

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 20 August 2020**

*In the Matter of:*

**FAIRFIELD CONSTRUCTION, INC.**  
**d/b/a FAIRFIELD LANDSCAPING,**  
*Employer.*

**BALCA Case No. 2020-TLN-00055**  
ETA Case No. H-400-20185-694414

**DECISION AND ORDER REVERSING THE DENIAL OF CERTIFICATION  
AND REMANDING TO THE CERTIFYING OFFICER**

*Appearances:* Devon Kenefick, Esquire  
MAS Labor H2B, LLC  
Charlottesville, Virginia  
*For the Employer*

Gema Hall, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, DC  
*For the Certifying Officer*

*Before:* **THEODORE W. ANNOS**  
Administrative Law Judge

This case arises under the labor certification process for temporary nonagricultural employment in the United States under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.*, and the implementing regulations promulgated by the Department of Labor (“DOL”) at 20 C.F.R. Part 655, Subpart A.

On July 3, 2020, Fairfield Construction, Inc. d/b/a Fairfield Landscaping (“the Employer”) submitted an *Application for Temporary Employment Certification* (“Current Application”). The Certifying Officer (“CO”) of the DOL’s Employment and Training Administration denied the Current Application, and the Employer subsequently submitted a timely request for administrative review to the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”).

### **BACKGROUND**

On March 9, 2020, the Employer received certification for 64 Landscaping and Groundskeeping Workers for the period April 1, 2020 to December 25, 2020 (“Certified Application”).<sup>1</sup> However, due to the statutory cap of 66,000 visas,<sup>2</sup> it was unable to hire the full number of out-of-country workers,<sup>3</sup> and was only able to transfer one in-country H-2B visa worker.<sup>4</sup> The remaining 63 positions for which it was certified remained unfilled.

On July 3, 2020, the Employer filed the Current Application to hire 40 Landscaping and Groundskeeping Workers for the period October 1, 2020 to December 25, 2020.<sup>5</sup> In the addendum to the Current Application, the Employer stated:

Because the Department of Homeland Security did not release additional cap relief visas for fiscal year (FY) 2020, we were unable to meet the entirety of our previously approved labor need. We remain unable to satisfy our bona fide temporary labor need through the h-2b program due to lack of available visas as well as an insufficient number of U.S. applicants ready, willing, and available to perform the work.

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<sup>1</sup> Administrative File (“AF”) at 32-35.

<sup>2</sup> 8 U.S.C. § 1184(g)(1)(B).

<sup>3</sup> AF at 3.

<sup>4</sup> AF at 3.

<sup>5</sup> AF at 51.

This application does not represent additional seasonal workers, as the statutory visa cap impeded the full use of the earlier labor certification (H-400-20002-224727) [Certified Application]. While we were able to locate 1 H-2b worker in the US, we still have a need for the remaining number of workers to meet our previously approved need. A copy of the USCIS I-797a approval notice is uploaded with this filing. This subsequent labor certification application should not be interpreted to suggest that the dates of need specified in our previous H-2b application was anything other than true and accurate. Nor, for that matter, is it indicative of an unpredictable or lack of a temporary labor need. To the contrary, our unanticipated inability to obtain the workers earlier in our season has caused irreparable harm, financially as well as reputational harm and loss of goodwill. We have undertaken reasonable efforts to satisfy our labor need through alternative means and have been unsuccessful in doing so.

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We require fewer workers at this time as compared to our prior certification because the H-2b visa cap and the economic upheaval from the coronavirus pandemic negatively affected our spring business and necessitated adjustments to our initial labor expectation.<sup>6</sup>

On July 13, 2020, the CO issued a Notice of Deficiency (“NOD”) pursuant to 20 C.F.R. § 655.15(f), which provides that only one application may be filed for worksites within one area of intended employment for each job opportunity with an employer for each period of employment.<sup>7</sup> Specifically, the CO stated that the Current Application is for the same position in the same area of intended employment and for an overlapping period of need as the prior, and still valid, Certified Application.<sup>8</sup> The CO requested that Employer provide the following information to correct the deficiency:

[A] detailed explanation and supporting documentation that demonstrates that the work described in the certification application is not the same as that covered by the newly filed application. The Department notes that the employer has already indicated that the newly filed application is for the same job opportunities as those for which it has already received certification;

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<sup>6</sup> AF at 56. See also AF at 3.

<sup>7</sup> AF at 45-50.

<sup>8</sup> AF at 49.

OR

[P]rovide support to show that it has a need for additional workers, totaling 104 Landscaping and Groundskeeping Workers, ... and also demonstrate that this need was not present at the time the employer's prior application was filed.<sup>9</sup>

On July 16, 2020, the Employer notified U.S. Citizenship and Immigration Services that it was surrendering the unused portion of the Certified Application,<sup>10</sup> stating:

This is to inform you that H-2B employer Fairfield Construction, Inc. remains unable to use the balance of their H-2B labor certification for ETA Case# H-400-20002-224727 [Certified Application] and is hereby formally surrendering the unused portion. The case was certified on March 9, 2020 for 64 positions. As this occurred after US Citizenship and Immigration Services reached the second half visa cap on February 18, 2020, the employer was unable to request the full amount of visa slots with your agency. Fortunately, they were able to locate 1 cap exempt workers (petition EAC-20-202-51494), leaving 63 positions remaining on this labor certification (H-400-20002-224727). This email serves as notification to your office of the unused portion of the labor certification and to attest that Fairfield Construction, Inc. has no intention of utilizing the unused positions associated with said certification. A copy of this email will also be submitted to DOL as part of the employer's in-process application with an October 1, 2020 date of need (H-400-20185-694414) [Current Application]. The October 1, 2020 application will serve as a replacement for, not in addition to, the unused portion of the earlier (capped) certification.

On July 22, 2020, the Employer responded to the NOD,<sup>11</sup> explaining:

The Employer holds a valid labor certification (H-400-20002-224727) [Certified Application] for 64 temporary Landscaping and Groundskeeping Workers, but was unable to utilize the entire labor certification to cross the

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<sup>9</sup> AF at 49.

<sup>10</sup> AF at 31.

<sup>11</sup> AF at 27-44.

full number of workers for which it was approved. The visa cap limit was reached for the second half of Fiscal Year 2020 before the Employer was able to obtain any visas for out-of-country workers. However, the Employer was able to locate one (1) in-country worker to transfer from another company using its valid labor certification with the start date of April 1, 2020. Following the transfer, the Employer had sixty-three (63) remaining slots, which went, and will continue to go, unused. The Employer does not intend to use the remaining sixty-three (63) slots from the earlier labor certification due to being unable to locate additional in-country workers.

The Employer is requesting only forty (40) temporary Landscaping and Groundskeeping Workers on the current application in question (H-400-20185-694414) [Current Application] which represents its current total need for Landscaping and Groundskeeping Workers at this location for its season.<sup>12</sup>

On July 28, 2020, the CO issued a Final Determination denying the Current Application (“Denial”).<sup>13</sup> The CO concluded that the Current Application was an impermissible second application covering the same period of employment contained in the Certified Application. Specifically, the CO stated, in relevant part:

In accordance with Departmental regulations at 20 CFR 655.15(f), only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment. The employer has submitted an application, H-400-20185-694414, [Current Application] for the same position in the same area of intended employment as a previously submitted application, H-400-20002-224727 [Certified Application], for which the employer received certification. That certification, for 64 workers and a period of need from April 1, 2020, to December 25, 2020, is still valid. The current filing seeks certification to employ eight workers<sup>14</sup> from October 1, 2020, to December 25, 2020—a period of need which overlaps with the period of need of the previously-certified application.

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<sup>12</sup> AF at 28.

<sup>13</sup> AF at 20-26.

<sup>14</sup> The CO erroneously stated that the Current Application requested eight workers. See AF at 3, 28, 51.

The employer indicated that although its prior application, H-400-20002-224727, was certified for 64 Landscaping and Groundskeeping workers in Canonsburg, Pennsylvania, it was unable to fill all of its positions due to the H-2B visa cap. The employer stated that it was able to locate one H-2B worker already in the U.S. and provided I-797A Notice of Action in support. In its current application, H-400-20185-694414, the employer is now requesting 40 workers to fill a portion of the 63 positions that remain unfilled. However, the employer has already received a certification for Landscaping and Groundskeeping workers at the same worksite location and covering the same period of need. The employer may only file one application for the same job opportunity, area of intended employment, and period of need. See 20 CFR 655.15(f). Because the employer has already employed some H-2B workers under certification H-400-20002-224727, the employer cannot now seek another certification for the same job opportunity, in the same area of intended employment, covering the same period of need, even if the employer “returns” the unused portion of the certification.

In the past, OFLC has permitted an employer to return a fully unused certification. Under such circumstances, OFLC marks the certification as returned and notifies U.S. Citizenship and Immigration Services (USCIS) that the certification is unavailable for use. When this is the case, the employer may file a new application for the same job opportunity, area of intended employment, and period of need without violating 20 CFR 655.15(f). However, an employer cannot return a used certification—even when the employer hired only a portion of the H-2B workers for which it received certification.<sup>15</sup>

On July 31, 2020, the Employer filed its request for administrative review of the Denial (“Request”).<sup>16</sup> On August 4, 2020, I issued a *Notice of Assignment and Expedited Briefing Schedule*, informing the parties that they may file briefs within seven business days of receiving the AF.<sup>17</sup> On August 5, 2020, the CO filed the AF. On August 13 & 14, 2020, the Employer and the CO filed briefs, respectively.

