



**Issue Date: 19 January 2021**

**OALJ Case No.:** 2021-TLC-00046  
**ETA Case No.:** H-300-19357-213574

*In the Matter of:*

**USA FARM LABOR,**

*Employer.*

**Certifying Officer:** John Rottterman,  
Chicago National Processing Center

Appearances:

Wendel V. Hall, Esquire  
Hall Law Office, PLLC  
Washington, D.C.  
*For the Employer*

Micole Allekotte, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, DC  
*For the Certifying Officer*

**Before:** Steven D. Bell  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF EXTENSION**

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor.<sup>1</sup> A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.<sup>2</sup>

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<sup>1</sup> 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

<sup>2</sup> 20 C.F.R. § 655.171.

## STATEMENT OF THE CASE

On January 7, 2020, USA Farm Labor (“Employer”) filed (1) Form ETA 9142A, *H-2A Application for Temporary Employment Certification* (“Application”); (2) Appendix A to Form ETA 9142; (3) Form ETA 790, 790 A, and Addendums, (4) Statement of Temporary Need, (5) Workers Compensation Insurance Documentation, and (6) Agent Agreement.<sup>3</sup> Employer requested certification for two Agricultural Equipment Operators,<sup>4</sup> from March 1, 2020 to December 15, 2020, based on an alleged seasonal need during that period.<sup>5</sup> The CO accepted Employer’s application on January 13, 2020, and on January 29, 2020, temporary labor certification was approved.<sup>6</sup>

In an e-mail dated December 10, 2020, the Employer asked to extend certification of its temporary workers for two additional months, from December 15, 2020 until February 15, 2021, in order to complete grain hauling and cleaning.<sup>7</sup> Employer stated that its temporary worker did not arrive as scheduled on March 1, 2020, and was delayed until June 12, 2020 due to travel restrictions related to Covid-19. Employer attached the H-2A employee’s I-94, showing that he did not enter the country until June 12, 2020.<sup>8</sup>

On December 15, 2020, the CO rejected the Employer’s request for a long-term extension.<sup>9</sup> The CO determined that:

The employer did not explain how the job duties listed in the application can be shifted from one time of year to another, for a total of 11.5 months, while remaining a “seasonal” need (i.e., tied to a certain time of year by an event or pattern). The regulation lists two situations in which an extension may be granted, weather and market conditions, so long as the situation directly affects an employer’s need for labor. In contrast, there is no indication whatsoever in this request that the employer’s need for labor has changed.<sup>10</sup>

The CO also noted that there was no documentation showing that the work would be able to be completed by February 15, 2021, and that it would not end sooner or continue indefinitely.<sup>11</sup>

On December 17, 2020, Employer contacted the CO via email with and attached letter from Travis Zabloutney, requesting reconsideration of the decision, stating that because the worker had been delayed until June, “[m]any tasks that we would complete in a normal season had to be put

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<sup>3</sup> AF 37-57. In this Decision and Order, “AF” refers to the Administrative File.

<sup>4</sup> SOC (O\*Net/OES) occupation title “Agricultural Equipment Operator” and occupation code 45-2091.00. AF 43-45.

<sup>5</sup> AF 45.

<sup>6</sup> AF 14-20, 26-31.

<sup>7</sup> AF 12.

<sup>8</sup> AF 12-13.

<sup>9</sup> AF 8-11.

<sup>10</sup> AF 11.

<sup>11</sup> AF 11.

off and/or deferred in the 2020 season to accommodate the activities on a farm that mother nature does not allow to be put off otherwise.”<sup>12</sup> It stated that Covid-19 had complicated work schedules, delaying commodity deliveries, that the owner’s father, a major contributor to the farm had fallen ill for 45 days, and that the following activities usually performed during the summer season had to be delayed due to all of these factors.

