



Issue Date: 08 January 2021

BALCA Case No.: 2021-TLC-00038

ETA Case No.: H-300-19338-179110

In the Matter of:

MARY'S ALPACA, LLC,
Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (“DOL” or the “Department”) at 20 C.F.R. Part 655. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

BACKGROUND

On December 12, 2019, Mary’s Alpaca, LLC (“Employer”) submitted a H-2A Application for Temporary Employment Certification (“Form 9142A”) for three Alpaca Farm Workers. AF 70-97.¹ The “Nature of Temporary Need” was listed as “seasonal.” AF 70. The period of intended employment was February 15, 2020, to December 15, 2020. AF 78. On January 10, 2020, the Certifying Officer (“CO”) certified Employer’s application for three Alpaca Farm Workers. AF 15-25.

On December 4, 2020, Employer submitted a long-term extension request for the three Alpaca Farm Workers to February 14, 2021. AF 12-14. The following paragraphs include portions of Employer’s argument as to why it was seeking a long-term extension for the three Alpaca farm workers:

Because of the COVID-19 global pandemic, the airports in Peru were closed until October 1 when they "opened" on a limited and sporadic basis. Last minute cancellation of flights is common. All in all leading to severely limited availability. Moreover, the likely prospects of another spike in the pandemic over the next

¹ For purposes of this Decision, “AF” stands for Appeal File

several months leading to re-imposing airport shutdowns is very real. Peru has the highest Covid death rate per population of any country in the world. I doubt that I will be able to schedule the workers' outbound flights with any reasonable confidence. Added to this uncertainty is a new threat at the airport in Lima, Peru. As you may know, political strife in Peru is high, and crime has risen dramatically, particularly at the airports against Peruvians returning from abroad.

The near certain inability to return for the 2021 season is equally problematic for their resumption of program status. Our H-2A contract ends on December 15, and we cannot afford to jeopardize their individual legal status and future work authorizations. Therefore, we are respectfully submitting a request to extend the validity of the workers' period of temporary employment through February 14, 2021.

[Employer] respectfully submits that the global COVID-19 pandemic, recurring travel restriction and general instability of the Peruvian airports, and the difficulties at the US Embassy in Lima, Peru are all events outside our control, and indeed good and substantial cause warranting a long term extension.

AF 13-14.

On December 8, 2020, the CO issued a Final Determination, denying Employer's extension request pursuant in accordance with 20 C.F.R. § 655.170(b). AF 7-11. The CO explained that in its initial application, Employer listed its need as a "seasonal." AF 11. Seasonal need is a need that "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." See 20 C.F.R. § 655.103(d). The CO wrote that 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 12 months, while remaining a 'seasonal' need (i.e., tied to a certain time of year by an event or pattern)." Furthermore, the CO noted that under the regulation pertaining to extensions requests (§ 655.170), the factors listed that could justify an extension request, *e.g.*, weather conditions and unforeseen changes in market conditions, "directly impact an employer's need for labor." AF 11. Here, according to the CO, "there is no indication whatsoever in this request that the employer's need for labor has changed." AF 11. Additionally, the CO added that Employer "did not include any supporting documentation or explanation as to how the employer determined that the work could be completed by February 14, 2021, and not earlier" and that "[h]ypothetical concerns surrounding the issuance of subsequent H-2A visas has no bearing on the employer's underlying need for labor" AF 11.

On December 10, 2020, Employer submitted its Request for Administrative Review. AF 1-6. Employer wrote that the CO's denial of its extension request was arbitrary and capricious because the CO applied the incorrect legal standard for an extension. AF 1. Rather than assessing whether Employer established a seasonal need, Employer argues that the CO should have determined whether extraordinary circumstances exist to justify its extension request. AF 1. Employer asserts that "an extension must be adjudicated on its own merits, not viewed in conjunction with the employer's recurring seasonal need."

On January 4, 2021, the CO submitted a brief. The CO requests that the Tribunal affirm the denial of Employer's long-term extension request. The CO argues that Employer is not entitled to a long-term extension because Employer's period of need, if the extension were granted, would span from February 15, 2020, to February 14, 2021, a period of one year. The CO cites to 20 C.F.R. § 655.170(b), which specifically states that the CO will not grant a long-term extension request "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" Additionally, the CO points out that § 655.170(b) requires long-term extension requests to 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." Because Employer did not support its long-term extension request with documentation, the CO writes that this alone is cause for affirmance.

The CO further argues that Employer has failed to demonstrate how its need meets the definition of seasonal under § 655.103(d). The CO wrote that Employer "did not explain how its need for labor could shift from one year to another time of year, totaling 12 months, while still remaining 'seasonal' in nature." The CO also noted that Employer's concerns regarding the immigration status of its foreign workers is not a matter for the Tribunal to address or consider in rendering its decision.

ANALYSIS

Legal Standard

Employer requested administrative review. Accordingly, the Tribunal must "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." 20 C.F.R. § 655.171(a). Although no standard of review is specified in the regulation, the Tribunal reviews the CO's denial to determine whether it is arbitrary and capricious. *J and V Farms, LLC*, 2016-TLC-00022, at note 1 (Mar. 4, 2016); *see also Resendiz Pine Straw, LLC*, 2019-TLC-00052 (June 14, 2019).

Long-Term Extension Request

As referenced above, Employer sought and received temporary alien employment certification for three Alpaca farm workers from February 15, 2020, to December 15, 2020. AF 15-25; 70-97. By granting certification, the Tribunal infers that Employer established its alleged seasonal need for that period of time. Thus, the issue before the undersigned is whether Employer has met its burden to establish a need for a long-term extension until February 14, 2021.

Under 20 C.F.R. § 655.170(b):

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.

Because the total work contract period if Employer's long-term extension would be twelve months (February 15, 2020, to February 14, 2021), the CO was not required to grant the extension request absent extraordinary circumstances. As further stated in § 655.170(b), the extension request must be related to "factors beyond the control of the employer" and "[s]uch 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."

Here, Employer requested an extension because of the current conditions in Peru, which is the home of the three Alpaca farm workers. Employer explained that because of the COVID-19 pandemic, airports in Peru were closed until October 1 and subsequently opened on a limited and sporadic basis, political strife in Peru is high, and the U.S. embassy in Peru is unable to resume visa service at this time. AF 13. Thus, Employer wrote that it doubts it "will be able to schedule the workers' outbound flights with any reasonable confidence." AF 13. The CO denied Employer's long-term extension request partially because Employer's cumulative twelve month labor need weighs against a finding of seasonal need under 20 C.F.R. § 655.103(d). However, it also denied Employer's extension request because Employer's "request did not include any supporting documentation or explanation as to how the employer determined that the work could be completed by February 14, 2021, and not earlier; or extend on indefinitely for that matter." AF 11.

The Tribunal finds that the CO did not act in an arbitrary or capricious manner in denying Employer's long-term extension request. Per § 655.170(b), a long-term extension request "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." (emphasis added). At no point did Employer support its extension request with documentation showing why the extension is needed. While the difficulty of securing travel in and out of Peruvian airports may be common knowledge to some, it is not so to the Tribunal. Employer's unsupported assertions regarding the current conditions in Peru are simply not enough to carry its burden of establishing extraordinary circumstances to justify a long-term extension. Based on the foregoing analysis, the undersigned concludes the CO did not act arbitrarily or capriciously in denying Employer's long-term extension request under the H-2A program.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**. See 20 C.F.R. § 655.171(a).

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey