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).

On September 21, 2021, NV Produce Inc., (“Employer”) filed a request for expedited administrative review of the Notice of Deficiency issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification application. The undersigned has received the Administrative File (“AF”) from the Department of Labor’s Employment and Training Administration (“ETA”) on September 27, 2021. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five calendar days of the receipt of the AF.
Statement of the Case

On March 12, 2021, Employer submitted an H-2A Application for Temporary Employment Certification for forty (40) vegetable farming and harvesting workers. AF 40-60. The “Nature of Temporary Need” was listed as “seasonal.” AF 40. On March 18, 2021, the CO approved Employer’s application for the original dates of need from May 20, 2021, to October 15, 2021. AF 23-28. On September 13, 2021, Employer requested a 45-day extension of the temporary certification to November 30, 2021. AF 9. In its request, Employer asserts that:

The reason for the request is due to the delayed entry of the workers due to the unusual circumstances the U.S. consulate and world has undergone due to the corona virus (Covid-19). Our workers were unable to travel out of their country of origin due to travel restrictions placed by their respective government and unable to reach the place of employment. The delay has caused us to be backed up on the current job duties on the farms listed and therefore need additional time in order to complete the season and tasks.

AF 9.

On September 17, 2021, the CO denied Employer’s request for extension due to its failure to comply with 20 C.F.R. §655.170. In its denial the CO states:

The employer did not explain how the job duties listed in the application can be shifted from one time of year to another, while remaining a “seasonal” need (i.e., tied to a certain time of year by an event or patter). Therefore, it is unclear how the employer’s delays, caused by the COVID-19 pandemic would change the employer’s seasonal need. Likewise, the COVID-19 pandemic and its then current effects on travel, etc., were known at the time employer filed its application.

Lastly, the employer failed to submit any supporting documentation with its request to extend its work contract either related to weather conditions, or other factors beyond the control of the employer, which may include unforeseen changes in market conditions, which could not have been reasonably foreseen by the employer.

AF 7.

On September 21, 2021, Employer requested administrative review, offering no new justification for its request. AF 2.

Legal Standard

Employer requested administrative review. Accordingly, the undersigned 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 review 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).

1 References to the 63-page appeal file will be abbreviated with an “AF” followed by the page number.
Long-Term Extension Request

As referenced above, Employer sought and received temporary alien employment for forty (40) vegetable farming and harvesting workers from May 20, 2021, to October 15, 2021. AF 40-60. By granting certification, the undersigned 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 an extension until November 30, 2021.

Under 20 C.F.R. §655.170(b):

Employers seeking extensions of more than two 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 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 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.

Analysis

If Employer’s long-term extension was granted it would have H-2A workers for seven months (May 20, 2021 to November 30, 2021). AF 9. As 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 Covid-19 pandemic and travel restrictions which prevented its employees from reaching their place of employment. AF 9. Further, Employer asserts that the delay of its employee's arrival caused a delay in completing job duties, and it needs its employees for 45 additional days. Id.

The CO denied Employer's long-term extension request because Employer did not meet the standard of showing that Covid-19 impacted its seasonal need. In addition, Employer did not how the season could change due to Covid-19 delays at the time of its application. AF 4-7. The CO further found Employer's extension request could not be granted because Employer "failed to submit any supporting documentation with its request to extend its work contract either related to weather conditions, or other factors beyond the control of the employer, which may include unforeseen changes in market conditions, which could not have been reasonably foreseen by the employer." AF 7.
The undersigned finds that the CO did not act arbitrarily and capriciously 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." At no point did Employer support its extension request with documentation showing why the extension is needed within the parameters of the applicable regulations. The difficulty of securing travel into the United States from other countries was not shown to change the seasonal need.

In addition, Employer cites the Covid-19 pandemic for the delay but fails to provide how it was reasonably unforeseeable. The undersigned agrees with the CO’s assertion that it is unlikely that Employer was unaware of the potential for delays during the time it filed its application. Especially with the pandemic beginning almost two years ago. Although the circumstances of the Covid-19 pandemic are out of Employer’s control, the undersigned finds they were not unforeseeable and there was no showing they changed the seasonal nature of the work. Therefore, Employer failed to meet its burden to justify a long-term extension. Based on the preceding analysis, the undersigned concludes that the CO did not act arbitrarily and 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.

SO ORDERED.

WILLIAM P. FARLEY
Administrative Law Judge
Washington, DC