undersigned finds that Employer has met its burden.

As an aside, although not specifically relevant to the ruling in this case, one would assume that after the extended period of temporary labor certification requested by Employer due to the “extraordinary circumstances” presented by the COVID-19 pandemic, that Employer would return to its typical “peakload” need, which it asserted was between October and August, in its original application for temporary labor certification. It is clear, and the granting of this extension does not alter, the well-established fact that the H-2A program is in place to address the temporary and seasonal needs of employers and is not meant to address the permanent or year-round employment needs of any particular employer.

CONCLUSION

For the reasons stated above, I find that that Employer has met its burden of proving its need for an extension of its temporary labor certification for two workers (fern cutters) for the period of August 21, 2020, to June 21, 2021. (Employer’s original certification period was October 20, 2019, through August 20, 2020.) I have based my decision on my review of the administrative file, as well as the evidence, testimony, and argument presented at the September 15, 2020 hearing, and closing briefs. Therefore, the CO’s denial of the Employer’s request for an extension, is reversed.

ORDER

Accordingly, for the foregoing reasons, the CO’s denial of Employer’s H-2A long-term extension request, is **REVERSED**, and this matter is **REMANDED** to the CO for additional processing.

For the Board of Alien Labor Certification Appeals:

SEAN M. RAMALEY
Administrative Law Judge