



Issue Date: 14 August 2020

BALCA Case No.: 2020-TLN-00052
ETA Case No.: H-400-20185-694828

In the Matter of:

Green Up Lawncare, LLC.

Employer.

**DECISION AND ORDER REVERSING THE CERTIFICATION OFFICER'S
DENIAL OF TEMPORARY LABOR CERTIFICATION**

This case arises from Green Up Lawncare, LLC's ("Employer") request for review of the Certifying Officer's ("CO") decision to deny an application for temporary alien labor certification under the H-2B nonimmigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).²

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* ("Form 9142"). A CO in the Office of Foreign Labor Certification ("OFLC") of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO's denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a).

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

² On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications "submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015." IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

BACKGROUND

On July 3, 2020, the Department of Labor's Employment and Training Administration ("ETA") received Employer's application for temporary labor certification. AF 66-89.³ Employer requested certification of "15 Landscaping and Grounds-keeping Workers," for an alleged period of peakload need from October 1, 2020 to November 14, 2020. AF 66.

On July 13, 2020, the CO issued a Notice of Deficiency (NOD) explaining that Employer's application contained deficiencies. AF 58- 64. According to the NOD, Employer submitted two applications for Temporary Employment Certifications "for the same position during the same period of need in the same area of intended employment" in violation of 20 CFR 655.15(f).⁴ AF 62. The CO requested additional information and provided ways in which Employer could cure the deficiency. AF 62-64.

On July 16, 2020, Employer responded to the NOD. AF 56-57. In its response, Employer referenced a statement in the CO's NOD where the CO specified that employers are not permitted to use a "portion of slots from a prior certification for cap-exempt workers, while at the same time fil[e] a new application under a new cap, for cap-subject workers."⁵ AF 57. Employer stated that this statement is contradictory to the CO's past practices as it has received NOAs for applications in the same situation:

We received a NOA just the other day for an application that we received this exact same NOD on last week. That employer had filled 7 of its 37 visas with CAP exempt workers, returned the [Labor Certification] to USDOL for the 30 unused, received notification from USDOL that the return was accepted and then the NOA.

Id. Employer adds that it informed the US Department of Labor on July 1, 2020 that it would not be using the remaining visas on the prior Labor Certification, case # H-400-20002-226303, due to the H-2B CAP. *Id.* Employer notified the USDOL again on July 8 and received confirmation that the USDOL had received the return notification and placed it on file. Employer's agent adds that it has done similar for multiple employers and those employers had received Notice of Acceptances.⁶ Employer added that its statement of need and evidence shows that it has a need for and can provide full time employment for the number of workers its requesting. Employer stated that it initially requested 30 laborers and was certified for this

³ References to the Appeal File will be abbreviated with an "AF" followed by the page number.

⁴ The CO included a chart indicating that in one application Employer requested Landscaping and Groundskeeping Workers to work from October 1, 2020-November 14, 2020 and in another application Employer requested workers from April 1, 2020- November 14, 2020. AF 62.

⁵ See AF 63.

⁶ "This is the same thing we have done for multiple employers that have filled for 10/1/20 start dates, many of which have received NOAs over the past two weeks. We have also filed similar requests for O/I petitions for the last two years for employers that were caught in the CAP each of those fiscal years. All applications were certified by USDOL." AF 57.

number. However, it was only able to fill five of those positions with CAP exempt workers.⁷ Accordingly, it is requesting 15 out of the 25 remaining workers it was originally certified for. Thus, Employer is not submitting a duplicate request but is rather requesting 15 workers that they had initially been certified for. Employer adds that it notified DOL and received notification that it would not be using the other 10 slots on its original Labor Certification.

