DECISION AND ORDER REVERSING DENIAL OF EXTENSION REQUEST


On December 28, 2021, 4L Construction, Inc., (“Employer”) requested a de novo hearing in regard to the Certifying Officer’s December 27, 2021 denial of Employer’s request for an extension of the period for which its H-2A temporary labor certification application had been previously certified. During a January 7, 2022 pre-hearing conference call with the parties’ Counsel, Employer’s Counsel asserted that it would not be offering any additional evidence in this matter, and requested that Employer’s request for a de novo hearing be converted to a request for administrative review under 20 C.F.R. § 655.171(a). Counsel for the Certifying Officer did not object to this request. I received the Administrative File subsequently on January 7, 2022. By Order dated January 10, 2022, Employer’s motion to convert its request for a de novo hearing to a
request for administrative review was granted and the parties were directed to file briefs on or before January 12, 2022.

Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record, and is issued within five (5) business days of the receipt of the Administrative File.

**BACKGROUND**

On April 7, 2021, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A ("Application"). AF 137-184.1 The Employer’s Application requested certification for ten (10) farm workers/laborers, under the occupation title of construction laborers, for the period beginning June 1, 2021, and ending December 31, 2021, on the basis of a seasonal need. *Id.*

On May 5, 2021, after the completion of procedural requirements, the Certifying Officer certified Employer’s H-2A application for ten (10) farm workers/laborers, under the occupation title of construction laborers, for the period of June 1, 2021, through December 31, 2021. AF 94-100.

By email correspondence dated December 10, 2021, Employer filed an extension request for the previously certified period of employment with attachments. AF 22-93. Employer’s December 10, 2021 letter requested that its certification for nine (9) of the workers be extended through January 31, 2022, because of “material delays.” Employer cited the regulation at 20 C.F.R. § 655.170(b) which states in pertinent part:

**Employers seeking extensions of more than two weeks may apply to the Certifying Officer. 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.**

Employer stated that the delay on its project was due to the fact that the materials required to complete the job were delayed in being delivered to its job sites, and because many of the building materials are sourced from other countries, resulting in further delays. AF 24. Employer further stated:

**The COVID-19 pandemic has further affected our operations in several ways. In particular, global shipping has been hard hit, as many companies try to contain the spread of the virus amongst their employees. In addition, lockdowns in other countries affect materials that were supposed to be shipped to the United States. For example, raw materials that are sourced from China experienced significant delays in arrival into the U.S. This is a frequent issue throughout the United States,**

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1 References to the appeal file will be abbreviated with an “AF” followed by the page number.
which receives roughly 30% of their construction materials from China. (See Exhibit B). Many supply orders are delayed while others are cancelled entirely. This has caused an escalation in pricing on the materials that are available, which in turn, negatively affects our construction projects.

AF 24.

In support of its request for an extension Employer attached as Exhibit A, a letter from 4L Construction, Inc.’s general contractor “showing the delays of material delivery at the worksites in Plainfield, IA.” Due to the alleged delay, Employer asserted that it would not be able to complete its work in the original timeframe. Employer explained that the work is ordinarily seasonal and is intricately intertwined with weather conditions due to the “inability to set concrete in cold and snowy weather conditions,” citing its attached Exhibit C. Employer asserted that the concrete on its projects had been set, but the work on its H-2A application could not be completed during the ordinary season, because of the stated material and shipping delays. Accordingly, Employer requested that its certification be extended through January 31, 2022, for nine (9) workers “in order to successfully complete the work at [its] construction projects.” AF 25.

Employer’s attached Exhibit A is a November 15, 2021 letter from Mindy Rodamaker in the purchasing and drafting department of “Premier AG Systems,” addressed to 4L Construction. Ms. Rodamaker’s letter states, “As you are aware, we are currently having unprecedented supply chain issues which have resulted in material delivery delays to the project located at MBS Farms in Plainfield Iowa.” She further states:

Unfortunately, this will delay the completion date of the work. As such, we respectfully request you continue to accommodate the schedule. The end date of work was December 31, 2021 and is now pushed to January 31, 2022. We apologize for any inconvenience this may cause.

AF 27.

Employer attached, as Exhibit B, three online articles addressing the COVID-19 pandemic’s effect on the construction industry and supply chain problems and delays. The first article is dated April 28, 2021, authored by Joe Bousquin and titled, “Amid delays and rising prices, contractors turn to tech to mitigate supply disruptions.” The second article, dated April 14, 2021, appears to be from a law firm’s newsletter and restates information from an article from the Associated General Contractors of America, titled, “Beware Project Impacts due to Rising Material Costs and long lead times.” The third article appeared in the Milwaukee “BizTimes” on May 14, 2021, and is authored by James Phelps, the President of JCP Construction. The article which is titled, “Paving the way for a successful construction project” addresses construction timelines and related issues.

Employer also attached, as its Exhibit C, a letter authored by Arturo E. Schultz, a professor in the Division of Civil and Environmental Engineering at the University of Texas at San Antonio, which is addressed to the Department of Homeland Security, U.S. Citizenship & Immigration Services. The letter is identified as a “Commentary on the Structural Risk of Constructing
Livestock Confinements during Winter Weather” and discusses seasonal weather concerns related to concrete construction.

On December 27, 2021, the CO issued a Denial of Employer’s long term extension request. The CO reiterated the Employer’s statement supporting its extension request as indicated in Employer’s December 10, 2021 letter. The CO also referred to the Employer’s temporary need statement in its H-2A application, which noted the seasonal need of its work due to difficulty in construction in winter weather conditions. The CO determined that based on Employer’s original temporary need statement, “the job duties as described in the Employer’s application as well as the limitations outlined in the temporary need statement, all point to the inability to complete these tasks in the winter month of January.” The CO further stated:

Given that the employer began this job opportunity in June, it is unclear how the employer was unaware of the delays in obtaining construction materials to perform the job as far back as June of 2021, and only towards the end of the contract period, has the employer identified said delays. Given that the supply chain issues and the effects of the Covid-19 Pandemic, have been identified as an issue for more than a couple of months now, it is unclear that the employer could not have reasonably foreseen this as an issue at the beginning of its contract period. The employer also has failed to establish how they may perform such duties and tasks during a time period that they have attested to is not within their season and are not capable of performing.

AF 17.

The CO also determined that the Employer had not submitted any work contracts to support its extension request. Accordingly, the CO denied Employer’s extension request on the basis of “missing supporting documentation,” the lack of clarity regarding “how the employer was not able to foresee the shortage in materials and delivery delays,” and a lack of explanation of how the employer can perform the duties in the winter months.

On December 28, 2021, Employer filed a timely request for a de novo hearing in regard to the CO’s denial of its request for an extension of its H-2A certification. AF 1-8. At a conference call with the parties the Employer requested that its de novo hearing request be converted to a request for administrative review.

As noted above by Order dated January 10, 2022, Employer’s motion to convert its request for a de novo hearing to a request for administrative review was granted and the parties were directed to file briefs on or before January 12, 2022. Both the Employer and the Certifying Officer filed timely briefs that were received and considered by the undersigned on January 12, 2022.

**ISSUE**

Whether the Certifying Officer properly denied Employer’s extension request due to Employer’s failure to establish grounds for its extension request under 20 C.F.R. § 655.170(b)?
SCOPE OF REVIEW

Where an employer has requested administrative review, as in the current case, the applicable regulation provides:

[Within 5 business days after receipt of the ETA administrative file 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. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the OFLC Administrator and DHS by means normally assuring next-day delivery.

20 C.F.R. § 655.171(a).

DISCUSSION

The H-2A regulations allow for the extension of the H-2A certification period under certain circumstances. The applicable regulation at 20 C.F.R. § 655.170 provides the following in regard to a request for a “long term extension” (i.e., more than 2 weeks):

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 not grant extensions 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.

20 C.F.R. § 655.170(b).

In the present case, the Employer received certification for ten (10) farm workers/laborers, under the occupation title of construction laborers, for the period of June 1, 2021, through December 31, 2021. On December 10, 2021, Employer requested an extension for nine (9) of the certified workers through January 31, 2021, due to delays in receiving necessary construction materials. Thus, in this case the total requested certification period, including the one month extension, is eight (8) months.

