UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, DC

Issue Date: 18 October 2023

In the Matter of:	
CAROLINA CORPORATION, *Employer.*	**BALCA Case No. 2023-TLC-00059** ETA Case No. H-300-22266-489834

DECISION AND ORDER REVERSING DENIAL OF EXTENSION AND REMANDING TO THE OFFICE OF FOREIGN LABOR CERTIFICATION

This matter arises under the labor certification process for temporary agricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*., and the associated implementing regulations promulgated by the Department of Labor ("Department") at 20 C.F.R. Part 655, Subpart B.

STATEMENT OF THE CASE

On January 11, 2023, the Office of Foreign Labor Certification ("OFLC") of the Department's Employment and Training Administration granted Carolina Corporation's ("Employer") *Application for Temporary Employment Certification* for 26 Farmworkers and Laborers, Crop, Nursery, and Greenhouse jobs covering a period of employment from January 13, 2023 through September 6, 2023.[1]

On September 6, 2023, Employer filed with the OFLC a *Certified H-2A Application Extension Request Due to Emergent Circumstances* ("Extension"), requesting that the certification period be extended until March 6, 2024.[2] Employer, by and through a statement signed by its Chief Operating Officer ("COO Statement"), stated that several of the workers did not arrive until April, May, June, or August 2023 because "the respective U.S. consulates in Brazil took longer time to schedule

[1] Administrative file ("AF") at P23, P44.

[2] *Id.* at P27-P36.

the interviews and approve the visas for all the H-2A workers and their derivatives."[3] The COO Statement provided the specific names and dates of arrival for the 18 affected workers and explained, *inter alia*, that their "late arrival … heavily impacted the first steps of cultivating and planting[.]"[4]

On September 6, 2023, a Certifying Officer ("CO") of the OFLC issued a *Denial of Long-Term Extension Request for Carolina Corporation* ("Denial").[5] Relying on 20 C.F.R. § 655.170(b), the CO explained:

> The employer provided no evidence from the United States Consulate to support its claim of interview and visa delays. Additionally, Consulate delays do not fall within the scope of weather conditions or changes in market conditions that are outside of the control of the employer. As a matter of record, Consulate delays occur frequently, and employers can plan for such delays in advance.
>
> Furthermore, the employer is requesting an extension of its end date of need until March 6, 2024. While its current beginning date of need was January 13, 2023, the extension would amount to the employer utilizing the H-2A Program for 418 days, or one year, one month, and 22 days. The Chicago NPC will not grant extensions beyond the allowable timeframe of 10 months, except under extraordinary circumstances, which the employer does not appear to have, in this case.[6]

On September 14, 2023, Employer filed with the Board of Alien Labor Certification Appeals ("Board") a *Request for an Expedited Administrative Review of the Denial* ("Request").[7] The Request contains a letter from Employer's counsel, a copy of the Denial, and the COO Statement.[8]

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[3] *Id.* at P29-P30.

[4] *Id.* at P30.

[5] *Id.* at P22-P26.

[6] *Id.* at P26.

[7] *Id.* at P1-P21. *See* 20 C.F.R. §§ 655.171(a), (d).

[8] *Id.*

On September 21, 2023, the Board, by and through District Chief Judge Theresa C. Timlin, issued an *Order* directing the CO to file a copy of the administrative file "by noon Friday, September 22, 2023, or the case will be remanded for further processing."

On October 4, 2023, the CO filed the administrative file.

On October 5, 2023, this case was assigned to the undersigned.

Counsel for the CO did not file a brief in support of the Denial,[9] and neither the CO nor his counsel has provided any explanation for the untimely filing of the administrative file or how the filing was made "as soon as practicable."[10]

This Decision and Order is being issued in compliance with the deadlines imposed by the regulations.[11]

SCOPE AND STANDARD OF REVIEW

The Board's review is limited to "the documents in the OFLC administrative file that were before the CO at the time of the CO's decision and any written submissions from the parties or amici curiae that do not contain new evidence."[12] The CO's decision must be upheld unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[13] The Board has the

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[9] *See* 20 C.F.R. § 655.171(d)(1) ("Within 7 business days of receipt of the OFLC administrative file, the counsel for the CO may submit a brief in support of the CO's decision and, if applicable, in response to the employer's brief.").

