

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 October 2020

Case No.: 2021-TLC-00008
ETA Case No.: H-300-19336-175054

In the Matter of

COBB CATTLE COMPANY
Employer

Certifying Officer: Alejandra Dominguez
Chicago National Processing Center

Appearances: Kandance Kropinak
Non-Attorney Representative, High Country Agricultural Services
Craig, Co
For the Employer

Nicole I. Schroeder
Office of the Solicitor
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United States Department of Labor
Washington, DC
For the Certifying Officer

Before: **TRACY A. DALY**
Administrative Law Judge

DECISION AND ORDER DENYING DENIAL OF CERTIFICATION

1. Nature of Appeal. 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 temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. This matter involves Employer’s application for an extension of a current temporary labor certification for one temporary agricultural worker and an administrative review of the application’s denial pursuant to 20 C.F.R. 655.170(b).

2. Procedural History and Findings of Fact.

a. On December 13, 2019, the Chicago National Processing Center (CNPC) granted certification for one livestock worker job opportunity covering a period of employment from February 1, 2020 through December 1, 2020. (AF p. 7)¹

b. On October 1, 2020, the CNPC received a request for an extension for said position for the livestock worker until January 31, 2021 in accordance with 20 C.F.R. § 655.170(b) on the basis that the novel coronavirus pandemic (COVID-19) has affected market conditions such that the sale of cattle is being held until January and spurned travel restrictions which bar the livestock worker's scheduled return to Peru. Included with that request was a document outlining the travel restrictions established by the Peruvian government effective August 13, 2020. (AF pp. 11-13, 22-25)

c. On October 5, 2020, the CO issued a non-acceptance letter and denied an extension of certification. First, the CO stated that the position was not temporary or seasonal because Employer "did not explain how the job duties listed in the application can be shifted from one time of year to another while remaining 'seasonal' . . . [and] it is unclear how the employer's delays, caused by the COVID-19 pandemic, would change the employer's seasonal needs." Second, the CO noted that Employer failed to "provide any documentation to support its delays or request for the extension." Lastly, the CO found that Employer had filed consistently for a period of February to December for the past three years, and opined that should Employer "file a new application with dates of need of February 1, 2021 to December 1, 2021, and if this request was approved, the employer would have claimed a seasonal need of approximately 24 months, which by definition is no longer seasonal but permanent and year-round." (AF pp. 7-10)

d. On October 12, 2020, Employer requested administrative review of the CO's denial of certification pursuant to 20 C.F.R. § 655.164(b). Employer requests an extension from December 2, 2020 to January 31, 2021 at which time Employer hopes that travel restrictions to Peru will be lifted. Employer asserted that it has "been forced to change [its] cattle operation this year and carry [its] livestock into early 2021" because of the strain the pandemic has put on cattle markets. Specifically, Employer assert that "the ranch's operational needs have been changed by [the COVID-19 pandemic], severe drought conditions in Wyoming, and a market slump," all of which are beyond Employer's control. (AF pp. 3-4) Employer attached an auction ledger dated January 15, 2020 and a public notice issued by the U.S. Department of Agriculture (USDA) on September 28, 2020 declaring Carbon County, Wyoming as a primary natural disaster area. (AF pp. 5-6)

e. On October 16, 2020, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. The undersigned received the administrative file on October 19, 2020. On October 21, 2020, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines.

f. In accordance with the Notice of Case Assignment, on October 22, 2020 the Solicitor's

¹ References to the Appeal File are by the abbreviation AF and page numbers.

Office advised that it does not plan on filing a brief on behalf of the CO in this matter, but rather will be relying on the Notice of Denial.

3. Applicable Law and Analysis.

a. *H-2A Program.* 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. 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)(A).

b. *Burden of Proof.* Throughout the labor certification process, the burden of proof in alien certification remains with the employer. *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a). The employer, therefore, must demonstrate that the CO’s determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible. *See Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014). Consequently, a CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

c. *Long-Term Extensions.* Pursuant to the regulations, 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.

20 C.F.R. § 655.170(b)

d. *Temporary or Seasonal Need.* Pursuant to the regulations, employment is of a seasonal nature where it 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. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year. 20 C.F.R. § 655.103(d).

When determining whether an employer’s need is seasonal, it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal.” *Sneed*

Farm, 1999-TLC-00007 (Sept. 27, 1999). In order to determine if the employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the need for labor or services during this time of the year differs from other times of the year. *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

e. *Analysis.*

In this matter, the CO denied the request for an extension because "it is unclear how the employer's delays, caused by the COVID-19 pandemic, would change the employer's seasonal need." (AF p. 8) Employer asserts that travel restrictions imposed by the Peruvian government due to the current pandemic bar the worker's return home and market conditions are such that the sale of cattle is being held until January. (AF pp. 11-13) In its appeal, Employer argues that the pandemic, coupled with changing market conditions and a severe drought, necessitate an extension until January 31, 2021.

Additionally, the CO reasoned that Employer did not explain how the job duties "can be from one time of year to another while remaining a 'seasonal' need." (AF p. 8) This is misplaced; the standard for a long-term extension of a temporary labor certification is not the seasonality of the position, but whether extraordinary circumstances exist such that a request for an extension related to unforeseen factors beyond the control of the employer should be granted.

Finally, the CO considered Employer's prior H-2A applications. These records reflect that Employer employed a temporary work for the February through December periods for the past three years and opined that should Employer "file a new application with dates of need of February 1, 2021 to December 1, 2021, and this request was approved, the employer would have claimed a seasonal need of approximately 24 months, which by definition is no longer seasonal but permanent and year-round." This is speculative. Past applications are not indicative of future actions, and the only issue ripe for decision is whether Employer established extraordinary circumstances sufficient to grant the requested extension.

In this matter, Employer established that the COVID-19 pandemic has directly affected cattle market conditions and forced Employer to delay the normal season sale of its cattle. Employer has been compelled to now maintain its livestock herd until January 2021. As a result, this extends the nature and scope of Employer's ranch operations and livestock care beyond its seasonal cycle and necessitates an extended labor level above those necessary for normal ongoing operations. (AF pp. 7-8, 11-12)

Additionally, the evidence in the administrative file demonstrates that Employer's work force has been directly and unexpectedly impacted by the effects of the pandemic. Specifically, Employer has been forced to maintain daily ranch operations with a reduced staff when two ranch employees were precluded from working. The impact of Employer's reduced work staff has also been unexpectedly exacerbated by unseasonable drought conditions, which forced operations changes related to livestock care. (AF pp. 7-8)

Furthermore, the evidence in the appeal file demonstrates that the Peruvian government imposed strict travel restrictions effective August 13, 2020. These travel restrictions were

imposed because of the COVID-19 pandemic. As a consequence, the laborer who is the subject of the extension request faces significant challenges in returning to his country of residence. (AF pp. 11-13, 22-25)

The undersigned concludes the above noted conditions are extraordinary circumstances and unforeseeable factors beyond the control of Employer. As such they warrant an extension of the temporary labor certification. The CO's denial was not based on an analysis of whether extraordinary circumstances existed; instead it was issued on the basis that Employer failed to establish the seasonal nature of the job duties the laborer performs. As such, the CO's denial was issued arbitrarily and must be denied.

4. Ruling. Employer carried its burden to establish its eligibility for a long-term extension of its H-2A labor certification. The CO's denial of a long-term extension of Employer's Application for Temporary Employment Certification is DENIED.

SO ORDERED this day.

TRACY A. DALY
Administrative Law Judge