Employer supported its request with a letter from 4L Construction, Inc.’s general contractor, which Employer asserts shows “the delays of material delivery at the worksites in Plainfield, IA.” AF 24. Employer’s attached Exhibit A is a November 15, 2021 letter from Mindy Rodamaker in the purchasing and drafting department of “Premier AG Systems,” addressed to 4L Construction. Ms. Rodamaker’s letter states, “As you are aware, we are currently having unprecedented supply chain issues which have resulted in material delivery delays to the project
located at MBS Farms in Plainfield Iowa.” She further notes that this issue will delay the projection’s completion date, and states, “As such, we respectfully request you continue to accommodate the schedule. The end date of work was December 31, 2021 and is now pushed to January 31, 2022. We apologize for any inconvenience this may cause.” AF 27.

Employer also submitted general supporting information about the impact of the COVID-19 pandemic on the construction industry, including commentary on supply chain problems in construction materials and information about weather-related issues affecting construction.

In regard to the seasonality of the job opportunity, the Employer explained that the work is ordinarily seasonal and is intricately intertwined with weather conditions due to the “inability to set concrete in cold and snowy weather conditions,” citing its attached Exhibit C. Employer asserted that the concrete on its projects had been set, but the work on its H-2A application could not be completed during the ordinary season because of the stated material and shipping delays. Accordingly, Employer requested that its certification be extended through January 31, 2022, for nine (9) workers “in order to successfully complete the work at [its] construction projects.” AF 25.

On December 27, 2021, the CO issued a Denial of Employer’s extension request. The CO denied Employer’s extension request on the basis of “missing supporting documentation,” the lack of clarity regarding “how the employer was not able to foresee the shortage in materials and delivery delays,” and a lack of explanation of how the employer can perform the duties in the winter months. However, the CO’s denial of the Employer’s extension request appears to disregard the explanation and documentation accompanying the Employer’s extension request.

The CO determined that based on Employer’s original temporary need statement “the job duties as described in the Employer’s application as well as the limitations outlined in the temporary need statement, all point to the inability to complete these tasks in the winter month of January.” This statement fails to acknowledge that the Employer stated, in its request for a one (1) month extension, that the concrete had already set on the project, but the extension was requested to finish the project because of delays encountered in receiving the necessary materials.

In this regard Employer stated:

This work is ordinarily seasonal as employer’s work is intricately intertwined with weather conditions (i.e. inability to set concrete in cold and snowy weather conditions). (See Exhibit C). However, all the concrete on these projects has been set, but the work on this application could not be completed during the ordinary season, because of the aforementioned material and shipping delays (See Exhibit A).

AF 25.

As the extension request in this case is only for one (1) additional month, Employer’s explanation is reasonable and consistent with its original statement asserting that concrete work should be performed prior to winter.
Although some BALCA cases addressing extension requests have turned on whether the extension request runs contrary to the seasonality of the Employer’s labor certification, this analysis must be dependent on the specific facts and determined on a case-by-case basis. Otherwise, all extension requests would be rejected as inconsistent with the originally alleged seasonal need. In this case, where Employer asserted in its request for an extension that the concrete work on the project was already “set” and the one (1) month extension was requested for finishing the project work due to the delays encountered, Employer’s explanation and request for a limited extension is justified.

The CO also questioned whether the delay in receiving the necessary materials was unforeseen by the Employer. The CO states:

Given that the employer began this job opportunity in June, it is unclear how the employer was unaware of the delays in obtaining construction materials to perform the job as far back as June of 2021, and only towards the end of the contract period, has the employer identified said delays. Given that the supply chain issues and the effects of the Covid-19 Pandemic, have been identified as an issue for more than a couple of months now, it is unclear that the employer could not have reasonably foreseen this as an issue at the beginning of its contract period.

AF 17.

The CO’s statement questions whether Employer should have known that it would encounter supply chain problems caused by the COVID-19 pandemic. However, the statement by the CO, as well as the CO’s analysis applies an overly broad standard. Employer does not have to prove that it was unaware that there may be supply chain problems and delays in material delivery that have been caused by the COVID-19 pandemic generally, but rather whether it should have “reasonably foreseen” the specific delay that would apply to its particular project.