[10] *See* 20 C.F.R. § 655.171(d)(4) ("After the receipt of the request for review, the CO will send a copy of the OFLC administrative file to the Chief ALJ, the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. DOL (counsel), *as soon as practicable*[.]") (emphasis supplied). Despite the untimely filing and lack of explanation, I need not remand this case in accordance with Judge Timlin's Order given my decision on the merits herein.

[11] *See* 20 C.F.R. § 655.171(d)(4) ("The decision of the ALJ … must be immediately provided to the employer, the employer's attorney or agent (if applicable), the CO, and counsel for the CO within 7 business days of the submission of the CO's brief or 10 business days after receipt of the OFLC administrative file, whichever is later[.]").

[12] 20 C.F.R. § 655.171(d)(3).

[13] *Id.* § 655.171(d)(2).

authority to "affirm, reverse, or modify the CO's decision, or remand to the CO for further action[.]"[14]

DISCUSSION

Long-term extensions for certified periods of employment are governed by 20 C.F.R. § 655.170(b), which 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 last longer than 1 year, except in extraordinary circumstances.

Here, the CO first faulted Employer for failing to provide "evidence from the United States Consulate to support its claim of interview and visa delays."[15] The CO is correct that the record is without supporting evidence from the Consulate. But what is present is the COO Statement, which provides the specific names and dates of arrival for the 18 affected workers giving rise to the Extension.[16] While the CO was under no obligation to accept the COO's assertions as credible or true, he must nonetheless consider them in making his determination and give them the weight that they rationally deserve.[17]

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[14] *Id.* § 655.171(d)(3).

[15] AF at P26.

[16] *Id.* at P30.

[17] *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc) ("[W]ritten assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve."); *AKSD Enterprises*, 2021-TLC-00006 (Oct 26, 2020) ("The CO is correct that no separate documentation – apart from Employer's detailed account of what happened – was offered in support of the above explanations. However, … the CO [does not] even hint that the facts recounted in Employer's letter are in any way incorrect or exaggerated. … I find that it was arbitrary, capricious, and an abuse of discretion for the CO to reject the extension request for its supposed lack of documentation, inasmuch as sufficient documentation was in fact offered.").

The CO next stated that "Consulate delays do not fall within the scope of weather conditions or changes in market conditions that are outside of the control of the employer."[18] The CO misconstrues the regulation. Extension requests are not limited to weather conditions or changes in market conditions. As § 655.170(b) clearly states, "*other factors* … which *may* include unforeseen changes in market conditions" can be sufficient to substantiate an extension request. It is apparent from the Denial that the CO did not consider whether Consulate delays are an "other factor" sufficient to justify the Extension.[19]

The CO further stated that "[a]s a matter of record, Consulate delays occur frequently, and employers can plan for such delays in advance."[20] The "record" does not contain, and the CO does not cite to, any information or data concerning the frequency of Consulate delays.[21] To the extent that the CO's statement is a suggestion that Consulate delays are common knowledge, I disagree with such an unsubstantiated generalization.

Lastly, the CO stated that "the employer does not appear to have" extraordinary circumstances "in this case."[22] The CO provided no further explanation, which renders the finding arbitrary and capricious.[23]

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[18] AF at P26.

[19] *See Great Northern Honey Co.*, 2023-TLC-00031, slip op. at 8-9 (Apr. 27, 2023) (finding CO abused her discretion when she "made the definition of commercial beekeeping more limited or restrictive than the plain text of the regulation").

[20] *Id.*

[21] *Id.* at P23-26.

[22] *Id.* at P26.

[23] *See Sola Fe Ranch LLC*, 2023-TLC-00038, slip op. at 7 (May 24, 2023) ("The CO's determination that Employer did not provide extraordinary circumstances to grant an extension of this length of time, and the CO's denial of the extension without stating why Employer did not show extraordinary circumstances, was conclusory, and therefore, arbitrary and capricious."). *See also Sunny Hills Farm LLC*, 2023-TLC-00020, slip op. at 4 (Mar. 10, 2023) ("Under the arbitrary and capricious standard, the reviewing judge or panel must determine whether the CO examined the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotations omitted) (alteration in original).

ORDER

It is hereby **ORDERED** that the CO's Denial is **REVERSED** and this case is **REMANDED** to the OFLC for further action necessary to effectuate Employer's Extension to March 6, 2024.

For the Board:

THEODORE W. ANNOS
Administrative Law Judge