In the Matter of:

UNITED DEVELOPMENT MANAGEMENT COMPANY, LLC,
Employer.

DECISION AND ORDER REVERSING
DENIAL OF LONG-TERM EXTENSION REQUEST

This matter arises under the temporary agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188, and the 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 seasonal or temporary basis.

I. Factual Background

United Development Management Company, LLC (“Employer”) is a specialized agricultural construction company that builds livestock confinements and operates out of Brookings, South Dakota. AF 309. On February 2, 2021, Employer filed an Application for Temporary Employment Certification ETA Form 9142A. AF 309-44. Employer sought certification to employ a total of 44 farm laborers from April 1, 2021, through December 31, 2021. See id. Eventually, on March 31, 2021, the Certifying Officer (“CO”) issued full certification for the 44 farm laborers. AF 106-12.

On December 9, 2021, Employer requested a long-term extension for 17 of the 44 workers from December 31, 2021, through March 15, 2022. AF 13-97. In its request, Employer indicated “[t]he delay on this project was due to the fact that the materials required to complete the job were delayed in being delivered to our job sites. Also, many building materials are sourced from other countries resulting in further delays.” AF 15. Employer went on to say,

[t]he 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.

1 The Administrative File will be referred to herein at “AF.”
Id. Employer attached to its request several emails and letters from suppliers documenting this delay as well as news articles about the global supply chain issues. AF 18-35.

On December 14, 2021, without issuing a Notice of Deficiency, the CO denied Employer’s request for the long-term extension. AF 8-12. The CO identified two reasons for the denial. First, Employer failed to explain how its need for these farm laborers is still a “seasonal” need. AF 11-12. The CO cited to Employer’s statement during the original certification process in which it indicated the work could not be done during the winter months. Id. This, according to the CO, meant the request for an extension to do work during the first three months of the year, was an untenable change in position. Second, the CO noted that the “supply chain issues were known in July 2021,” and thus were reasonably foreseeable. AF 11.

On December 28, 2021, Employer filed a timely request for a de novo hearing. AF 1-7. At a preliminary conference call with the parties on January 5, 2022, Employer requested that the de novo hearing be converted to an administrative review and the parties be permitted to file briefs by January 10, 2022. The CO and Employer timely submitted briefs (“CO Br.” and “Er. Br.”, respectively).

II. Standard of Review

The scope of review in H-2A cases is limited. The current case arises from Employer's request for administrative review in regard to the CO’s denial of a long-term extension.

Under the applicable regulation, in cases where administrative review has been requested, “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.” 20 C.F.R. § 655.171(a).

III. Analysis

H-2A employers may apply for an extension of the certified period of employment. Id. § 655.170(b). Here, Employer has requested a long-term extension of just over two months. The applicable regulation provides, in relevant part:

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 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.
Id. § 655.170(b) (emphasis added). Thus, an employer requesting an extension that would make the total period of employment 12 months or greater, as here, must first show (1) extraordinary circumstances are present. Then it must show (2) the extension request was made in writing with supporting documentation, and (3) the circumstances necessitating the extension “could not have been reasonably foreseen.” Id. § 655.170(b)

As the parties reference in their respective briefs and supplemental authority filings, four other BALCA judges recently addressed this exact issue in strikingly similar, if not identical, contexts. In R&R Christo Construction, 2022-TLC-00046 (ALJ Dec. 21, 2021), the administrative law judge (“ALJ”) affirmed the CO’s denial, finding the employer “failed to satisfactorily explain how work that was previously established to be dangerous or impossible during the coldest winter months . . . suddenly became feasible due to supply chain delays brought” on by the pandemic. R&R Christo Construction, 2022-TLC-00046, PDF at 5. The ALJ also rejected the employer’s contention that the supply chain issues were not reasonably foreseeable. Id.

In Signet Construction, LLC, 2022-TLC-00044 (ALJ Dec. 23, 2021), the ALJ reversed the CO’s denial. In finding the CO erroneously maintained the employer had not shown how its seasonal need had shifted or that it could perform the work, the ALJ reasoned that the employer explained that there are more days with snow and ice in January and February than in other months, which would present a safety hazard, but did not represent that construction was impossible or that there were no snow- and ice-free days on which construction could proceed. Given the delay, clearly the [e]mployer would rather extend its H-2A workforce and manage the safety and weather issues to complete the project – perhaps with more days off for weather than in its preferred construction season, the fall – than lose its workforce and not complete this six-week project. The denial’s assertions that the [e]mployer could not perform the work due to weather or is changing its tune, “runs counter to the evidence before the agency.” State Farm, 463 U.S. at 43.