Employer has supplied three online articles, dated April and May 2021, that clearly support the proposition that the ongoing pandemic has caused supply chain problems in the construction industry. However, even assuming that it is a generally accepted notion that the COVID-19 pandemic has caused supply chain delays in many instances, there is no support in the record that Employer was aware of how the delays would specifically impact its current labor certification and construction project, nor is there any reason to believe that Employer could have obtained that specific information at the time it originally requested certification. Surely the CO is not suggesting that this Employer should have speculated on the potential for delays when it made its labor request, and in addition, speculated with 100% accuracy. Had the Employer speculated and attempted to estimate this factor at the time it requested its original certification, without specific supporting evidence, it is very likely that its certification would have been denied for lack of precise documentation that could not have been provided at that time.

In this case, the Employer supports its extension request with a November 15, 2021 letter from its general contractor, which specifically documents the impact of the delay in obtaining the materials for this particular job, and the projected extension necessary due to the actual delay that
occurred in this case. After receiving this letter, the Employer filed its extension request for the specific length of the extension supported by the documentation, which, in this case, was for one (1) additional month, from December 31, 2021, to January 31, 2021. After reviewing the record in this case, I find that the Employer has established through this documentation, “that the extension is needed.” I further find that the specific need in this case “could not have reasonably been foreseen by the employer,” as required by the applicable regulation pertaining to extension requests. See 20 C.F.R. § 655.170(b).

BALCA has acknowledged that general supply chain problems caused by the COVID-19 pandemic are no longer unforeseeable and cannot provide a blanket support for all requests for extensions of H-2A certifications. See e.g. R & R Christo Construction, LLC, 2022-TLC-00045, 00048, and 00049 (Dec. 21, 2021). However, recent BALCA cases, which I find to be persuasive, support that a foreseeability finding should be based on the facts of a particular case and not dependent on general supply chain considerations. See SBH AG Services, Inc., 2022-TLC-00040, 00043 (Dec. 23, 2021)(A foreseeability finding should be based on an employer’s particularized situation and specific need, and not a blanket reliance on universal supply chain issues, especially because employers are largely prohibited from relying upon generalized industry trends and statistics when applying for certification).2 See also Signet Construction, LLC, 2022-TLC-00044, slip op. at 6 (Dec. 23, 2021)(While recognizing that pandemic related delays are foreseeable, “an extension that nevertheless becomes necessary, due to a greater degree of delay than anticipated,” should still meet the “could not have been reasonably foreseen” standard).

After reviewing the record in this case, and in consideration of the explanation and documentation provided by the Employer, I find that Employer has provided the required support for its extension request. The CO’s denial failed to consider and adequately weigh the Employer’s explanation regarding seasonality in this case, as well as the specific documentation that supported an extension of thirty (30) additional days, amounting to a total certification period of eight (8) months. Thus, the CO’s determination is not supported by the record. Therefore, the CO’s denial of the Employer’s extension request is reversed. Although a general recognition and acknowledgement that supply chain delays have been caused by the pandemic should not be a blanket basis to support and establish all extension requests, it also should not be a blanket reason to deny all legitimate and supported certification extension requests that comply with the applicable regulation. As noted in SBH AG Services, Inc., 2022-TLC-00040, 00043, slip op. at 6, “The extension mechanism was not intended to account for an employer’s potentially “shifting” season, but was the result of the Department’s recognition that employers may need some flexibility in the period of need due to unforeseen circumstances outside of their control.”

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2 See BMC West Corporation, 2016-TLN-00039 (May 18, 2016)(general statistics regarding an industry are insufficient to establish a specific employer’s need); GM Tile LLC, 2017-TLN-00032 (Apr. 25, 2017)(data showing an overall trend in an industry is insufficient to establish a specific employer’s need).
CONCLUSION

After reviewing the totality of the evidence in the record, I find the basis for the CO’s denial is not supported by the evidence as outlined above. In addition, I find Employer has met its burden of proving its need for a one (1) month extension, from December 31, 2021, to January 31, 2022, for the requested nine (9) construction laborers, in compliance with the regulation at 20 C.F.R. § 655.170(b).

ORDER

Accordingly, IT IS HEREBY ORDERED that the CO’s denial of Employer’s extension request is REVERSED and Employer’s previous certification is extended to January 31, 2022, for the requested nine (9) construction laborers.

For the Board of Alien Labor Certification Appeals:

SEAN M. RAMALEY
Administrative Law Judge