Commodity Hauling - including straw and hay  
Farm building, grain storage and yard maintenance  
Cleaning seed for my seed business that is a direct marketing activity of my farm.  
Cleaning of farm machinery  
Putting machinery into storage  
Land improvement activities - clearing dead trees and hauling rocks, maintaining farm windbreaks<sup>13</sup>

On December 23, 2019 Employer submitted a request for a de novo hearing based on its previously stated arguments.<sup>14</sup>

The Office of Administrative Law Judges received the Administrative File on January 4, 2021. The parties agreed to consolidate this claim with 2021-TLC-00048, *Zablotney Farm*, and to participate in a telephonic hearing on January 8, 2021. At the time of the hearing, because Employer’s witness was unavailable, the parties agreed to reach a decision on the record based on the appeal file and the additional exhibit submitted by the solicitor, while maintaining the review standard of a de novo hearing. The CO filed a brief, and Employer failed to file a brief related to this claim.<sup>15</sup>

The issues before me are whether per 20 C.F.R. § 655.170(b), Employer’s requested extension is based on a need for additional time that has arisen based on unforeseeable circumstances. This decision is based on the administrative file, the arguments of the parties, the evidence presented, and the applicable laws and regulations. This decision is issued within ten business calendar days of the hearing, as required by 20 C.F.R. § 655.171(b)(1)(iii).

### **ARGUMENTS OF THE PARTIES**

The CO argues that the granting of long-term extensions is within the CO’s discretion, provided its decisions are not arbitrary and capricious. The CO argues that Employer’s extension request establishes that the reason for granting its original application, a seasonal need, does not exist because it shows that the duties can be performed at any time of the year and that these reported seasonal duties would be performed during almost the entirety of the off season. The CO also argued that the schedule of operations that is not a part of the record in this claim established

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<sup>12</sup> AF 5-7.

<sup>13</sup> AF 7.

<sup>14</sup> AF 1.

<sup>15</sup> I note that although Employer filed a brief with both case numbers listed, this claim was never addressed or even mentioned throughout the course of the brief.

that some of the duties Employer stated needed to be done are usually performed at different times during the year and are thus not seasonal if they can be performed in the coming months.<sup>16</sup>

As already noted, Employer did not submit a brief related to this claim. I have summarized the arguments included with its requests for reconsideration and a de novo hearing above.

### **DISCUSSION AND APPLICABLE LAW**

Pursuant to 20 C.F.R. § 655.171(b) and the agreement of the parties, I will independently examine the evidence to determine Employer's eligibility for temporary labor certification.<sup>17</sup> The burden remains with the Employer throughout the process.<sup>18</sup>

The Employer bears the burden to establish eligibility for temporary labor certification.<sup>19</sup> In this case, Employer has appealed the denial of its request for a two month extension of its temporary labor certification. An employer may apply for an extension of more than two weeks.<sup>20</sup>

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."<sup>21</sup>

Aside from the statements from Travis Zabloutney in Employer's application and request for reconsideration, the only evidence that Employer has submitted in this claim is the I-94 form for its H-2A employee, showing that he did not arrive until June. It failed to submit any documentation establishing its need for the work alleged, such as a revised schedule for hauling commodities or records establishing that the seeds had not yet been cleaned or that any of the work had not yet been completed. As Employer has failed to produce any documentation of the alleged need for work beyond the time covered in its initial application, as required by § 655.170(b) I find that it has failed to establish entitlement to an extension.

In light of the foregoing, I conclude that the Employer has failed to demonstrate that weather conditions or other factors beyond its control existed to justify extending its contract for temporary labor certification. Therefore, the CO properly denied the Employer's request.

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<sup>16</sup> *CO. Post-Hg. Bf.*

<sup>17</sup> *David Stock*, 2016-TLC-00040 (May 6, 2016).

<sup>18</sup> *Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011).

<sup>19</sup> *See e.g. Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *see also Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015).

<sup>20</sup> 20 C.F.R. § 655.170(b).

<sup>21</sup> *Id.*

**ORDER**

It is hereby **ORDERED** that the CO's decision denying the Employer's request for a long-term extension be, and hereby is, **AFFIRMED**.

Steven D. Bell  
Administrative Law Judge