



Issue Date: 17 October 2017

BALCA Case No.: 2017-TLN-00072

ETA Case No.: H-400-17010-160940

In the Matter of:

A C CONSTRUCTION,
Employer.

Certifying Officer: William L. Carlson, Ph.D.
Chicago National Processing Center

Appearances: Armando Garcia, Esq.
Lefelco
Las Vegas, NV
Attorney for the Employer

Heather Filemyr, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
Attorney for the Certifying Officer

Before: **COLLEEN A. GERAGHTY**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF EXTENSION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of a denied request for an extension of Employer's H-2B temporary labor certification. *See* 20 C.F.R. §§ 655.60, 655.61.¹ For the reasons discussed below, the Certifying Officer's denial of Employer's request for an extension is affirmed.

¹ On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security ("DHS") jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the "2008 Rule" found at 73 Fed. Reg. 78020 (Dec. 19, 2008). *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) ("2015 IFR"). Where Employer filed its Application after April 29, 2015, and its period of need begins after October 1, 2015, the process outlined in the 2015 IFR applies. *See* 20 C.F.R. § 655.4(e) (explaining transition procedures).

STATEMENT OF THE CASE

On September 21, 2016, A C Construction (“Employer”) filed an *H-2B Application for Temporary Employment Certification* (“Application”) with the Department of Labor’s Employment and Training Administration. (AF at 50-84).² Employer sought temporary certification to hire fifteen full-time “Helper of Carpenters,” due to a peakload need, with a start date of April 1, 2017 and an end date of October 31, 2017. (AF 50).

On March 14, 2017, the Certifying Officer (“CO”) issued a Notice of Certification, granting temporary labor certification for 15 Helper of Carpenters for a period beginning on April 1, 2017 and ending on October 31, 2017. (AF 25-34).

On August 26, 2017, Employer filed a request for an extension of the period of employment for the labor certification until December 15, 2017. (AF 12). In support of its request, Employer stated:

Due to the notice received from the [United States Citizenship and Immigration Services (“USCIS”)] early in January, “USCIS has announced that it has received a sufficient number of petitions to reach the congressionally mandated cap of 33,000 H-2B workers for the first half of [Fiscal Year (“FY”)] 2017[,]”[] the workers under H-2B program that were approved later in April could not be able to finish the contracted work by October 31, 2017.

(AF 12).

On August 29, 2017, the CO issued a Denial of Extension Request. (AF 10-11). The CO found that pursuant to 20 C.F.R. § 655.60, “[t]he employer has not demonstrated that an extension is necessary due to weather conditions or other reasons beyond the control of the employer that could not be reasonably foreseen.” (AF 10).

On September 9, 2017, Employer sent an email to the CO, stating “we want to ask an update on the status of [the extension] request.” (AF 5). Employer stated that “[t]his extension is necessary due to weather conditions which are beyond the control of the employer that could not be reasonably foreseen.” (AF 5). Specifically, Employer asserted that the work had been delayed for six weeks due to rain, attaching an email from its client and a picture of the worksite that had been affected. (AF 5). Employer also attached a copy of the CO’s denial of the extension request. (AF 5-9). Employer again stated it was requesting an extension until December 15, 2017. (AF 5).

On September 12, 2017, the CO responded to Employer’s email, stating that the extension request was denied on August 29, 2017, as shown in the denial letter attached to Employer’s email, and that Employer can appeal the denial to BALCA pursuant to 20 C.F.R. § 655.61. (AF 3-4).

² References to the Appeal File appear as “AF” followed by the page number.

On September 19, 2017, Employer filed a Request for Administrative Review. (AF 1-2). Employer explained its original date of need was from February 1 to October 31, 2017, and it received certification for this period of employment; however, when it petitioned to the Department of Homeland Security, the petition was returned “due to USCIS announcing it has reached the H-2B mandated cap for the first half of FY 2017.” (AF 1). Employer stated it had to file another application for certification, with the start date of need from April 1 to October 31, 2017. (AF 1). Employer stated “this was a decision that was beyond the control of the employer due to the change to the visas issued.” (AF 1). Employer asserted that the postponement of the start date until April 1 and the fact that the work could not be completed due to the weather were beyond its control. (AF 1).

This case was assigned to me for disposition, and on September 29, 2017, I issued a Notice of Docketing and Expedited Briefing Schedule. *See* 20 C.F.R. § 655.6.

On October 4, 2017, the CO filed a Notice indicating he would not be filing a brief and requesting that the denial of extension be affirmed based on the reasons set out in the CO’s final determination. In a footnote, the CO also asserted the request for administrative review was untimely.