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<sup>15</sup> AF at 23-25.

<sup>16</sup> AF at 1-11.

<sup>17</sup> 20 C.F.R. § 655.61(c).

## LEGAL STANDARD

The scope of review for a denial of a temporary labor certification is limited to the written record, which consists of the Appeal File, any legal briefs submitted by the parties, and the employer's request for administrative review (which, itself, may only contain legal arguments and evidence actually submitted before the CO).<sup>18</sup> The standard of review is de novo. That is, I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.<sup>19</sup>

## DISCUSSION

This case centers on 20 C.F.R. § 655.15(f), which provides in pertinent part that “only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.” The Employer does not dispute that the Current Application and Certified Application are for the same occupation, worksite and area of intended employment, but contends that the applications are for distinct periods of employment, and that therefore, the Current Application does not violate the “one application” limitation under Section 655.15(f).<sup>20</sup> That is, the Employer argues that the Current Application “is for a different start date, making this a different period of employment.”<sup>21</sup>

In response, the CO argues that the Current Application was properly denied because it is a successive application for the same underlying need as the Certified Application.<sup>22</sup> Specifically, the CO contends that “[w]hen successive applications are for the same job, at the same location, during the same time period—even if start dates

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<sup>18</sup> 20 C.F.R. § 655.61(a) and (e).

<sup>19</sup> The proper standard of review is not identified in the INA or 20 C.F.R. Part 655. I find persuasive the rationale articulated in *Best Solutions USA, LLC*, 2018-TLN-00117, slip op. at 3 n.2 (May 22, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate for administrative review under 20 C.F.R. Part 655. See also *Albert Einstein Medical Center et al.*, 2009-PER-00379-81, slip op. at 31-32 (Nov. 21, 2011) (en banc) (“BALCA’s review of the CO’s legal and factual determinations when denying an application for permanent alien labor certification [under 20 C.F.R. Part 656] is de novo[.]”)

<sup>20</sup> AF at 4-6; Employer Brief (“Emp. Br.”) at 1, 4-7.

<sup>21</sup> AF at 28.

<sup>22</sup> CO Brief (“Br.”) at 4-9.

differ within that period—the CO may properly determine that they represent the same job opportunity and underlying need for labor.”<sup>23</sup>

The “period of employment” language was added to the “one application” regulation in 2012.<sup>24</sup> While the term is not defined in the regulations, DOL provided some context in the “Supplementary Information” sections of both the 2012 Final Rule and the 2015 Interim Final Rule:

[A]n employer must file only one Application for Temporary Employment Certification for worksite(s) within one area of intended employment for each job opportunity for each date of need.<sup>25</sup>

Paragraph (f) requires that ... employers file separate applications when there are different dates of need for the same job opportunity.<sup>26</sup>

As reflected above, DOL effectively equates “period of employment” with “dates of need,” and clarifies that separate applications are required when dates of need differ. The regulations define “date of need” as “the first date the employer requires services of the H-2B workers as listed on the *Application for Temporary Employment Certification*.”<sup>27</sup>

Also instructive is the Board’s recent decision in *Green Up Lawncare, LLC*.<sup>28</sup> In *Green Up*, the employer received certification for 30 Landscaping and Groundskeeping Workers for the period February 15, 2020 to November 14, 2020. However, due to the

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<sup>23</sup> CO Br. at 5 (citing *KDE Equine, LLC d/b/a Steve Asmussen Racing Stable*, 2020-TLN-00043, slip. op. at 9 (May 20, 2020)).

<sup>24</sup> See 20 C.F.R. § 655.20(e) (2009) (“[O]nly one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer.”); 20 C.F.R. § 655.15(f) (2012) (“[O]nly one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.”).

<sup>25</sup> *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10038-01, 10114 (Feb. 21, 2012).

<sup>26</sup> *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24042-01, 24060 (Apr. 29, 2015). The 2015 Interim Final Rule is “virtually identical to the 2012 final rule that DOL developed following public notice and comment[.]” *Id.* at 24043. However, DOL never implemented the 2012 final rule because of challenges to the agency’s rulemaking authority. *Id.* at 24045.

<sup>27</sup> 20 C.F.R. § 655.5.

