



Issue Date: 08 October 2019

BALCA Case No: 2019-TLN-00152
ETA Case No.: H-400-19004-272151

In the Matter of:

IOWA PLAINS SIGNING, INC.,
Employer.

DECISION AND ORDER REVERSING DENIAL OF EXTENSION REQUEST

This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) pursuant to Iowa Plains Signing Inc.’s (Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of an extension of a previously approved temporary labor certification under H-2B program. For the reasons set forth in great detail below, the Board reverses the CO’s denial.

On January 4, 2019, Employer applied for temporary employment certification through the H-2B program to fill 15 positions for Crossing Guards (Flaggers) for construction projects for the period of April 1, 2019 to November 1, 2019. (AF 756-921). On February 15, 2019, the CO issued a Notice of Certification accepting Employer’s application. (AF 58-60).

On August 27, 2019, Employer requested an extension of the certification period until December 15, 2019, due to unseasonably large amounts of rainfall and storms in the area of intended employment. (AF 26-57). Employer included with its request a variety of supporting documentation, including the weather reporters and rainfall amounts in the geographic area of intended employment. (AF 26-57).

On August 30, 2019, the CO issued a Denial of the Extension Request under the provisions of 20 C.F.R. § 655.60. The CO reasoned that the Employer’s extension requests workers during the time originally noted were not ideal for work in its original statement for temporary need. When making the original request for works, Employer noted that “therefore, Iowa Plains Signing does not need these workers from late November through March.” (AF 12-13).

On September 12, 2019, Employer submitted a request to BALCA for administrative review and appealing the CO's denial of extension. (AF 1-16). On September 16, 2019, BALCA docketed the appeal and I issued a *Notice of Docketing and Order Establishing a Briefing Schedule*. The CO assembled the appeal file and transmitted it to BALCA and this office received the file on September 24, 2019. Neither party submitted a brief. I decide this matter on the existing record.

Applicable Law

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the program must apply for and receive a “labor certification” from the United States Department of Labor, Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(5). To apply for this certification, an employer must file an Application for Temporary Labor Employment Certification with ETA’s Chicago National Processing Center. 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a CO, who will either request additional information or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

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. *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), “the scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal arguments and such evidence that was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a).

An employer may apply for an extension of the period of employment granted. A request for extension must be related to factors beyond the control of the employer, 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. 20 C.F.R. § 655.60.

The Employer bears the burden of proving that it is entitled to the extension of temporary labor certification. 8 U.S.C. § 1361; *See also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014). After considering all the evidence, BALCA may take one of the following actions:

1. Affirm the CO’s denial of temporary labor certification,
2. Direct the CO to grant temporary labor certification, or
3. Remand to the CO for further action.

Discussion

Employer avers that it requires an extension of the certification period for its temporary workers because of excessive rain and storms throughout the certification time frame have delayed the scheduled work and forced them to extend their projects beyond the typical season. (AF 26-57; 01-16). Employer argues that under 20 C.F.R. § 655.60, the weather conditions are beyond its control and could not be foreseen. Therefore, Employer contends it is entitled to an extension. The CO did not file a brief and did not address the foreseeability of the weather conditions in the denial. (AF 17-24). Instead, the CO denied the request as the extension requested dates outside the original requested need timeline.

The Board finds that although it is generally foreseeable that weather conditions could interfere with Employer's work, it was not reasonably foreseeable that the above average rainfall and storms would significantly interrupt the work as they have not experienced similar delays in the past. The extent of the above average rainfall and storms experienced by the area were not reasonably foreseeable nor was the need to extend into a period of time that have not needed workers in the past.

In *Corporate Green, LLC, d/b/a Greenseasons*, 2019-TLN-00003 (Nov. 7, 2018), the Board reversed a denial of an extension request in a similar situation. The Employer experienced above average rainfall and unseasonably warm weather that interrupted the work. The CO did not find the situation unforeseeable and denied the extension request. The Board reversed the CO's determination and granted the extension.

Consequently, when the credible evidence submitted to the CO prior to the Denial of Extension Request is considered as a whole, the Board finds Employer has met its burden to establish that it requires a brief extension of its certification period for its temporary workers based on factors outside of its control which were not reasonably foreseeable at the time the Application for Temporary Employment Certification was submitted. If we found that an extension could be denied simply because it is outside the original requested period of time, then an extension could never be granted and that would be contra to the regulations.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of the Employer's request for extension of certification is **REVERSED**. This matter is **REMANDED** to the Certifying Officer who is directed to **GRANT** an extension of the certification period until December 15, 2019, effective the dates of this Order.

For the Board:

JOSEPH E. KANE
Administrative Law Judge