On July 17, 2020, the CO issued its Final Determination informing Employer that its application was denied because deficiencies still remained. AF 50 -P55. The CO explained that under 20 CFR 655.15(f), employers can file only one Temporary Employer Certification “for worksite(s) that are within one area of intended employment for each job opportunity with an employer for each period of employment. 20 CFR 655.15(f); AF 54. The CO explained that Employer submitted duplicate applications. Employer submitted an application (H-400-20185-694828) for the same position and same area of employment as its previously submitted application (H-400-20002-226303). The CO mentioned that Employer’s previous certification (for 30 workers from April 1, 2020, to November 30, 2020) is still valid and added that Employer’s current application (for certification to employ 15 workers from October 1, 2020, to November 30, 2020) overlaps with the period of need of the previously-certified application.

The CO further explained that Employer’s previous application (H-400-20002-226303) was certified for 30 Landscaping and Groundskeeping workers in Baton Rouge, LA. AF 55. However, due to the H-2B visa cap,⁸ Employer was unable to fill all its positions. Employer however managed to employ four H-2B workers who were already in the United States. Now, Employer is seeking 15 workers to fill part of its unfilled positions. Those workers will work in the same worksite location for the same period of need. According to the CO, employers are barred from doing this. Per the regulations, an employer is entitled to filing only one application for the same job opportunity, area of intended employment, and period of need. Thus because Employer has already employed some H-2B workers under its prior certification (H-400-20002-226303), Employer is precluded from requesting 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.” AF 55.

⁷ Employer states that it was able to fill five positions with CAP exempt workers (AF 57) but the CO states employer obtained four workers (AF 36). However, in its appeal, Employer mentions that it was able to fill four positions. AF 2.

⁸ Explanation for the H-2B cap can be found at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants>.

Under the Immigration and Nationality Act (INA), as amended, there is a statutory numerical limit, or “cap,” on the total number of aliens who may receive an H-2B visa, or otherwise granted H-2B status, during a fiscal year. Currently, Congress has set the H-2B cap at 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (Oct. 1 - March 31) and 33,000 for workers who begin employment in the second half of the fiscal year (April 1 – Sept. 30). Any unused numbers from the first half of the fiscal year will be available for employers seeking to hire H-2B workers during the second half of the fiscal year. Unused H-2B numbers from one fiscal year do not carry over into the next fiscal year.

Id.

The CO explained that the Office of Foreign Labor Certification (OFLC) previously allowed employers to return a fully unused certification. In those situations, the OFLC would mark the certification as returned and notify the U.S. Citizenship and Immigration Services (USCIS) that the certification is unavailable for use. Employer could then 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, employers cannot return used certifications including certifications where the employer only hired a portion of the H-2B workers it was certified for.

On July 28, 2020, Employer requested administrative review of its denial. AF 1- 49. In its appeal Employer acknowledged that it was previously certified for 30 H-2B workers but because of USCIS' application of the statutory visa cap it was precluded from completing its hiring process. AF 2. Employer however managed to fill four positions with CAP exempt⁹ workers and returned the unused portion to USDOL as is common practice. Employer, because it had a need, filed a new application for 15 laborers. Employer explained that because of the time lapse from April 1 to October 1, USCIS "refuses to approve a visa petition for the 26 unfilled positions; they require a new labor cert for that new start date." AF 2. Employer states that it followed DOL and USCIS requirement and was still denied. It further states that its new petition is not duplicative and will not cause it to hire H-2B workers in excess of what it was certified for.¹⁰ Employer also adds that it agrees with the CO's statement that it cannot file more than one application for the same job opportunity, area of intended employment, and period of need. AF 3-4. This is why it followed the regulations and started a new process with a separate job posting, recruitment and a different date of need. Employer states that neither DOL nor USCIS would permit a 6-month delayed entry on the original labor certification and that it was not attempting to use its original certification but rather it was in accordance with DOL's process, it was pursuing a new labor certification process.

Employer disagrees with the CO's stance about employers not being allowed to return partially used certifications. Employer categorizes the CO's actions as inconsistent. According to Employer, the current job opportunity is not the same as the previous one for which it was certified even if it falls within the same timeframe. AF 3. For example: this job opportunity is for 1.5 months instead of the previous 7.5 months offered. Employer also argues that "20 CFR 655.15(f) does not list any references to the return of LC, and therefore does not specify whether

⁹ USCIS' description for exempt workers is as follows:

Generally, workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment will not be subject to the cap. Similarly, H-2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names them on the petition and indicates that they have already been counted. The spouse and children of H-2B workers classified as H-4 nonimmigrants also do not count against this cap.

See United States Citizenship and Immigration Services, Cap Count for H-2B Nonimmigrants, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants> (last visited Aug. 9, 2020).

¹⁰ In its NOD, the CO suggested that Employer was seeking 45 workers. *See* AF 65.

full or partial LC returns are deemed acceptable.” AF 4. Employer then must rely on consistent determinations from the USDOL to understand what is acceptable. It claims that the USDOL has accepted partial labor certification returns, allowing employers to then file new applications within the same area of intended employment and time of need for years. According to Employer, there have been instances where employers who were limited by the first half of the CAP filled some of the visas with CAP exempt workers and then applied for the remainder on the second half CAP. Employer asserts that “there is no difference between an employer doing this within the same fiscal year versus a new fiscal year CAP.”¹¹ Employer’s agent writes that within days of the CO denying its certification, it received an NOA for another similarly situated employer (Case# H-400-20185-695016). That employer was certified for 37 laborers from 4/1/20 to 11/15/20 but were caught in the CAP. However, they were able to fill 7 of the 37 visas with CAP exempt workers. The employer returned the unused portion of their labor certificate and then later filed for 12 workers from 10/1/20 to 11/15/20. The employer similarly received the same NOD referencing that this was not allowed per regulations. However in that case, an NOA was granted after the CO received its response to the NOD. Employer states that it has spoken with multiple agents who are also experiencing these same inconsistencies in adjudication. Employer states that the Case# H-400-20185-695224 is another example of an application issued an NOA for a 10/1 start date, after returning a partially used Labor Certification. The Employer refers to these inconsistencies as arbitrary and capricious, and that the denials have no bearing on actual regulation language. AF 5.

Employer also asserts that it correctly followed 20 CFR 655.15(f) which requires that employers must file separate applications where there are different dates of need. Employer states that:

The previous application included a start date of need of April 1, 2020; this new application has a start date of need of October 1, 2020. As far as the Department’s request that employers “accurately identify their personnel needs” for each period of time, this employer has done so - the original need for workers was not met, for reasons entirely outside the employer’s control, and this new need for workers for a much shorter season reflects a reduced need. The employer provided updates and additional information about returning unused positions to the Department and the combined workforce will remain far below the size for which the Department originally approved them. Moreover, by filing separately now, six months after the original application, the employer will better be able to test the new (drastically altered) labor market in their area, further promoting the purposes of the H-2B program, generally, and the Department’s regulations, specifically.

AF 4-5.

¹¹ The undersigned does not find this statement to be accurate as the U.S. Citizenship and Immigration Services has said that “unused H-2B numbers from one fiscal year do not carry over into the next fiscal year.” United States Citizenship and Immigration Services, Cap Count for H-2B Nonimmigrants, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants> (last visited Aug. 9, 2020). However, it is true that “unused numbers from the first half of the fiscal year will be available for employers seeking to hire H-2B workers during the second half of the fiscal year.” *Id.*

On Wednesday, August 13, 2020, the Tribunal received the CO's brief.¹² In the brief, the CO reiterated that it denied Employer's application because Employer sought a new application for the same need that it had already been certified for. According to the CO, the OFLC first issues a NOD if an employer files for the same job opportunity as a previously-certified application. CO Br. at 4 *citing* H-2B Webinar Materials and Information for 2020 Peak Filing Season (Dec. 12, 2019), <https://www.dol.gov/agencies/eta/foreign-labor/>. Should the employer failed to establish a bona fide need for the new application, OFLC will issue a denial.

The CO maintains that the regulations bar employers from getting certified for successive applications that are “for the same job, at the same location, during the same time period—even if start dates differ within that period—the CO may properly determine that they represent the same job opportunity and underlying need for labor.” AF 5 *citing* *KDE Equine, LLC d/b/a Steve Asmussen Racing Stable*, 2020-TLN-00043, slip. op. at 9 (May 20, 2020) (holding that the employer's application sought H-2B workers for the same job opportunity and period of employment as a previous certification, even though the start dates of employment differed). The CO explained that the USDOL crafted the language 20 C.F.R. § 655.15(f) to prevent staggered entries based on a single date of need (excepting the seafood industry in 2015). *Id.* at 5-6. Consequently, employers are required to file separate applications if they wish to hire workers for the same job in the same location during the same time period, but starting on different dates. The new applications however would have to meet the requirements for certification, including establishing temporary need for the requested labor.¹³ The CO advises that allowing Employer to obtain a second certification for an already-certified labor need, will violate USDOL regulations and the will of Congress as Employer will effectively be staggering the entry of workers for which it holds a valid certification.

The CO additionally asserts that Employer's arguments fails to consider that fact that successive applications must also demonstrate a need for the number of workers during the particular period an employer seeks certification. AF 9. The CO argues that here, “Employer has conceded that the current application does not represent a distinct need for labor—rather, the current application represents the same need for which the Employer was previously certified but was unable to fully fulfill because of the visa cap.”¹⁴ *Id.* The CO goes on to add that the USDOL has already provided Employer with a certification which Employer has utilized to hire H-2B workers. *Id.*

The CO continues that Employer is mistaken in its assertion that it's USDOL's practice to accept the return of unused and partially-used labor certifications. According to the CO, while the regulation and DOL's practice allow OFLC to accept the return of unused certifications to permit employers to file subsequent applications for the same job opportunities and need for labor, this is not the case for partially-used certifications as the regulations clearly prohibit the filing of more than one application for the same job in the same location for the same time period. *See* 20 C.F.R. § 655.15(f). The CO adds that it'll be a disincentive for employers to

¹² The CO's brief will be cited to as CO Br. followed by the page number.

¹³ Congress thus attempted to prevent scenarios where an employer would receive certification for all the workers needed for the season and then attempt to bring those workers in on different start dates. AF 6.

¹⁴ The CO quotes Employer's appeal file: “[t]he new [application] will not result in . . . the hiring of H-2B workers in excess of the employer's certified need.” CO Br. at 9 *quoting* AF 2.

accurately identify their personal needs if they were allowed to return partially-used certifications and then file an application for the same job opportunities. CO Br. 11 *citing* 80 Fed. Reg. 24,042, 24,060. The CO goes on to say that it is administratively infeasible to accept partially-used certifications and acceptance could undermine the integrity of the H-2B program since there is no formal process to vet how many workers employers ultimately hired. CO Br. at 11.

The CO finds Employer's argument about the CO subsequently certifying other employers who used partially certification unavailing. Employers are required to establish that each application they file is eligible for certification. Thus prior certification does not guarantee future certification. The CO cites to various cases for the proposition that a CO's approval in similarly application in the past is not grounds for reversal of the denial and that BALCA, per the regulations, is not allowed compare the CO's determination in one case with the CO's determination in another case, amongst others. CO. Br. at 11.

It is the CO's position that Employer has not met its burden in demonstrating that the job opportunities for the certification it now are distinct from those in its previously certified application. CO. Br. at 13. Therefore, Employer is precluded from receiving a new certification. Further, even if it is the case that the other employers' certifications are relevant here, the CO did not consider those cases in making its final determination. Also since those cases are not part of the record before the undersigned, they cannot be considered. The CO additionally adds that even if those previous certifications should have been denied because those employers received certifications for the same job opportunities in the same area and during the same time period but were not, the CO should not have to certify a deficient application in this case. CO. Br. at 13 *citing Rollins Sprinkler & Landscape, LLC*, 2017-TLN-00020 (Feb. 23, 2017) (noting "two wrongs would not make a right"); *G.H. Daniels III & Associates, Inc.*, 2012-TLN-00037, at 5 (June 18, 2012) ("[T]he fact that ETA may have let deficiencies slip through in the past should not estop the CO denying certification on a legally sufficient basis."); *see also Double J Harvesting, Inc.*, 2019-TLC-00057, at 7 (July 2, 2019) (finding that harm to employer "does not justify ignoring clear regulatory guidance").

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board "must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. *Id.* While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

DISCUSSION

A. Legal Standard

An employer seeking certification under the H-2B program must “establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer’s need is temporary if it is: “a one-time occurrence; a seasonal need; a peakload need; or an intermittent need.” 20 C.F.R. § 655.6(b).

An employer establishes a “peakload need” if it shows that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In this case, the CO denied Employer’s application not because Employer failed to establish a peakload need but because Employer had a previous valid certification that it had used to employ H-2B CAP exempt workers and was applying for a new certification for the same job opportunity, in the same area of intended employment, covering the same period of need. Per 20 CFR 655.15(f), Employer is barred from doing this even if it returns the unused portion of the certification.

B. Analysis

The issue here is whether the CO properly denied certification on the basis that Employer did not comply with the application filing requirements under 20 C.F.R. § 655.15(f). Employer filed Case# H-400-20002-226303 filed for 30 laborers from 2/15/20 to 11/14/20 but was precluded from hiring in February due to the first half CAP. Employer was however able to fill 4 of the 30 positions with CAP exempt workers and notified the USDOL that the remaining 26 could not be used. Employer however had a need for more laborers and filed Case# H-400-20185-694828 for 15 laborers from 10/1 /20 to 11/14/20.

The CO would not certify Employer’s request (# H-400-20185-694828 for 15 laborers from 10/1 /20 to 11/14/20) because it found that Employer had a valid certification for the same job opportunity, in the same area of intended employment, covering the same period of need. Also, Employer had already used this certification to hire 4 exempt CAP workers and consequently could not request a new 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. Employer argues that this finding is arbitrary and capricious because it does not conform to the CO’s contemporaneous findings. According to Employer, its agent had other employers in the same situation. However, the CO granted their certification. As part of its appeal request, Employer attached:

- a copy of the Labor Certification for H-400-20002-226303;

- copy of the complete application, 9142, documents and supporting evidence provided at time of submission for case# H-400-20185-694828
- copy of the NOD and response for case# H-400-20185-694828;
- copy of the final determination for case# H-400-20185-694828; and
- Copy NOD, NOD response and NOA for the aforementioned application case# H-400-20185-695016

AF 5.

According to the regulations:

Except as otherwise permitted by this paragraph (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. Except where otherwise permitted under § 655.4, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H-2B program.

20 CFR 655.15(f). “*Job opportunity* means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.” See 20 CFR § 655.5. The regulations define *Area of intended employment* as: the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. 20 CFR § 655.5

The Office of Labor Certification recently addressed the return of approved labor certifications not utilized for cap reasons in a frequently asked questions (FAQ). See § 7:29. Post-certification issues: Redeterminations, extensions of employment period, withdrawals, and amendments after final determination, Immigr. Proc. Handbook § 7:29.

Q: I received a temporary labor certification from OFLC containing an employment start date before April 1, 2020, but DHS rejected my petition due to the first-half cap being reached. May I return my temporary labor certification and file a new application for the same job opportunity with OFLC requesting an employment start date on or after April 1, 2020?

A: Yes. With limited exceptions, under 20 CFR 655.15(f), only one Application for Temporary Employment Certification (Form ETA-9142B and appendices) may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.

OFLC will issue a Notice of Deficiency (NOD) when an employer has filed a new H-2B application and has not returned the first certification covering the same job opportunity before the Certifying Officer reviews the application. This NOD will require the employer to justify the bona fides of the new H-2B application. OFLC may not accept for processing a new or subsequent H-2B application covering the same employer and job opportunity without the first labor certification being returned.

Employers can return a temporary labor certification that is no longer needed, at any time, using the following procedure:

- Email the Chicago National Processing Center at TLC.Chicago@dol.gov;
- Include the phrase “H-2B Cert Return Notification” followed by the full case number in the email subject line; and
- Include the full case number and employer name in the body of the email and a brief explanation as to the certification return.

Example: Acme Company will not use the certification for H-400-1234-56789 due to the H-2B cap being reached.

§ 7:29. Post-certification issues: Redeterminations, extensions of employment period, withdrawals, and amendments after final determination, Immigr. Proc. Handbook § 7:29.¹⁵

According to Employer’s agent, within days on its certification being denied, another employer’s (in the exact same position) certification was granted (Case# H-400-20185-695016). Employer states that this was also the case for the employer in Case# H-400-20185-695224 where the CO issued an NOA for a 10/1 start date, after the employer returned a partially used labor certification. Pursuant to 20 C.F.R. § 655.61(a)(5), any arguments and evidence that Employer presents must be made before the CO’s final determination for it to be considered on appeal. As Employer informed the CO of its inconsistent decisions, though it did not give specific case instances, the undersigned can consider this argument.¹⁶

Employer’s agent attached a copy of the NOD, NOD response and NOA from Case Number: H-400-20185-695016 to its appeal. AF 37. In that case the CO denied that employer’s certification because it violated 20 CFR 655.15(f). There, the CO stated that the employer submitted an application that matches a filing for which the employer previously received certification, C-400-20002-226343. The CO found that the current filing is for the same position in the same area of intended employment, and for an overlapping period of need as a prior still valid, certification. AF 40. In that case, Employer’s agent responded to the CO’s NOD and explained that:

[It] was . . . able to fill 7 of the 37 workers they were certified for through an extension request. The employer was caught in the CAP and could not fill any of their visas. They were able to find 7 workers available to transfer from another employer who could no longer use the workers, but due to the CAP they could not utilize the remaining 30 visas on their labor certification for case# H-400-20002-226343.

¹⁵ See also U.S. Department of Labor Employment and Training Administration OFFICE OF FOREIGN LABOR CERTIFICATION H-2B Program Frequently Asked Questions, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Visa-Cap_FAQs_01.02.20.pdf (last visited Aug.10, 2020).

¹⁶ “However, we have already received NOAs for applications in this exact same situation. We received a NOA just the other day for an application that we received this exact same NOD on last week. That employer had filled 7 of its 37 visas with CAP exempt workers, returned the LC to USDOL for the 30 unused, received notification from USDOL that the return was accepted and then the NOA” AF 57.

AF 42. On July 14, 2020, the CO issued a notice of acceptance for that employer. AF 43. At the outset, the undersigned notes that one difference between Employer and the employer from H-400-20185-695016 is how they filled their open positions when they got caught in the cap. Employer here utilized H-2B exempt employers whereas the employer from Case Number: H-400-20185-695016 requested an extension request. Extension requests are governed by 20 C.F.R. § 655.60 and there is no evidence here that Employer requested an extension. However, based on the USCIS webpage (and in line with what Employer states), employers can only fill H-2B positions with CAP exempt workers if those employers are caught in the cap.¹⁷ Thus the undersigned finds that those cases are similar enough to note that the CO's decisions are not consistent.¹⁸ Thus, if it is the case that situations where an "employer is seeking to use a portion of slots from a certification for cap-exempt workers, while at the same time filing a new application under a new cap, for cap-subject workers" are not permitted, then the CO's actions must be consistent as well.

However, while the CO's actions (certifying applications in certain instances but denying application in case with close facts and issues) could be perceived as arbitrary and capricious, how the CO acted in other cases is not germane to the case at hand. *See e.g.*, *Rollings Sprinkler & Landscape*, 2017-TLN-00020 (Feb. 23, 2017); *Wickstrum Harvesting, Inc.*, 2018-TLC-00018, at 8 (May 3, 2018). It is the Tribunal's duty to assess whether the CO acted arbitrarily and capriciously in this particularly case. As the CO notes two wrongs do not make a right. CO Br. at 13 *citing Rollins Sprinkler & Landscape, LLC*, 2017-TLN-00020 (Feb. 23, 2017). The regulations and the will of Congress are not invalidated simply because the CO dropped the ball in previous cases (approving certifications in cases that warranted a denial because employers submitted duplicate applications).

The regulations mandate that employers submit one application. Subsequent applications therefore cannot be a duplicate of the initial application and must meet the regulatory requirements. 20 C.F.R. § 655.15(f) clearly states that unless an exception applies, "only one Application for Temporary Employment Certification (ETA Form 9142B and appendices) may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment." In its FAQ, the USDOL clarified instances under 20 C.F.R. § 655.15(f) where the Employer has an unused certification and wants to file a new one. The FAQ however, did not clarify situations such as this one, where an Employer is not able to hire H-2B laborers due to the CAP but it was fortuitously able to hire CAP exempt workers and return its unused application. According to the CO, it is however not the case that the OFLC accepts partial certifications. Employer's position is contrary to the CO's. Employer argues that in the past it has returned the unused portion of its certification and has received confirmation from the USDOL that its return had been received. Nevertheless, Employer agrees (and as the CO states), the regulations clearly demonstrate that an Employer can only apply for one

¹⁷ "Once the H-2B cap is reached, USCIS may only accept petitions for H-2B workers who are exempt from the H-2B cap." United States Citizenship and Immigration Services, Cap Count for H-2B Nonimmigrants, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants> (last visited Aug. 9, 2020).

¹⁸ Employer mentioned cases H-400-20185-695016 and H-400-20185-69522. However, Employer did not attach the CO's decision in these cases. Consequently, the undersigned makes no determination on whether those decisions establish that the CO acted in an arbitrary and capricious manner.

certification for the same job opportunity, in the same area of intended employment, covering the same period of need. Employer states it is for this reason that it applied for a new certification.

Having established that the regulations set forth the requirements -- and not the actions of the CO in prior determinations -- the Tribunal will now turn to whether the CO acted arbitrarily and capriciously in the case at hand. The Tribunal finds that Employer has established that its current application does not violate 20 C.F.R. § 655.15(f).¹⁹

In H-400-20002-226303, Employer requested 30 Landscaping and Groundskeeping Workers to work from 4/1/2020 to 11/14/2020. AF 6. In H-400-20185-694828 (the certification at issue here), it is requesting 15 Landscaping and Groundskeeping Workers to work from October 1, 2020 to November 14, 2020. AF 66. The undersigned is cognizant that because Employer only provided the labor certification for case # H-400-20002-226303, the undersigned is unable to determine the job duties of those laborers and thus cannot make a finding on whether their job function truly differs from the job function of the 15 workers that Employer now seeks. Thus perhaps, Employer has been unable to demonstrate how the job opportunities presented in each application are not the same. However, the undersigned notes that in its statement of temporary need, Employer delineates its schedule of operations. AF 71. The schedule of operations show that the type of work performed in April is similar to that performed in October.

The undersigned finds that the period Employer is now requesting workers is much reduced from its initial application and so is the number of workers it is seeking. The regulations define *Job opportunity* as one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers. See 20 CFR § 655.5. The regulations define *Area of intended employment* as: the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. 20 CFR § 655.5. The undersigned finds that while the area of intended employment is the same in both applications, the job opportunity is not. Here, unlike in Employer's previous application, the number of job opportunities has been reduced both in terms of the number of workers needed and the employment duration. This case is also different from the *KDE Equine, LLC d/b/a Steve Asmussen Racing Stable*, 2020-TLN-00043, slip. op. at 9 (May 20, 2020) that the CO relies on. There, the employer's certification was denied because even though the start dates of employment differed, the employer wanted H-2B workers for the same job opportunity and period of employment as a previous certification. In that case, the employer was certified for 70 workers and requested an additional 45 workers. The time period between the start date of the previous application and the current application is another important factor. In *KDE Equine*, Employer argued that the applications were distinct because the first application had an anticipated start date of April 1, 2020, whereas the second application had an anticipated start date of May 1, 2020.²⁰

¹⁹ In the NOD, the CO asked Employer to either demonstrate that the job opportunities presented was distinct from the one its previous certification or that it had a need for additional workers. Based on the statements in its Appeal File and response to the NOD, Employer's new application sought to establish that the job opportunities were distinct and not that it had a need for additional 15 workers.

²⁰ It is also important to note that in *KDE Equine*, the employer did not argue that it had returned unused portions of its labor certification. The facts there clearly establish that the employer had

Here, Employer is not endeavoring to add 15 workers to the 30 workers it has already been certified for. Employer submitted a new application and explained why it needed the 15 workers. The CO asked Employer to explain how this job is distinct for the previous employment it had been certified for and the Employer explained that it was seeking lesser workers to work for a less time period and provided documentation for its period of need. As Employer notes, due to current conditions, the job market for hiring US workers could have change considerably. Thus their request is aligned with the goal of the H-2B program to protect U.S. workers.²¹

The undersigned is also unpersuaded by the CO's assertion that Employer's current period of need overlaps with the period of need in its previously-certified application. Evidently, Employer's peakload is within a certain period of time. Thus there will definitely be an overlap if Employer seeks to file for a new certification. Moreover, the undersigned finds that the reason why Employer was unable to attain workers was because of the visa cap. Fortunately it was able to find a small number of workers to cover certain periods and thereafter, in keeping with practice, it returned the rest of its unused Labor Certification. Though it is true that employers should be deterred from using the visa CAP as an excuse to extend their temporary need or inconsistently represent their periods of need, the Tribunal does not find that to be the case here. *See AC Sweepers*, 2017-TLN-00012, slip. op. at 6-7 (Jan. 11, 2017); *see also Marco, LLC, d/b/a Evergreen Lawn Care & Rainmaker Irrigation*, 2009-TLN-00043, slip op. at 4 (Apr. 9, 2009). If Employers are prohibited from honestly acknowledging that there is a visa cap imposed which affects obtaining visas in certain months, then every Employer whose peakload need overlaps 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. It is however clear that in this situation, Employer has established that its new certification meet the regulatory requirements.

The undersigned has reviewed Employer's documentation and explanations and finds that the Employer has met its burden of proving its temporary need for 15 Landscaping and Groundskeeping Workers to work from October 1, 2020-November 14, 2020.

CONCLUSION AND ORDER

For the reasons explained above, the CO's denial is unsupported by the record and therefore is REVERSED. This matter is REMANDED to the CO for the issuance of the Notice of Acceptance for the 15 requested temporary workers, and for any other appropriate processing in accordance with the regulations.

demonstrated an increase in earnings and wanted to hire more workers than it had previously been certified for.

²¹ The CO mischaracterizes Employer's request. Employer mentioned that the new application "will not result in duplication or the hiring of H2B workers in excess of the employer's certified need - there will be, at most 19 workers, not 45 workers as the CO seems to suggest." The undersigned infers that what Employer was conveying was that it was not seeking additional workers but that the number of workers it sought would not exceed its original certification. The undersigned also does not find that Employer is trying to circumvent the regulations by staggering workers.

SO ORDERED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge