In the Matter of:

Super Bob's Lawn and Landscaping, LLC

Employer

Before: Judge Francine L. Applewhite

DECISION AND ORDER AFFIRMING DENIAL OF EXTENSION REQUEST

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Super Bob's Lawn and Landscaping, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination regarding the Employer’s request for an extension of the H-2B temporary labor certification.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“DOL”).³ Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

H-2B Application and Temporary Labor Certification

On January 1, 2021, the Employer filed an ETA 9142B, Application for Temporary Employment Certification and supporting documentation (“Initial Application”) with the CO. (AF 323-468; see also AF 1, 158).⁴ The Employer requested 15 Landscaping and Groundskeeping Workers for the period of April 1, 2021 to December 15, 2021. (Id. at 323). In its Statement of Temporary Need, the Employer requested “an additional two workers, a small

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³ 8 C.F.R. §214.2(h)(6)(ii).
⁴ Citations to the Administrative File are abbreviated as “AF.” The Employer's Brief will be referred to as “Em. Br.”
increase from the 2020 application, due to the damage caused by Hurricanes Laura and Delta and additional landscaping work to be done in the area.” (Id.).

On March 15, 2021, the CO issued a Notice of Certification, informing the Employer that its application for temporary labor certification for the H-2B program was certified. (Id. at 307-311). Specifically, the Department granted certification for 15 Landscaping and Groundskeeping Workers for the period of April 1, 2021 to December 15, 2021. (Id. at 307).

Employer’s Request for Extension

On July 14, 2021, the Employer filed a Request to Extend Labor Certification, a Memorandum in Support of Request to Extend Labor Certification (“Memorandum”), and seven exhibits with the Chicago National Processing Center. (Id. at 161-306). The Employer asserted that it needed an extension of the labor certification to March 31, 2022, “based on extreme and unforeseen weather conditions beyond control of the [E]mployer.” (Id. at 163). In its Memorandum, the Employer identified the circumstances as the “extremely unique, unforeseeable, and catastrophic event to southwest Louisiana in the form of Hurricanes Laura and Delta [sic] which made landfall in the fall of 2020.” (Id. at 165.). The Employer stated that all of its normal landscaping jobs and contracts now include full renovations of clients’ yards because of the damage caused by the hurricanes. Further, the Employer asserted that it did not predict the number of projects “as the current temporary labor certification was filed when southwest Louisiana was still mostly evacuated, and storm assessment had not yet taken place.” (Id. at 165-66). The Employer’s supporting documentation consists of various articles about Hurricane Laura and Hurricane Delta, and multiple photos of the damage caused by the hurricanes. (Id. at 161-306).

CO’s Denial of Extension Request

On July 21, 2021, the CO issued a Denial of Extension Request (“Denial”), denying the Employer’s request for an extension. (Id. at 159-160). Specifically, the CO stated that “[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,” in accordance with 20 C.F.R. § 655.60. (Id. at 159). The CO noted that the Employer’s request was for work caused by additional storm clean up and that “the hurricanes occurred several months before filing the initial application.” (Id.). Further, the CO inferred that “had the employer truly believed the hurricanes caused a significant backlog in its business, it seems reasonable it would have mentioned this fact in its original Statement of Temporary Need submitted to the Department.” (Id.).

Procedural History

The Employer filed a Request for Review of Denial of Extension Request, dated July 30, 2021, appealing the CO’s denial of the Employer’s request for an extension on its Temporary Labor Certification. (Id. at 1).5 On August 16, 2021, I issued a Notice of Docketing and Order

5 BALCA received the Request for Administrative Review on August 3, 2021.
Establishing Briefing Schedule. Subsequently, on August 19, 2021, the Employer filed a brief through counsel.

**Standard of Review**

BALCA’s standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. See *Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

**Discussion**

Pursuant to 20 C.F.R. § 655.60, an employer may file for an extension of their temporary labor certification under the following circumstances:

A request for extension 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.

20 C.F.R. § 655.60.

In its Request to Extend Labor Certification, the Employer asserted that it needs an extension of its temporary labor certification for 15 Landscaping and Groundskeeping Workers until March 31, 2022 due to extreme and unforeseen weather conditions. (AF 163-67). Specifically, the Employer identified Hurricanes Laura and Delta, which made landfall in August 2020 and October 2020, respectively, as causing a significant and unforeseen amount of damage. (See AF 196-200). The Employer also claimed that that it did not predict the number of new projects because “the current temporary labor certification was filed when southwest Louisiana was still mostly evacuated, and storm assessment had not yet taken place.” (See AF 166).

In addition to the above assertions, the Employer, in its appellate brief, asserts that record flooding in May 2021 contributed to the need for the requested extension. The Employer cites three cases where unforeseen weather conditions resulted in significant delays and the requested extension. (Em. Br. pgs. 2-4).

Regarding the cases cited in the Employer’s brief, I note that each case dealt with delays due to weather conditions that occurred at least in part during the certification time period. Conversely, Hurricanes Laura and Delta, the weather conditions that affected the Employer, occurred prior to the certification time period. Thus, I do not find the cases cited by the Employer to be persuasive on this issue. Furthermore, there is no evidence contained in the file
to support the Employer’s assertion regarding flooding, and I cannot consider evidence beyond the record in front of the CO at the time of the CO’s determination. See 20 C.F.R. § 655.61.

Turning to the record as it stood before the CO, the Employer filed for its Initial Labor Certification on January 1, 2021. (Id. at 1, 159). A time period of approximately four months passed between the landfall of Hurricane Laura and the Employer’s Initial Application. The time period between Hurricane Delta and the Initial Application was approximately two months. Given that the hurricanes occurred several months prior to the Initial Application, the Employer should have reasonably foreseen that the damage from the hurricane would result in additional work and projects.

Moreover, the Employer’s assertion that it could not predict the number of projects resulting from the damage caused by Hurricanes Laura and Delta conflicts with its Initial Application. Specifically, in its January 2021 Initial Application, the Employer requested two additional workers for “the damage caused by Hurricanes Laura and Delta and additional landscaping work to be done in the area.” (Id. at 323). Thus, the Employer was aware of the resulting damage, and requested additional workers to perform the additional, an increase from past years, work to be done.

Therefore, I do not find that the CO’s decision to deny the extension request to be arbitrary or capricious, because the Employer did not demonstrate that an extension was necessary due to the weather conditions or other reasons beyond the control of the Employer that could not be reasonably foreseen by the Employer. See 20 C.F.R. § 655.60

Upon consideration of the record as a whole, I find that the Employer has failed to show that the CO’s decision was arbitrary or capricious, or otherwise not in accordance with the law. The CO did not err in denying the Employer’s request to extend the temporary labor certification to March 31, 2022. Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper.

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6 In addition to the grounds stated above, the Employer’s request for an extension to March 31, 2022 would extend the certification timeframe to a year. 20 C.F.R. § 655.60 states that the CO shall not grant a certification beyond a total time of nine months except in extraordinary circumstances. Such circumstances do not exist here to justify extending the period of need beyond the temporary amount.
ORDER

Wherefore, the Denial of Extension Request issued by the Certifying Officer in this matter is AFFIRMED.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge
Washington, D.C.