Signet Construction, LLC, 2022-TLC-00044, PDF at 4 (emphasis in original).

The ALJ also determined the CO failed to apply the correct standard when evaluating foreseeability. Id. at 5. Instead of an “employer- and job-specific” inquiry, the CO merely treated the COVID-19 pandemic and related delays as presumptively foreseeable. Id. at 6. “Under the standard argued by the CO . . ., no pandemic-related delay could qualify an employer because in general pandemic-related delays are foreseeable.” Id. (emphasis in original).

In SBH Ag. Servs., Inc., 2022-TLC-00040; 43 (ALJ Dec. 23, 2021), the employer requested an extension of workers until March 2022. The ALJ found the employer has shown extraordinary circumstances based on the “pandemic that has persisted for almost two years.” SBH Ag. Servs., Inc., 2022-TLC-00040; 43, PDF at 7. As for foreseeability, the ALJ noted the analysis should not be based on a “blanket reliance on universal supply chain issues” and instead focus on an employer’s “particularized situation and specific need.” Id. at 7-8. Using this standard, the ALJ

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2 The period from April 1, 2021, to March 15, 2022, is technically 11.5 months. It is unclear from the regulations how many days are necessary for it to count as a full month. For purposes of this decision, I will round up to 12 months.
found the employer could not have reasonably foreseen the supply chain disruptions and reversed the CO’s denial. *Id.* at 8-9.

Finally, and most recently, in *4L Construction, Inc.*, 2022-TLC-00051 (ALJ Jan. 13, 2022), which did not involve a request totaling 12 months or greater, the ALJ reversed the CO’s denial. The ALJ reiterated that the “analysis must be dependent on the specific facts and determined on a case-by-case basis.” *4L Construction, Inc.*, 2022-TLC-00051, PDF at 7. Based on this standard, the ALJ found the employer provided sufficient documentation showing the “ongoing pandemic has caused supply chain problems in the construction industry.” *Id.*

Having addressed the landscape of recent relevant decisions, I will now turn to Employer’s request for a long-term extension.

1. **Extraordinary Circumstances**

At this point, almost two years into the unprecedented COVID-19 pandemic, everyone is well-acquainted with the extreme exigencies it has caused. The public health emergency has put a tremendous strain on the United States economy, and specifically, the supply chain. Consequently, “[t]here is really no dispute that . . . the impact of COVID-19 constitutes extraordinary circumstances.” WM. F. Puckett, Inc., 2020-TLC-00117, PDF at 15 (ALJ Sept. 25, 2020) (emphasis added); see *Merrill v. People First*, 141 S. Ct. 25, 26 (2020) (Sotomayor, J, dissenting) (“The severity of the COVID-19 pandemic should, by now, need no elaboration.”); *Fitzgerald v. Shinn*, No. CV-19-5219-PHX-MTL, 2020 U.S. Dist. LEXIS 109069, at *13 (D. Ariz. June 22, 2020) (“[In the context of tolling t]here is little doubt that ultimately, the COVID-19 pandemic will be considered an extraordinary circumstance.”).

2. **Request Made in Writing with Documentation**

On December 9, 2021, Employer made a written request to the CO identifying specific supply chain issues delaying the project and its needs for 17 of its 44 approved laborers to remain for a little over two additional months. AF 13-15. In its request for an extension, Employer averred

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. . . . Many supply orders are delayed while others are cancelled entirely.

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3 It appears most cases combine the “extraordinary circumstances” and “foreseeability” analyses because they often rely on identical circumstances. For clarity of the analysis, I think it is appropriate to consider them separately. This distinction is particularly relevant because “extraordinary circumstances” only have to be shown when the extension would make the total period greater than or equal to 12 months. That is, if the total period with the extension is under 12 months, an employer is only required to show the need was not reasonably foreseeable. Therefore, as a matter of logic, “extraordinary circumstances” must mean something different from “reasonably foreseeable” warranting separate analyses.
AF 15. Employer attached to the request several letters and emails from various suppliers confirming the extreme delay of materials necessary to complete the construction project. See AF 18-35. For example, in a letter from its Vice President of Operations, one supplier, VES-Artex, wrote: “[W]e are currently having unprecedented supply chain issues which have resulted in material delivery delays.” AF 21. This statement is repeated in letters from three other suppliers, Steadfast Electric, Crest Structures, and Milbank Winwater. AF 18-20. In addition, an email string shows issues that Employer had in getting skylights for a project due to shipping delays. AF 22-25. This information clearly supports Employer’s stated reason for needing the extension: the COVID-19 pandemic and resulting supply chain and shipping delays have necessarily extended the project timeline.

3. Foreseeability

“Foreseeability” is conventionally defined as the “ability to see or know in advance.” Foreseeability, BLACK’S LAW DICTIONARY (6th ed. 1990). According to the CO, “any argument by Employer that these material delays and shortages in 2021 was (sic) unforeseen would run contrary to all Employer’s evidence.” CO Br. at 8. Citing to the news articles attached to the extension request, the CO states “the supply chain issues . . . started in 2020 and continued throughout 2021,” which provided Employer with “ample time to assess its project needs and anticipate delays in materials.” Id. at 6-7.

The CO does not explain how Employer would have been able to “see or know in advance” that the materials of this specific project would be delayed. As we have witnessed over the past 18 months, businesses and individuals are suffering from the detrimental effects of COVID-19. The pandemic is an ever-evolving situation wrought with new disease variants and changing public health recommendations that have had far-reaching consequences on the economy and supply chain. This requires a business to be flexible when determining the manner in which it will complete projects. It is ostensibly for this reason the long-term extension provision exists: to provide businesses with a way to complete the projects it brought the workers to do without having to undergo the certification process again.

Further, even assuming Employer predicted the supply chain issues and ordered more material earlier, that preparation does not change that the materials were delayed. No amount of prognosticating could ameliorate the effects of the ongoing and widespread supply chain disruptions.

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4 In his briefs, the CO states these letters lack indicia of credibility because they are “almost verbatim copies of one another.” CO Br. at 7. I note these appear to be form letters that are likely uniform across the industry. The letters appear trustworthy on their face: they are signed, dated, and on company letterhead. Additionally, there are only so many ways to convey that the materials are delayed.

5 It is unlikely the regulations contemplated a pandemic resulting in global supply chain issues.

6 As the ALJ in 4L Construction, Inc. aptly put it:

[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.]
The CO, in its denial and brief, also takes issue with Employer’s explanation for how this work remains seasonal despite previously stating the work could not be done in the cold winter months. I first note that an explanation of how the work during the extension meets the already approved “seasonal” employment does not appear in the regulation. Nonetheless, Employer did adequately explain how the work would be performed in the winter months, stating:

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). 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.

AF 16 (citation omitted). As the ALJ in SBH Ag. Servs., Inc., correctly observed “clearly the [e]mployer would rather extend its H-2A workforce and manage the safety and weather issues” than leave the project unfinished.⁷

Finally, other recent cases have suggested delays relating to the COVID-19 pandemic are merely “general supply chain issues” without showing a specific need. This, however, improperly conflates the foreseeability inquiry with the requirement that the employer provide “documentation showing that the extension is needed.” 20 C.F.R. § 655.170(b). The specifics of any supply chain issues can be verified by examining the supporting documents accompanying an employer’s extension request. If an employer states in its request that it is experiencing delays relating to the pandemic, it will need to back that up with appropriate documentation. Thus, no employer will be able to rely on bald assertions of delays due to COVID-19 or supply chain disruptions without the supporting documentation required by the regulation.

In sum, I find Employer, in its application for a long-term extension, has satisfied the requirements of section 655.170(b). The ongoing COVID-19 pandemic and attendant supply chain disruptions constitute extraordinary circumstance warranting an extension. Employer provided its request in writing with supporting documentation exhibiting the delays specific to the project at hand. Lastly, the delays relating to the pandemic were not reasonably foreseeable.

⁷ I note the CO represents the interests of the United States. It seems self-evident during these turbulent times that the Department of Labor should focus on supporting American businesses as they try to maintain operations and contribute to the economy. In his first address to a joint session of Congress, President Biden spoke of “help[ing] . . . our businesses succeed in the 21st-century economy.” Joseph R. Biden, President of the United State, Remarks in Address to a Joint Session of Congress (Apr. 28, 2021). The CO’s extraordinarily rigid position in this case seems to run counter to that pledge. Employer’s inability to complete the work for its customers, without the extension, presumably will have a detrimental effect on the customers’ businesses. In this case, they are five dairy farms in South Dakota. AF 318-25.
ORDER

Accordingly, it is ORDERED that the CO’s denial of Employer’s extension request is REVERSED and Employer’s previous certification is extended through March 15, 2022, for the requested 17 farm laborers.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts