

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

Issue Date: 24 May 2023

BALCA Case No.: 2023-TLC-00038
ETA Case No.: H-300-22124-132697

In the Matter of:

SOLA FE RANCH, LLC,
Employer.

Certifying Officer: Srdzan Lazarevski
Chicago National Processing Center

Appearances: Anthony L. Ray, Esq.
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Chicago, Illinois
For the Employer

Rebecca Nielsen, Esq.
Office of the Solicitor of Labor
Division of Employment & Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **DANA ROSEN**
Administrative Law Judge

DECISION AND ORDER¹

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188, and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary agricultural labor certification (H-2A) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

This matter is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Sola Fe Ranch, LLC's (Employer) Request for Expedited Administrative Review of the Certifying Officer's (CO) Denial of Employer's Long-Term Extension Request in the above captioned H-2A temporary labor certification.

¹ The style and format of this Order are meant to comply with Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d.

STATEMENT OF THE CASE

Employer's H-2A Application and Temporary Employment Certification

On May 13, 2022, Employer submitted its Application for Temporary Employment Certification (Application). On June 22, 2022, the Employment and Training Administration (ETA) of the Office of Foreign Labor Certification (OFLC) granted certification of Employer's Application for Temporary Employment for 1 Exotic Game Ranch Manager.² The nature of the temporary need was seasonal, and the employment period was from July 16, 2022, until April 30, 2023. (AF 242-469).³

In its Application and supporting documents, Employer described its yearly business operations and temporary seasonal need as:

[T]he work of the Exotic Game Ranch Manager is tied to a defined yearly pattern of breeding and raising the specialty bred deer and antelope. The breeding and raising operations require a lot of labor, care, and attention.

Sola Fe Ranch's breeding season begins in July. In the months of July and August, Sola Fe Ranch will review their bucks, and determine which bucks to keep, and which bucks to move and market at summer auctions. The farmers will assess the bucks' characteristics and health in determining which bucks will be sold to market.

In September, Sola Fe Ranch will wean the fawns, collect their DNA, and tag and process them. The does (female deer) and bucks are then sorted into breeding groups, and the bucks' antlers will be sawed to prevent fighting and injury.

In October, Sola Fe Ranch will then conduct artificial collection from the bucks and proceed with artificial insemination of the does (female deer). Breeders are also moved to their appropriate pens for further breeding.

November through February is hunting season. From the November through February hunting season, Sola Fe Ranch puts breeders back to bachelor groups, and focuses on game feed management, and wildlife disease control prevention.

² Per documentation Employer submitted to the ETA, in response to the CO's Notice of Deficiency, Employer "specializes in breeding operations of exotic game hoof stock herds... the breeds of deer and antelope are raised by farmers for purposes of making them marketable for the hunting and meat industry... and are bred and raised on Sola Fe Ranch." (AF 361).

³ The Administrative File will be referred to as "AF."

In March and April, Sole Fe Ranch directs their attention to moving in new exotic breeders and handling animal pasture tasks, such as weed killing, fertilization, and cutting hay.

In the months of May and June, breeding operations are suspended. During these two (2) months the deer and antelope are left to graze. Daily feed and water of the animals must be conducted, and the health of the deer and antelope are monitored. The pastures are also maintained. Be that as it may, the feeding, monitoring animals, and pasture maintenance is not specific to May and June – it is conducted year-round. As such, because the only activity during this time of year is to maintain raising wildlife, May and June is considered a lull period.

In sum, from July through the end of April, the breeding operations at Sola Fe Ranch requires [sic] labor levels far above those necessary for the rest of the year. Sola Fe Ranch has provided a detailed description of their year-round business operations, in which the May and June months are not focused on breeding activities. The Exotic Game Ranch Manager is seasonal in nature as the time needed for the Exotic Game Ranch Manager does not exceed more than one (1) year and is tied by the event and pattern of the breeding process.

(AF 247-48).

Employer stated the Exotic Game Ranch Manager job duties were assisting in genetic management, feeding, breeding the animals, maintaining pastures, disease control and prevention, overseeing darting and medicine administration of the animals, and seasonal preparations of pastures for new fawns. (AF 362-63). Employer stated the work schedule was as follows:

The Exotic Game Ranch Manager will work Mondays – Fridays from 9AM – 5PM for the 10-month H-2A visa durational period, as well as on Saturdays and/or Sundays once a month, in which the work will be expected to assist in feeding the deer and antelope for two (2) hours a day. It is not uncommon to have unexpected longer hours due to weather and animal emergencies.

(AF 375) (emphasis added).

Employer's Long-Term Extension Request

On March 24, 2023, Employer submitted its request to extend the period of need for temporary seasonal employment until March 1, 2024, along with its supporting exhibits (Request).⁴

In Employer's Request for a long-term extension, it stated:

Unexpected weather patterns have greatly impacted the productivity of pastures and fawning. A series of events over the last 2 years has had grave impacts on the animals and ranch. As a result of this, our ranch had a severe drop in fawn crops for the 2022 season and depleted pastures have affected the health of our herds. We need to extend Mr. Eduard Nel's stay here to help us bring the land and animals back to a productive state.

The El [sic] Niña weather pattern has negatively impacted Texas Agriculture. The first event was the February 2021 freeze winter storm Uri, and another freeze occurred in 2022. Both freezes were extreme for Texas and affect the reproductive cycles, antler growth and overall health of livestock, along with animal deaths due to extreme cold. Operational setbacks were extreme and then quickly followed by drought and record-breaking heat wave of 2022. By fawning season of June 2022, the heat wave was in full force. Due to lack of rains, the pastures were barren and lacking forb plants and browse (shrubs/trees) for the deer and antelope to eat. The heat index soared above 106.

With high heats and dust, we lost a large number of fawns in June. Typically, we have a 90% fawn crop (meaning 90% of the does/cows fawn). In 2022, our crop was below 60%. We believe this was due to does aborting babies during the freeze and drought conditions and losing fawns due to high heat at birth.

For the fall and winter of 2022, as the drought persisted, our pastures became so depleted that it was dust only. Quality of food and hay declined and continually got harder and mor[e] expensive to maintain. Because the stress on the animals, our bucks and does delayed coming

⁴ Exhibit I was a July 12, 2022 news article that reported the effects of drought conditions on cattle ranchers and agriculture in North Texas. (AF 86-87). Exhibit II was a March 2, 2021 news article that reported the agricultural and livestock losses caused by Winter Storm Uri throughout Texas in February 2021. (AF 89-95). Exhibit III was titled "Sola Fe Ranch Drought Photos," which pictured some animals in green grasses, and other animals underneath trees with green and brown ground-covering. The photos were not dated. (AF 97-101). Exhibit IV was a chart that noted Employer's annual fawn crop numbers from 2019 to 2022. (AF 103). Exhibit V contained three Facebook job postings by Erin Stephens, seeking a full-time ranch hand, on November 15, 2022, December 16, 2022, and February 4 [no year shown.] (AF 105-07). Exhibit VI contained hospital charges for medical treatment provided at University Health from January 29, 2022 through March 1, 2022. (AF 109-111).

into rut and when we attempted to collect them on the usual Oct 1 timeline, they were not yet ready. It risks the animal[']s life to sedate so we only do one attempt annually as needed. We had financial hardship for this reason as we had pre sold semen we could not deliver. We were not able to get our anticipated 2022 semen collections and lost income with little semen to sell for AI [artificial insemination].

Then once again La Niña lingered and we had a freeze during the Christmas of 2022. This freeze, though shorter, was the straw that broke the back we believe and has result[ed] in death loss on the ranch from unknown illness. Primarily, it is hitting our exotic herds of Bongo, Kudu, and Sable. We have been performing tests on feed and soils and waters to isolate the source. And the conclusion is that the feed rations need to be adjusted and pastures need to be rested so they can regenerate and reduce parasite loads. Our response to this impact of weather is to build and prep new pastures for our deer and antelope. We have planned and/or begun to build at least 5 new breeding pastures along with new feed regiments and grouping of animals.

Furthermore, one of our ranch hands, Mr. Colby Stephens, sustained an injury resulting in a loss of one of his thumbs. This hinders his work efforts and makes everything go a bit slower. We also lost our second ranch hand in November of 2022 and have been unsuccessful at replacing him; further slowing the labor intensive recovery progress.

Still, we are hopeful that over the course of the next two years we can get all the pastures to a healthier state and begin to recoup the losses we have had. As such, we need to request an extension for Mr. Eduard Nel's H-2A visa to help us with this labor intensive coming year.

(AF 12-13) (emphasis added and internal quotations omitted).

Certifying Officer's Denial of Employer's Long-Term Extension Request

On April 19, 2023, the Certifying Officer denied Employer's Request. In its denial, the CO stated:

The employer has requested an extended period of need from April 30, 2021, through March 1, 2024. Combined with its previous certification from July 16, 2022, through April 30, 2023, the employer's total period of need is 1 year, 7 months and 14 days. The employer has not provided extraordinary circumstances to grant an extension of this length of time. Therefore, the employer's extension request for 1 Exotic Game Ranch Manager job opportunity has been denied.

(AF 10).

Employer's Request for Expedited Administrative Review

On April 27, 2023, Employer submitted its Request for Expedited Administrative Review of the Certifying Officer's denial. In the Request for Expedited Administrative Review, Employer argued the CO's denial was arbitrary and capricious because the CO did not explain its reason(s) for denying the extension, nor "what part or parts of Sola Fe Ranch's extension request were deficient." (AF 4). Employer argued the CO did not provide "a rational connection between the instant facts and the denial" and did not "consider important information proffered by Sola Fe Ranch." (AF 6). Employer stated it needed to extend the employment for an additional 10 months, "in order to assist with the upcoming July – October breeding season, November – February hunting season, and March intensive pasture preparation." (AF 5). Specifically, Employer described the relationship between "the extraordinary weather conditions" and the Exotic Game Ranch Manager as "twofold."

First, Mr. Nel must assist with genetic management, feeding strategies, identifying new breeding animals, artificial insemination, intensive pasture management, and more to ensure that Sola Fe Ranch does not continue to see financially devastating fawn counts. Second, the additional work necessitated by extreme weather conditions has become even more difficult due to Sola Fe Ranch's loss of a ranch hand and current ranch hand's debilitating hand injury. Given the rural, remote nature of Sola Fe Ranch, Sola Fe Ranch has thus far been unable to fill the open ranch hand position. As such, Sola Fe Ranch temporarily requires Mr. Eduard Nel to continue assisting Sola Fe Ranch during the upcoming breeding and hunting seasons.

(AF 5-6).

Employer requested that BALCA approve "the entire certification period extension," or alternatively, partially approve the certification period until October 31, 2023. (AF 5-6).

STANDARD OF REVIEW

When an employer requests administrative review under 20 C.F.R. § 171, BALCA may only consider evidence before the Certifying Officer at the time of the CO's decision. 20 C.F.R. § 655.171(d)(3). Based on the administrative file and written submissions from the Parties, BALCA will affirm, reverse, modify the CO's decision, or remand to the CO for further action. *Id.* BALCA must uphold the CO's decision unless the employer shows the CO's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 20 C.F.R. § 655.171(d)(2).

For the reasons discussed below, BALCA finds that the Certifying Officer did not provide any explanation or rationale for the CO's finding that Employer did not show "extraordinary circumstances" and denial of Employer's Long-Term Extension Request.

Accordingly, the CO's decision was arbitrary and capricious. Nonetheless, Employer's evidence did not support its Request for a Long-Term Extension. Therefore, BALCA cannot approve or partially approve Employer's Request, as Employer asked in its Request for Administrative Review. Accordingly, the CO's determination is reversed, and this matter is remanded to the CO for further consideration.

DISCUSSION

Employer requested a long-term extension of a temporary labor certification for 1 Exotic Game Ranch Manager, from April 30, 2023 (when the employment period ended), until March 1, 2024. In total, Employer's stated period of need for temporary, seasonal employment is 1 year, 7 months, and 14 days.

Employment is temporary and of a seasonal nature where it is:

 tied to a certain time of the year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.

 Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 C.F.R. § 655.103(d).

An employer seeking to extend a temporary labor certification for more than 2 weeks must request a long-term extension from 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 notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. 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.

20 C.F.R. § 655.170(b) (emphasis added).

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. However, Employer's reasons and the evidence it submitted with its Request for a long-term extension did not support the length of the

extension (10 months) and did not support that Employer's need "could not have been reasonably foreseen." Id.

Employer stated it needed a long-term extension because there were unexpected freezes in 2021 and 2022 that affected reproductive cycles, antler growth, health of livestock, and caused animal deaths. The news article submitted in support of the freeze was from a storm in February 2021, more than 1 year before Employer submitted its application, on May 13, 2022. No evidence was submitted to support similar freezing conditions in 2022. The 2021 freeze was outside of the employment period and does not support an unforeseeable need in 2023 and 2024. As for the alleged freeze in 2022, any need stemming from it was "reasonably foreseen" given the freeze from the previous year, and Employer's own admission in its application that "it is not uncommon to have unexpected longer hours due to weather and animal emergencies."

Employer stated it needed a long-term extension because a heat wave and drought were in effect by June 2022, which stressed the animals and delayed the animals' typical reproductive patterns. The news article submitted in support of the drought was dated July 12, 2022 and discussed drought effects in North Texas on cattle and agriculture – not exotic deer or African hoof stock animals. In addition, Employer is based in Lockhart, Texas, which is Central Texas (less than 50 miles south of Austin) – not North Texas.⁵

The pictures submitted of Employer's exotic animals (titled "Drought Photos") do not clearly support Employer's statements. Some of the animals are pictured in green grass, and some are pictured underneath trees in areas with short brown/greenish grass and groundcover. There is no date on the pictures to confirm when they were taken and the time of year they were taken, and the animals are not pictured in the same location throughout the photos to confirm which photos support the drought conditions that Employer alleged.

Assuming Employer was affected by the drought reported in the July 12, 2022 news article, any need arising from the drought was reasonably foreseeable, given the climate risks noted in the Redfin documents that Employer submitted with its Application, which stated the drought risk for Employer's ranch properties was "moderate," and the heat risk was "very high." (AF 391-425). This, in addition to Employer's admission in its application that "it is not uncommon to have unexpected longer hours due to weather and animal emergencies," does not support that any need arising from a 2022 drought "could not have been reasonably foreseen" by Employer.

Employer stated that due to the inclement weather, it lost animals to the extreme cold, and gave rise to an "unknown illness" which resulted in death loss on the ranch. Based on the chart Employer submitted of its fawn crop numbers, the number of "breeding does" Employer had in 2021 was 69, and in 2022, the number of "breeding does" increased to 95. These numbers do not reflect widespread death loss on Employer's ranch.

⁵ Driving Directions from Lockhart to Austin, TX, Google Maps, <http://maps.google.com>.

Employer stated one of the “events” warranting the extension was that one of its ranch hands lost a thumb or had a “debilitating hand injury.” However, the medical records submitted in support of the injury were from January 19, 2022 to March 1, 2022. This was more than 2 months before Employer submitted its Application on May 13, 2022. This “event” was outside of the employment period and does not support an unforeseeable need in 2023 and 2024.

Employer stated it needs a long-term extension because it lost one of its full-time ranch hands in November 2022 and has been unable to fill the position. However, the nonavailability of U.S. workers to fill employment opportunities is the purpose of the H-2A program and is why Employer sought the temporary labor certification that is the subject of these proceedings. Thus, Employer’s loss of one of its ranch hands and its inability to find someone to fill the open position, does not support a need that “could not have been reasonably foreseen” by Employer.

Last, the entire employment period requested is significant—1 year, 7 months, and 14 days. Under the H-2A program, the query is whether the need is of a temporary or seasonal nature. 20 C.F.R. § 655.103(d). To qualify as such, the employment period may not last longer than 1 year, “except in extraordinary circumstances.” *Id.* In Employer’s Application for Temporary Labor Certification, Employer stated, “The Exotic Game Ranch Manager is seasonal in nature as the time needed for the Exotic Game Ranch Manager does not exceed more than one (1) year and is tied by the event and pattern of the breeding process.” (AF 248). Per Employer’s Request for a long-term extension, Employer is requesting the employment period be doubled for a temporary or seasonal need. Based on Employer’s Application and Request for a long-term extension, Employer’s stated need does not meet the 1-year requirement for temporary or seasonal need. Instead, it appears Employer has a permanent, year-round need, that is not “tied to a certain time of the year by an event or pattern.” 20 C.F.R. § 655.103(d). In addition, Employer’s Request and documentation do not clearly support “extraordinary circumstances” that would justify such a significant extension, nor why Employer needs 1 Exotic Game Ranch Manager for another entire year/season.

CONCLUSION

Employer’s requested extension is significant. It spans 2 seasonal operations for Employer. It is not clear how Employer’s reasons and the evidence it submitted support the length of the extension requested, as discussed above. Therefore, BALCA cannot approve or partially approve Employer’s Request, as Employer asked in its Request for Administrative Review. However, the Certifying Officer did not consider Employer’s reasons and documentation. Instead, the CO denied Employer’s Request for a long-term extension, finding that Employer did not show extraordinary circumstances to support the extension, but without stating why. This was arbitrary and capricious. Accordingly, the CO’s determination is reversed, and this matter is remanded to the CO for further consideration of Employer’s reasons and evidence. On remand, the Certifying Officer should discuss Employer’s reasons and evidence and provide an

explanation for why or why not the Request for a long-term extension is approved or denied.

ORDER

1. The Certifying Officer's Denial of Employer's Long-Term Extension Request is **REVERSED**.
2. The matter is **REMANDED** to the Certifying Officer for further consideration of Employer's reasons and evidence submitted for its Long-Term Extension Request.
3. On remand, the Certifying Officer should discuss Employer's reasons and evidence and provide an explanation for why or why not the extension is approved or denied.

SO ORDERED.

For the Board:

DANA ROSEN
Administrative Law Judge