<sup>28</sup> 2020-TLN-00052 (Aug. 14, 2020).

visa cap, it was only able to fill five positions with cap exempt workers. Employer subsequently filed an application for 15 Landscaping and Groundskeeping Workers for the period October 1, 2020 to November 14, 2020, clarifying that the 15 workers was in lieu of, and not in addition to, the 25 unfilled positions from the prior certification. The CO denied the application, finding that the employer was in violation of the “one application” limitation under Section 655.15(f) because the two applications were for the same “job opportunity, in the same area of intended employment, covering the same period of need, even if the employer ‘returns’ the unused portion of the certification.”<sup>29</sup>

The Board reversed, finding that the two applications did not represent the same job opportunity and, therefore, did not violate the “one application” limitation under Section 655.15(f). Specifically, the Board determined that while the two applications had the same area of intended employment, the job opportunities were different, as the subsequent application had reduced opportunities in terms of both the number of workers needed and the employment duration.<sup>30</sup>

The facts in this case mirror those in *Green Up*. Here, the Certified Application was for 64 Landscaping and Groundskeeping Workers from April 1, 2020 to December 25, 2020. While the Employer was able to fill one of the positions with an in-country H-2B transfer, it was unable to fill the remaining 63 due to the visa cap. It followed with the Current Application for 40 Landscaping and Groundskeeping Workers for the period October 1, 2020 to December 25, 2020. In both the Current Application and in response to the NOD, the Employer clarified that it does not intend to use the remaining 63 slots from the Certified Application, and its request for 40 workers in the Current Application represents its total need at this location for its season.

While I recognize that an employer should refrain from using the visa cap to support its claimed period of need,<sup>31</sup> the cap was not the only justification for the Current Application. Indeed, in the Current Application, the Employer stated that it now needed fewer workers because “the economic upheaval from the coronavirus pandemic negatively affected its spring business and necessitated adjustments to its labor expectation.”<sup>32</sup> But even if the cap was the principal motivating factor in filing the

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<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> *Green Up*, 2020-TLN-00052, slip op. at 13 (citing *AC Sweepers*, 2017-TLN-00012, slip. op. at 6-7 (Jan. 11, 2017); *Marco, LLC, d/b/a Evergreen Lawn Care & Rainmaker Irrigation*, 2009-TLN-00043, slip op. at 4 (Apr. 9, 2009)).

<sup>32</sup> AF at 56.

Current Application, the Board has previously recognized that “[i]f Employers were prohibited from honestly acknowledging that there is a visa cap imposed which affects obtaining visas in certain months, ... then every Employer whose peakload need begins during the gap between the two allotments of visas would be prohibited from ever using the H-2B program, even for a limited part of its peakload season.”<sup>33</sup>

The CO relies on *KDE Equine*<sup>34</sup> to support her argument that the differing start dates in the Certified Application and the Current Application do not require a finding that the applications represent different job opportunities.<sup>35</sup> However, *KDE Equine* is distinguishable from this case. In *KDE Equine*, the employer filed successive applications with the fundamental difference being that the second application proposed a start date one month after the start date of the prior certified application. The Board held that “even though the start dates differ by one month, these workers are essentially working during the same period of employment.”<sup>36</sup> Here, the workers will not be “essentially” working during the same period of employment. The period has been significantly reduced from approximately nine months to three months, with a start date of October 1, 2020 as opposed to April 1, 2020. What is more, the employer in *KDE Equine* filed the second application because it was seeking to obtain certification for 45 workers in *addition* to the 70 workers already certified in the first application. The Employer here confirmed that the 40 workers it now seeks is in lieu of, and not in addition to, the 63 unfilled positions from the Certified Application.

In all, I find that the Current Application represents a different job opportunity than the Certified Application because of the significant reduction in both the period of employment and the number workers requested. Therefore, the Employer has not violated the “one application” limitation under 20 C.F.R. § 655.15(f).<sup>37</sup>

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<sup>33</sup> *RBD Holdings, LLC*, 2020-TLN-00033, slip op. at 13 (Apr. 30, 2020). See also *Park Range Construction*, 2020-TLN-00004 (Nov. 7, 2019) (BALCA reversing CO and granting Employer’s application for extension of period of need where start date was delayed due to delay in obtaining temporary workers due to visa cap).

<sup>34</sup> 2020-TLN-00043.

<sup>35</sup> CO Br. at 5-7.

<sup>36</sup> 2020-TLN-00043, at 9.

<sup>37</sup> In light of my finding, I need not address the parties’ additional arguments concerning the practice of “returning” unused and partially used certifications for the purpose of allowing an employer to file a new application for the same job opportunity. See AF at 6-8; Emp. Br. at 2, 8-11; CO Br. at 9-11.

I further find that, based upon my review of the Appeal File, the Employer has met its burden of proving a temporary need for 40 Landscaping and Groundskeeping Workers for the period October 1, 2020 to December 25, 2020.

**ORDER**

Based on the foregoing, the denial is **REVERSED** and this case is **REMANDED** to the CO for the issuance of a Notice of Acceptance pursuant to 20 C.F.R. § 655.33, and for other appropriate processing in accordance with the regulations.

For the Board:

**THEODORE W. ANNOS**  
Administrative Law Judge