On October 10, 2017, Employer filed its appellate brief (“Er. Br.”). Employer stated it has a date of need from February and through October each year, but because of the cap for the first half of FY 2017, its petition had to be postponed to April 1, 2017 to October 31, 2017. Er. Br. 1. Employer stated due to the period of need being shortened by the first cap of FY 2017, and later the weather delays, it seeks an extension to finish with the scheduled work. *Id.*

DISCUSSION³

Employers may request an extension of the period of employment for a labor certification pursuant to 20 C.F.R. § 655.60. The extension request “must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the Employer.” *Id.* Stated differently, an employer must establish that its need for an extension is due to factors

³ The CO asserted in a footnote to its appellate filing that Employer’s request for review was untimely under 20 C.F.R. § 655.61(a)(1). A request for administrative review must be sent to BALCA within 10 business days from the date of the determination. 20 C.F.R. § 655.61(a)(1). The CO’s denial of extension was issued on August 29, 2017, resulting in a deadline of September 13, 2017 for filing an appeal. Employer did not file its appeal until September 19, 2017. (AF 1). While this is outside the time limit for filing an appeal, on September 9, 2017, the Employer did file with the CO what amounts to a request for reconsideration of the denial, providing new evidence, within the 10 business day period. On September 12, 2017, the CO responded, stating the extension had already been denied and directed the Employer to file an appeal pursuant to Section 655.61(a)(1). The Employer then filed its request for administrative review on September 19, 2017. Thus, given that the Employer did file a response to the denial with the CO within 10 business days, and then filed its appeal within 7 days of the CO’s reply, I am hesitant to find the appeal untimely given this atypical procedural history. However, because this decision affirms the denial of extension on the merits of the case, a specific finding on timeliness is not necessary.

outside of its control and that were not “reasonably foreseen.” The employer bears the burden of proof to establish it has met the requirements under the H-2B program. *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (*citing* 8 U.S.C. § 1361).

Employer asserts that it originally received temporary labor certification for a period of intended employment from February 1, 2017 to October 31, 2017, but when Employer petitioned to USCIS in January, USCIS returned the petition, notifying Employer that the congressionally mandated cap of H-2B workers for the first half of Fiscal Year (“FY”) 2017 had been reached. (AF 1, 12; Er. Br. 1).⁴ Employer asserted it had to file another application for certification with the start date of need of April 1, 2017, and ending on October 31, 2017. (AF 1; Er. Br. 1). Employer asserts because the start date was postponed until April, the H-2B workers are unable to finish the contracted work by October 31, 2017. (Er. Br. 1).

While the delay in Employer obtaining workers from February to April was out of Employer’s control due to USCIS meeting its cap of H-2B workers, it cannot be said that it was unforeseen to Employer at the time it filed its new application that the delay would prevent Employer from finishing its work by its original end date of October 31, 2017. *See* 80 Fed. Reg. 24042, 24081 (Apr. 29, 2015) (“There may be instances when an employer will have a reasonable need for an extension of the time period that was not foreseen *at the time the employer originally filed the Application . . .*”) (emphasis added). Employer could have requested a later end date of December 15, 2017 when it filed its second application for certification, as it was aware at that time of the delay due to the USCIS cap on H-2B workers. As such, Employer has failed to meet the requirements of Section 655.60 for an extension as it has not established the need for an extension “could not have been reasonably foreseen,” and the CO properly denied the extension request.

Following the CO’s denial of extension, Employer sent the CO an email providing an additional reason for the extension – that the work had been delayed six weeks due to rain, and Employer attached in support of this new reason for extension an email from a client and a picture showing the affected work site. (AF 5-9). The CO did not take this new evidence into consideration. (AF 3-4). In Employer’s request for administrative review, it again argued in part that an extension was needed due to rain, attaching the same client email and picture of the worksite. (AF 1-2). On appeal, BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination and ultimately alter his findings. 20 C.F.R. §§ 655.61(a)(5), (e); *see Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012). Employer’s information regarding the alleged delay due to rain was not provided to the CO prior to his Final Determination, and the CO did not accept this documentation provided after the Final Determination. Instead, the CO stated his denial had already been issued and the appropriate procedure was to file an appeal with BALCA.

⁴ Employer did not attach with its request for extension any evidence regarding the initial labor certification application with an intended period of employment from February to October, nor did it include the letter from USCIS indicating its petition was rejected because the mandated cap of workers for the first half of FY 2017 had been reached.

Accordingly, as the evidence pertaining to delays due to rain was not part of the record before the CO at the time he issued the Final Determination, we cannot consider this new reason for the request for extension on appeal.

Because Employer has not met its burden of establishing entitlement to an extension under 20 C.F.R. § 655.60, the CO's denial of the extension in this matter is affirmed.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

For the Board:

COLLEEN A. GERAGHTY
Administrative Law Judge