Case No.: 2021-TLC-00178
ETA Case No.: H-300-21029-042204

In the Matter of

LAKEBED FARMS, LLC,
Employer

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Anthony Guidice, Esq.
For the Employer

Nicole Schroeder, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
United States Department of Labor
Washington, DC
For the Certifying Officer

Before: Tracy A. Daly
Administrative Law Judge

DECISION AND ORDER
(Affirming Denial of Request for Extension 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 request for a long term extension of the certification of four temporary agricultural workers granted in its Employment and Training Administration (ETA) Form 9142A application for temporary labor certification and an expedited administrative review of the denial of Employer’s request for a long term extension.
2. **Procedural History and Findings of Fact.**

   a. On February 19, 2021, the Chicago National Processing Center (CNPC) received for filing an ETA Form 9142A application from Lakebed Farms, LLC (Employer). Employer requested authorization for six Farmhand Workers to perform job duties to include planting, weeding, harvesting, washing, packing, and miscellaneous farm maintenance from March 31, 2021, to July 10, 2021, based on a seasonable temporary need. (AF 95-111)\(^1\)

   b. On February 9, 2021, the CO issued a Notice of Deficiency that was satisfactorily addressed by Employer. (AF 84-89)

   c. On February 12, 2021, the CO issued a Notice of Acceptance accepting Employer’s temporary labor certification application for processing and outlining the required steps to receive a final determination on the application. (AF 78-83)

   d. On February 19, 2021, the CO issued a final determination letter certifying Employer’s H-2A temporary labor certification application for six farmhand job opportunities for a period of employment from March 31, 2021 until July 10, 2021. (AF 70-74)

   e. On June 21, 2021, Employer submitted a request for a long term extension of its labor certification for four farmhand workers from July 10, 2021 until January 15, 2022, noting Employer’s business operations were established in 2019 and it is still creating an effective business operation. Employer asserted that adverse weather conditions delayed the harvest of its produce by eleven weeks and further that summer maintenance demands exceed the ability of its domestic labor. Employer also stated that the extension would allow a second harvest in September 2021, for which “it would be easier to submit this amended petition to include the full duration of the summer and harvest months” rather than submit a new application.

   f. In support of its request, Employer attached a summary of the adverse weather conditions from April through June 2021 that restricted the planting and growing of crops and delayed harvest by eleven weeks to the week of June 7, 2021. Employer’s summary further explained that Employer adjusted the remainder of the 2021 season to allow for a second full harvest during the weeks of September 20 through January 10, 2022 and provided a chart summarizing the projected unit harvest confirmed by its purchasers for kale, chard, escarole, beets, cabbage, eggplant, peppers, zucchini, cucumber, squash, fennel, cauliflower, broccoli, leek, and celery root. (AF 61-65)\(^2\)

   g. In response to Employer’s extension request, the CO sought confirmation of Employer’s assertions regarding the weather from the North Carolina State Workforce Agency (NCSWA). In response, NCSWA’s field staff responded that (1) “weather patterns have been

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\(^1\) References to the Appeal File are by the abbreviation AF and page numbers.

\(^2\) Employer also requested to change the employer of the other two employees from Lakebed Farms LLC to its sister farm Mason Farms Operating Co. LLC and to extend their time frame until September 15, 2021. On June 24, 2021, the CO responded that “questions regarding the transfer of workers may be directed to the U.S. Citizenship and Immigration Services (USCIS).” (AF 52)
very difficult for farmers here in NC” and “I’m assuming that this grower is talking about greenhouse crops or some other management style that provides controlled growing conditions, because some of the crops listed cannot be raised outside during North Carolina’s fall and winter.” and (2) “Jones county did experience a number of frost dates and a very late one, this year on 04/21/2021, which is much later than the usual last frost dates of March 28. We also had excessive rains, that made fields way too wet, at the start of the year through the end of March, that delayed planting of all crops, in Jones county.” (AF 54-60)

h. On June 24, 2021, the CO issued a final determination, denying Employer’s request for a long term extension of its temporary labor certification. The CO stated the adverse weather conditions were confirmed by the NCSWA, but noted that the NCSWA assumed the grower was referring to greenhouse crops because some of the crops listed by the grower cannot be raised outside during North Carolina’s fall and winter. The CO included an aerial image of Employer’s work site and stated as follows:

There is no apparent greenhouse at the employer’s worksite. Therefore the need for the employer to extend its certification period to January 15, 2022 remains unclear as the employer is apparently unable to grow crops in the winter.

Likewise, in its request, the employer explained that the new dates would include a second round of harvesting and stated “Lakebed Farms, LLC was going to submit another petition for these workers to come back and harvest in September. However, it would be easier to submit this amended petition to include the full duration of the summer and harvest months.” This explanation indicates that the employer chose to produce the crops on this schedule at the time of the initial filing and renders the need both foreseeable and under the employer’s control both which is inconsistent with the regulatory requirements for the granting of an extension.

Additionally, the ability to produce crops in the winter months calls into question the seasonality of the employer’s job opportunity. That is, it remains unclear as to how the job opportunity is tied to a certain time of year by an event or pattern while the employer can grow in all seasons of the year.

(AF 46-51).

i. On July 1, 2021, Employer requested administrative review of the CO’s denial of its request for a long term extension of certification pursuant to 20 C.F.R. § 655.170. Employer argues that 1) only summer crops need a greenhouse for winter growing; winter leafy greens and other winter crops can be harvested straight from the fields; and 2) its request was unforeseeable and based on two increases in demand from a customer and a delayed harvest and crop availability caused by adverse weather conditions. Employer asserts that typically it does not grow year round; instead, it grows for eight months, provides produce from storage for two months, and grows transplants for the field for two months. This year, the weather and the buyer’s augmented needs altered the original, pre-planned schedule for its H-2A temporary labor. In support of its arguments, Employer attaches exhibits marked A through F to its request for review, including exhibit E which was attached to its request for extension to the CO. (AF 1-
j. On July 12, 2021, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal and the CO transmitted the Appeal File to BALCA. On July 19, 2021, this case was assigned to the undersigned and a Notice of Case Assignment and Order Establishing Brief Filing Deadlines was issued.

k. The Solicitor’s Office does not plan on filing a brief on behalf of the CO in this matter, and it relies on the analysis in the notice of denial.

3. Applicable Law and Analysis.


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. Request for Long Term Extension of Certification. An employer may apply for an extension of the period of employment in a labor certification application. 20 C.F.R. § 655.170. If the extension requested is more than two weeks, the employer is required to apply to the CO. Id. at § 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). 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” Id.

An employer may appeal a denial of a request for an extension by following the procedures provided by 20 C.F.R. § 655.171. Id. When an employer has requested administrative review, “the ALJ will, on the basis of the written record and after due consideration of any written submissions - which may not include new evidence - from the parties involved or amici curiae, either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” Id. at § 655.171(a).

d. Analysis. In this matter, the CO denied Employer’s requested extension on grounds that: (1) Employer’s need was clouded by Employer’s lack of greenhouse and apparent inability to
grow crops in the winter; (2) Employer’s need was foreseeable because its explanation – that it planned to file a new application for the “workers to come back and harvest in September” but it was easier to submit this extension to include the full duration of the summer and harvest months – indicated that Employer’s crop schedule and late harvest was planned at the time of its initial labor application filing; and (3) Employer’s ability to produce all season crops calls into question the seasonality of Employer’s job opportunity.

In its request for administrative review, Employer argues that its lack of a greenhouse is not indicative of its need for an extension because only summer crops – cucumber, summer squash, and eggplant – require a greenhouse for winter growing; leafy greens – leaks, broccoli, cauliflower, kale, and cabbage – may be harvested in the winter straight from the field. Employer also argues that its need was not foreseeable because it was not following a schedule formulated prior to the initial filing of its H-2A application. Rather, Employer’s buyer changed the schedule twice by demanding increased production. This coupled with adverse spring weather delayed the harvest and availability of crops. Finally, Employer argues that its need for this long term extension does not impact its typical seasonal needs because Employer usually tries to grow for only eight months per year and domestic workers provide enough manpower for the remaining four months per year.

As an initial matter, in support of its administrative appeal, Employer relies in large part on new evidence not submitted to the CO prior to its final determination. The regulations do not allow the parties to submit new evidence on administrative review and thus the undersigned will not consider evidence submitted by Employer that was not presented to the CO prior to its final determination. See 29 C.F.R. § 655.171.

Additionally, Employer’s arguments are unpersuasive and, in some instances, contrary to those made to the CO. Employer’s summary attachment provided to the CO as the only evidence in support of its extension request included the projected unit harvest per month for a lengthy list of produce confirmed by Employer’s purchasers. Contrary to Employer’s assertions, the crops Employer states are summer crops include no projected unit harvest for the warmer months of August, September and October and harvest of at least 100 cases/week for the colder months of November, December, and January. Employer provides no explanation or argument as to why the crops are included on its harvest list if it only intended to grow leafy greens, which it now seems to argue in justification for its lack of a greenhouse. Likewise, Employer raises for the first time on administrative review an unsupported argument that its need for an extension was not foreseeable because its buyer twice increased its produce demand request. In its request to the CO, Employer simply asserted that adverse weather delayed harvest by eleven months and, “[w]hile also trying to make up this lost time … maintenance during the summer months is too much for domestic workers to take on alone.”

The evidence in the appeal record demonstrates – and the CO confirmed in its denial – adverse weather conditions asserted by Employer in its request for a long term extension. However, the appeal record does not demonstrate a need by Employer for the long term extension that could not have been reasonably foreseen. While the adverse weather conditions through at least the late April 2021 frost undoubtedly caused delay in Employer’s business operations, there was no evidence offered to the CO that this delay was unforeseeable and alone
justified the need for a long term extension of the labor certification for an additional six months from July 2021 until January 2022. To the contrary, Employer’s request on its face stated a desire to extend the current certification from July 2021 to January 2022, rather than submit its planned second certification request and supports the CO’s conclusion that Employer’s second harvest schedule was pre-planned and thus foreseeable.

4. **Ruling.** Employer failed to carry its burden to establish its eligibility for an extension of its H-2A labor certification. The CO’s denial of Employer’s request for an extension is **AFFIRMED.**

**SO ORDERED** this day.

TRACY A. DALY
Administrative Law Judge