

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 October 2020

OALJ Case No.: 2021-TLC-00006
ETA Case No.: H-300-20017-260338

In the Matter of:

AKSD ENTERPRISES INCORPORATED
d/b/a AKSD ENTERPRISES, INC.,
Employer.

Appearance: Rose Whitiak
Greenfield Township, PA
For Employer

Kate S. O'Scannlain
Solicitor of Labor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Noran J. Camp
Administrative Law Judge

DECISION AND ORDER

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.

I. STATEMENT OF THE CASE

On March 6, 2020, the Certifying Officer ("CO") of the U.S. Department of Labor's Office of Foreign Labor Certification ("OFLC"), granted AKSD Enterprises, Inc.'s ("Employer") H-2A Application for Temporary Employment Certification for nine (9)

Farmworkers and Laborers. AF at 12.¹ Employment was to begin April 1, 2020, and end November 30, 2020. *Id.*

In an undated letter, with a September 22, 2020, follow-up letter, Employer asked the CO to extend the labor certification to December 31, 2020, pursuant to 20 C.F.R. § 655.170(b). AF at 7-8. On September 24, 2020, the CO denied the extension request. AF at 2-6.

On October 1, 2020, Employer sought review of the extension denial. AF at 1. The Administrative File (“AF”) was transmitted to the Office of Administrative Law Judges (“OALJ”) on October 7, 2020, and assigned to me on October 19, 2020. Employer’s letter seeking review did not indicate whether it sought an expedited administrative review (20 C.F.R. § 655.171(a)), or a *de novo* hearing (20 C.F.R. § 655.171(b)). Accordingly, on October 19, 2020, I advised the parties that in the absence of a request for a *de novo* hearing, I would consider the matter be an administrative review, unless I heard otherwise from Employer no later than close of business on October 20, 2020. There was no response. I thereupon granted the parties leave to file briefs by no later than close of business on October 23, 2020. There was no response.

Accordingly, pursuant to 20 C.F.R. § 655.171(a), this Decision and Order is based on the Administrative Record alone.

II. STANDARD OF REVIEW

This matter is before me as an expedited “administrative review.” See 20 C.F.R. §§ 655.165(b) (applicant may pursue an “expedited administrative review” or a “de novo administrative hearing”), 655.171(a) (“Administrative review”). I am authorized to “either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” *Id.*, § 655.171(a).

As acknowledged by the Employment and Training Administration (“ETA”), the promulgator of the above regulation,² the regulations are silent on the actual standard to be applied to that review. See *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 Fed. Reg. 36,168, 36,214 (July 26, 2019).³ However, the only regulation that does specify a standard for review of such a decision by the CO, provides that “[t]he ALJ must uphold the CO’s decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 20 C.F.R. § 655.461(d)(2) (regarding

¹ Administrative File, filed October 7, 2020.

² See *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6,884 (Feb. 12, 2010) (Final Rule).

³ I note that ETA has issued a Proposed Regulation to correct this, and that would “incorporate the arbitrary and capricious standard of review into requests for administrative review.” *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 Fed. Reg. 36,168, 36,214 (July 26, 2019). The proposed change “codifies the Department and OALJ’s well-established and longstanding interpretation of the standard of review for such requests.” *Id.* (citing *J and V Farms, LLC*, 2016-TLC-00022, at 3 & n.2 (Mar. 7, 2016)).

BALCA review of denial of certification for temporary workers in the Commonwealth of the Northern Marianas Islands, “CW-1 Workers”); *see also In re AKSD Enterprises, Inc.*, 2019-TLC-00090 (October 18, 2019) (CO’s decision must be affirmed unless it is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law”).

Accordingly, I will affirm the CO’s decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

III. DISCUSSION

In seeking an extension, Employer is required to submit “documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer.” 20 C.F.R. § 655.170(b). The CO rejected the extension request on the grounds that: (1) 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;” and (2) Employer provided no documentation to support the request.

I disagree on both counts.

A. “Seasonal” Need.

Regarding the seasonal nature of the work, Employer explained that the work will focus on its “second harvest,” which, it says “is now planned to be cut in beginning [*sic*] December.” AF at 1. It further explained that this December harvest will suffer in quality, but still be saleable. *Id.* Moreover, Employer does offer an explanation for how the “second harvest” – seasonal work – has now shifted from its original date in October, to December. Specifically, according to Employer, the first harvest was delayed one month (from April to May) because of COVID-19 related travel delays. That delay, in turn, “pushed back the regrowth period of our second harvest, which is now planned to be cut in beginning [*sic*] December (Originally scheduled to be cut in October).” In short, Employer did explain how the job duties could shift from November to December and still be a “seasonal” need.⁴

I find that it is arbitrary, capricious, and an abuse of discretion for the CO to deny the extension on the ground that no such explanation was offered when in fact, it was offered.

B. Documentation.

Employer explained that it sought the extension because of “the delayed arrival of our H-2A workforce.” AF at 1. Employer further explained that the delays arose from travel delays attributable to the COVID-19 pandemic. *Id.* Indeed, Employer’s appeal letter goes into some detail about which employees were delayed, what country they were coming from, which embassy was involved in the delay, what date the workers finally arrived, and which workers

⁴ I am not a farmer, and am not qualified to determine whether this explanation corresponds with actual farming practices. However, the CO does not challenge this explanation, nor offer any reason for why I should not accept it as correct.

still have not been able to arrive. *Id.*

The CO is correct that no separate documentation – apart from Employer’s detailed account of what happened – was offered in support of the above explanations. However, the CO also does not give any hints about what type of documentation would suffice in this most unusual situation – a sudden and unexpected world-wide shut-down of international travel and disruption of communications due to a world-wide pandemic. Nor does the CO even hint that the facts recounted in Employer’s letter are in any way incorrect or exaggerated. In a prior proceeding involving the same Employer, BALCA adopted the rule that in these cases, “written assertions that are reasonably specific and indicate their sources or bases shall be considered documentation and must be considered by the CO and given the weight they rationally deserve.” *In re AKSD Enterprises, Inc.*, 2019-TLC-00090 at 4 (October 18, 2019) (quotation marks omitted). Such a rule is no less warranted now, when the ability to obtain outside documentation would be constrained because of complications arising from the pandemic.⁵ And, it would be unfair to this Employer to advise it that this type of documentation is sufficient just two years ago, and to then reject it, when there is no meaningful distinction to be made between the cases in this regard.

I find that it was arbitrary, capricious, and an abuse of discretion for the CO to reject the extension request for its supposed lack of documentation, inasmuch as sufficient documentation was in fact offered.

IV. CONCLUSION & ORDER

For the reasons stated above, **IT IS HEREBY ORDERED** that the September 24, 2020, Final Determination of the CO, denying the request for an extension to December 31, 2020, is **REVERSED**.

IT IS SO ORDERED.

NORAN J. CAMP
Administrative Law Judge

Boston, Massachusetts

⁵ I take judicial notice of the fact that the COVID-19 pandemic, currently widespread throughout the United States and the rest of the world, has caused major disruptions in travel and procedures, as evidenced even by OALJ’s own website. *See, e.g.*, https://www.dol.gov/agencies/oalj/COVID_19_AND_HEARINGS.