



Issue Date: 07 November 2018

BALCA Case No.: 2019-TLN-00003
ETA Case No.: H-400-17289-669218

In the Matter of:

CORPORATE GREEN, LLC, d/b/a GREENSEASONS,
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 Corporate Green, LLC’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of a 30 day extension of a previously approved temporary labor certification under the H-2B program. For the reasons set forth in greater detail below, the Board reverses the CO’s denial.

Background

On October 17, 2017, Employer applied for temporary employment certification through the H-2B program to fill 110 positions for Landscaping and Groundskeeping Workers for the period of January 15, 2018 to October 15, 2018. (AF 128).¹ On November 16, 2017, the CO issued a Notice of Certification, accepting Employer’s application for H-2B labor certification for 110 Landscape Laborers. (AF 82).

On October 4, 2018, Employer requested a 30 day extension of the certification period to November 15, 2018 due to unseasonably large amounts of rainfall in the area of intended employment. (AF 7). Employer included with its request a variety of supporting documentation, including the rainfall amounts in Employer’s geographic area throughout 2018. (AF 9-26).

On October 10, 2018, the CO issued a Denial of Extension Request under the provisions of 20 C.F.R. § 655.60 because “[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 4). The CO noted that Employer had requested an

¹ In this decision, AF is an abbreviation for “Appeal File.”

extension of its period of need for the same occupation in its two previous applications also based on unprecedented rainfall amounts. Therefore, the CO asserted that the rainfall could have been reasonably foreseen by this, the third year.

On October 10, 2018, Employer submitted a request to BALCA for administrative review and appealing the CO's denial of extension request. (AF 1). On October 15, 2018, BALCA docketed the appeal and on October 18, 2018, I issued a *Notice of Docketing and Order Establishing Briefing Schedule*. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services in accordance with 20 C.F.R. § 655.33(b) on October 24, 2018. Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of October 31, 2018. Neither party has submitted a brief and 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 H-2B 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 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), “[t]he 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), (e).

An employer may apply for extensions of the period of employment. A request for extension must be related to weather conditions or other 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); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). 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.

20 C.F.R. § 655.61(e)(1)-(3).

Discussion

Employer avers that it requires an extension of the certification period for its temporary workers because "2018 rain days exceeded normal rain days in September and now in October we are above normal night time average temperatures, and that has kept the soil temperatures too high to plant our fall flowers and we have to push the planting until the end of October." (AF 2). Employer appears to argue 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 the 30 day extension.

The CO asserts that the weather conditions were foreseeable and an extension is not warranted because Employer had filed for extensions in the previous two years also based on unprecedented rainfall amounts. (AF 4-5).

The Board finds that although it was generally foreseeable that weather conditions could interfere with Employer's landscaping work, it was not reasonably foreseeable that above-average rainfall and unseasonably warm weather would significantly interrupt work in 2018 simply because it had also delayed work in 2016 and 2017. The record demonstrates that in 2016 Employer "had the 1000 year flood" and in 2017 had a "record number of rain days and total rain." (AF 1). Employer could not have reasonably foreseen from these two separate incidents in 2016 and 2017 that in 2018 rainfall would continue to exceed normal levels. In fact, it was equally likely for Employer to assume the odds of a third straight record rainfall were statistically unlikely. Additionally, Employer could not have reasonably foreseen that in October 2018 they would have "above normal night time average temperatures," keeping the soil temperature too high to plant fall flowers.

In *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012), the Board affirmed a denial of temporary labor certification where the employer made unsupported assertions about how weather conditions and contract patterns caused job openings to fluctuate. However, in the instant case, Employer did submit a number of climate and weather reports which document unseasonably warm weather and excessive rainfall in 2018.

Consequently, when the credible evidence submitted to the CO prior to the October 10, 2018 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 and which were not reasonably foreseeable at the time the Application for Temporary Employment Certification was submitted. Accordingly,

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 Chicago National Processing Center where the Certifying Officer is directed to **GRANT** a 30 day extension of the certification period, effective the date of this Order.

SO ORDERED.

For the Board:

Stephen R. Henley
Chief Administrative Law Judge