



Issue Date: 21 August 2020

BALCA Case No.: 2020-TLN-00056
ETA Case No.: H-400-20185-694360

In the Matter of:

THE NATURE GROUP, INC., dba NATURE'S PARTNER,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Devon Kenefick, Esq.
For the Employer

Matthew Bernt, Esq. Associate Solicitor and Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Drew A. Swank
Administrative Law Judge

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

This case arises from the request for review of Nature Group, Inc., dba Nature's Partner ("Employer") in regard to the Certifying Officer's ("CO") July 28, 2020 denial of Employer's application for temporary alien labor certification under the H-2B non-immigrant 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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

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*

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).

BACKGROUND

On July 3, 2020, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 40 landscape laborers for the period of October 1, 2020, to November 25, 2020. AF 57-93.³ Employer indicated that the nature of its temporary need was “seasonal.” Employer attached a statement regarding its temporary need and the dates of need requested in its current application. In this regard it referred to its prior certified application in which it requested landscape laborers for the period April, 2020 – November 25, 2020 (ETA case # H-400-20002-223725). Employer stated:

Our requested beginning date of need for this current application is later than the most recent 2020 Labor certification that DOL/CNPC granted prior to the start of our traditional season. The Nature Group, Inc. was most recently certified to employ H-2B workers beginning in April, 2020. 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. Our requested end date of need remains unchanged from our prior certification, and our truncated period of employment remains within our previously established season given that our industry traditionally experiences an increased workload in the fall months with tree/shrub installation, intense clean-up work, mulching, and other tasks to ready properties in advance of winter, we are filing this replacement application to meet our labor need for the remainder of our established season. This new, fully compliant ETA Form 9142B (in accordance with H-2B FAQ Round 12) represents the earliest date that we reasonably expect to employ H-2B workers. This application does not represent additional seasonal workers, as the statutory visa cap impeded the full use of the earlier labor certification (H-400-20002-223725). While we were able to locate 5 H-2B workers in the US, we still have a need for the remaining temporary workers to meet our previously approved need. A copy of the USCIS receipt notices are included for your review.

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 have 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.

³ References to the appeal file will be abbreviated with an “AF” followed by the page number.

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 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.

While we fully expect to file future applications with worker numbers and dates of need more comparable to our historical filing patterns, the present application represents only a portion of our standard labor need and work season (for the reasons discussed above). The number of workers represents our current assessment of the local labor market and historical demand for services during the remaining months of our season. 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 adjustment to our initial labor expectation. Our inability to employ the full number of foreign H-2B workers earlier in our season does not negate the legitimacy or our ongoing temporary labor need, as we are dependent on a labor force of sufficient size to complete our work obligations for the balance of our season.

AF 62.

Employer also submitted the statement of temporary need from its previously filed application which again explained its difficulty in utilizing the H-2B program due to the visa cap. Employer stated, “[I]n 2019 we filed 2 applications splitting our labor need across two dates of need. The first application was filed under DOL case number H-400-18305-465026 and the second under DOL case number H- 400-18340-269815. However, due to H2B cap limitations, we will be combining these applications for the 2020 season into one application.” AF 73.

The CO issued a Notice of Deficiency on July 15, 2020, listing only one deficiency in the Employer’s application. AF 51-56. The CO noted that Employer had failed to comply with application filing requirements under 20 C.F.R. § 655.15(f) which states that only one application for temporary labor certification may be filed for the worksite within one area of intended employment for each job opportunity for each period of employment. The CO noted the Employer’s filing history in the following chart:

Case #	Workers Requested	Location	Occupation Code	Occupational Title	Dates of Need
H-400-20185-694360	40	5740 Thunderbird Drive, Suite D Indianapolis, Indiana 46236	37-3011	Landscaping and Groundskeeping Workers	10/1/2020 - 11/25/2020
H-400-20002-223725	60	5740 Thunderbird Drive, Suite D Indianapolis, Indiana 46236	37-3011	Landscaping and Groundskeeping Workers	4/1/2020 - 11/25/2020

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 Employer's prior, still valid certification. The CO noted Employer's explanation that although it was certified for 60 workers in its prior application, it was unable to fill all of its positions due to the H-2B visa cap. Employer had represented that it was able to locate five H-2B workers already in the U.S. but it is now requesting 40 workers for the remaining 55 positions unfilled. The CO noted that Employer may only receive one certification for the same job opportunity, area of intended employment, and period of employment need. The CO further determined that an employer is not permitted to file a new application for the same job opportunity with partially open positions due to the unavailability of H-2B visas in a prior certification. AF 55.

Accordingly, the CO directed that the Employer provide a detailed explanation and supporting documentation demonstrating that the work described in the previously certified application is not the same as that covered by the newly filed application. However, the CO noted that Employer had already indicated that the newly filed application is for the same job opportunities as those in the previous certification. *Id.*

Alternatively, the CO directed that the Employer show that it has a need for additional workers, totaling 100 landscaping workers and also must demonstrate that this need was not present at the time the employer's prior application was filed. In addition, the Employer was directed to provide supporting documentation including summarized monthly payroll reports to justify the number of workers. AF 55-56.

Employer responded to the Notice of Deficiency on July 22, 2020. AF 25-50. Employer explained that it is requesting forty landscapers from October 1, 2020 through November 15, 2020.⁴ In addition, the Employer stated that it holds a valid labor certification (H-400-20002-223725) for 60 temporary landscape laborers, but was unable to utilize the entire labor certification for which it was approved. Employer asserted that 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. Employer noted that it was able to locate five in-country workers to transfer from another company, using its valid labor certification with the start date of April 1, 2020. Following the transfer of the five workers, Employer had fifty five remaining slots which went, unused under that labor certification. Employer further asserted that it did not intend to use the remaining fifty five slots from the earlier labor certification due to the fact that it was unable to locate additional in-country workers. AF 25-29.

Employer also pointed out that it is not requesting 100 laborers with its current application, rather it is requesting forty landscape laborers which represent a portion of the Employer's need that was not satisfied under its April 1, 2020 application due to the visa cap limitation. Employer disagreed with the CO's interpretation of the regulations which determined that the Employer was prohibited from filing a new application for the same job opportunity with partially open positions due to the unavailability of H-2B visas in a prior certification. AF 26.

⁴ As noted in the CO's brief this statement appears to include typographical errors including dates of need which should actually state October 1, 2020 through November 25, 2020 consistent with the Employer's application and other statements in the record.

Employer argues that its current application is for a different start date, making this a different period of employment. Employer noted that the pertinent regulation at 20 CFR §655.15(f) states 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.” *Id.* Employer asserts that it is not attempting to obtain two labor certifications for the same period of employment, but rather the periods of employment are separate and distinct from one another, by virtue of the differing start dates. Employer further states that “[i]f there was a method in which the Employer could return a portion of the certification [from the prior application] they would do so, but unfortunately, no such method exists within the parameters of the H-2B program.” *Id.*

Employer’s response also enclosed correspondence sent to United States Citizenship and Immigration Services (“USCIS”) via email, stating that it surrenders the unused portion of its labor certification (H-400-20002-22372), and that the October 1, 2020 application is a replacement for, not an addition to the earlier (capped) certification. AF 27, 29.

On July 28, 2020, the CO issued a Final Determination Denial to the Employer, stating that the noted deficiency, still remained and therefore the application was denied. AF 18-24. The CO noted Employer’s response, but asserted that because Employer has already employed some H-2B workers under certification H-400-20002-223725, 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. AF 24.

The CO acknowledged that in the past the Office of Foreign Labor Certification (“OFLC”) has permitted an employer to return a fully unused certification, in which case it notifies USCIS that the certification is unavailable for use. When this occurs the CO stated, 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, the CO asserted that 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. Accordingly, in this case Employer’s application was denied. *Id.*

On July 31, 2020, Employer made a timely request for administrative review of the CO’s determination. AF 1-17. By order dated August 5, 2020, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before August 14, 2020. Employer filed a timely brief that was received by the undersigned on August 13, 2020. Attorney Edward Waldman of the Office of the U.S. Department of Labor, Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a timely brief in this matter, on behalf of the Certifying Officer, which was received by the undersigned on August 14, 2020.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.61(e).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO's determination in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUE

Whether the Certifying Officer properly denied the Employer's H-2B application as an impermissible second application involving the same job opportunity, area of intended employment, and period of need, in violation of the regulation at 20 CFR § 655.15(f).

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. § 214.2(h)(6)(ii).⁵ This regulation states:

- (A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

8 C.F.R. § 214.2(h)(6)(ii)(A).

⁵ Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. § 214.2(h)(6)(ii). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019). *See also* 20 C.F.R. § 655.6(b).

The DHS regulation further states in regard to the nature of petitioner's need:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B).

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflects a temporary need within the meaning of the H-2B program. *See, e.g., Alter and Son General Engineering*, 2013-TLNL-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need). Other requirements imposed on Employer's seeking temporary labor certification for H-2B workers are found in the regulations found at 20 C.F.R. Part 655, Subpart A.

In the current case, the Employer applied for temporary labor certification for 40 landscape laborers for the period of October 1, 2020, to November 25, 2020, on the basis of a "seasonal" need. AF-57. Employer does not dispute that it also filed a previous application for the same job opportunity requesting 60 landscape laborers, in the same area of intended employment, for the period covering April 1, 2020 to November 25, 2020 and that it received certification for the 60 workers under ETA case # H-400-20002-223725. Employer explains in its response to the CO's Notice of Deficiency, as well as in its brief, that although it received certification for 60 landscape workers for the period of April 1, 2020 to November 25, 2020 it was unable to utilize that certification due to the visa cap which had been met for the second half of Fiscal Year 2020, by the time it received its certification. Employer noted that it did use the previous certification to transfer five alien workers from other in-country worksites that were "cap exempt," but it was unable to utilize the certification for the other 55 worker slots.

In the Final Determination-Denial the CO determined that Employer had failed to comply with the regulatory requirement that an employer may only file one application and receive one certification for a particular job opportunity within a particular area of intended employment and for a particular period of employment need. The regulation at 20 C.F.R. § 655.15(f) states, in pertinent part:

Except as otherwise permitted by this paragraph (f), [exceptions applicable to seafood workers] **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 (emphasis added)

...

Employer does not dispute that its current application is for the same job opportunity and for the same worksites in the same area of intended employment as its previously certified

application. However, Employer argues initially, that its current application should not be considered a second application because the period of employment has a different start date, even though the end date of employment (November 25, 2020) is the same as the previously certified application.

The CO reasonably rejected this argument finding that the requested period of employment in the current application is contained within the requested period of need in the previously certified application. *See 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 notified the Employer in the Notice of Deficiency that it would have to establish a bona fide need for the 40 additional workers (or a total of 100 workers when added to the 60 workers already certified) in order to receive certification for the 40 workers requested in the current application. In its response Employer clarified that it is not requesting an additional 40 workers but rather 40 of the 60 workers for which it was originally certified. Employer asserts that although it was originally certified for 60 workers it was only able to use five of the worker slots as it was able to transfer five workers from positions within the country. Employer asserts that it was unable to use the certification for the other 55 positions because the 2020 visa cap had been met and therefore it could not obtain visas for the 55 requested workers. There is no evidence in the record to the contrary.

Employer provided verification in the materials provided to the CO that it had notified the USCIS that it returned 55 of the 60 worker certifications as they could not be used due to the 2020 visa cap and therefore Employer argues that it should be allowed to file a second application for workers to cover the portion of its period of need (October 1 – November 25, 2020), as there would be additional visas available at the beginning of the next fiscal year beginning October 1, 2020.

The CO argues in its brief that since Employer has an open certification for sixty workers, it cannot be granted certification for 40 additional workers as this would equate to an open certification for 95 workers regardless of whether Employer had utilized the original certification or not.

Significantly, the CO acknowledges in the Final Determination–Denial that if the certification had been returned in its entirety, the Office of Foreign Labor Certification has in the past allowed a “second application” for the same period of need, which could potentially allow an employer to receive certification for workers to cover at least a part of its period of need, that which occurs after the release of additional visas at the beginning of the next fiscal year (i.e. October 1). Specifically, the CO stated in the Final Determination- Denial:

Because the employer has already employed some H-2B workers under certification H-400-20002-223725, 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.

The regulation at 20 C.F.R. § 655.15(f) prohibits a second application for the same job opportunity, area of intended employment, and period of need, regardless of whether a previous certification was returned, and does not speak to the distinction noted by the CO above.

The underlying question at issue is whether the CO’s policy of allowing a second application in some cases (where the certification was returned by the Employer fully unused), but not allowing a second application (where the certification was partially used, but Employer informed USCIS that it would not be using the remaining certified work slots due to the visa cap) is arbitrary and capricious or an abuse of the CO’s discretion.

In the brief filed by the Solicitor on behalf of the CO, the Solicitor argues that the CO is not acting arbitrarily or capriciously in allowing a second application for the same period of need in cases where an Employer returns a fully used certification while not allowing a second application in cases such as the current one, where the Employer utilized a portion of the certification, but returned only the unused portion informing immigration authorities that it would not be using the remaining slots.

The Solicitor notes several bases for the CO’s determination in this case. Firstly the Solicitor cites the Department’s comments to the H-2B rulemaking in 2012, which resulted in the wording of the current regulation in question. The Solicitor argues that the regulation is in place to prevent the “staggered entries [into the country] on a single date of need,” in order to “ensure that employers provide U.S. workers the maximum opportunity to consider the job opportunity.” See Final Rule, *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,038, 10,062 (Feb. 21, 2012). The Solicitor reasons that if Employers were allowed to bring workers in on an initial application and then be allowed to bring workers in on a second application for the same period of employment this would, in effect, be a “staggering” of the entries into the country.

The reasoning behind this rationale is somewhat faulty because if the Employer were granted the certification in the current application it would be required to recruit U.S. workers specifically in regard to the current job opportunity, in compliance with the regulations, and would not be able to rely on the initial recruitment done in regard to its previously certified application. Therefore, there would not be a detrimental impact on the recruitment of U.S.

workers as may occur if an initial application allowed workers to come into the country on a staggered basis over the course of the requested period of need.

The Solicitor also addressed the Employer's claims that permitting the return of unused certifications, but not "partially-used" certifications, is arbitrary and would require notice-and-comment rulemaking. The Solicitor points out that the regulation does not prohibit the return of completely unused certifications. In these cases, consistent with the CO's position, a second application can be filed because there would not be two valid certifications for the same job opportunity, area of intended employment and period of need and therefore there is no conflict with the regulation which prohibits two applications, and logically two certifications, for the same job opportunity with the same period of need. However, in the case of a partially used application where a second application is filed, there are in fact two applications and two valid certifications for the same job opportunity, area of intended employment and period of need which conflicts with the regulation at 20 C.F.R. § 655.15(f) which prohibits second applications for the same job opportunity, area of intended employment and period of need.

The Solicitor also notes that if employers could return partially-used certifications and then file applications for the same job opportunities, they would have little incentive to "accurately identify their personnel needs" to qualified and available U.S. workers *citing* 80 Fed. Reg. 24,042, 24,060.

Finally, the Solicitor argues that it would be administratively infeasible for the CO to acknowledge the return of partially used certifications and allow Employers to file second applications in those cases. Citing the Department's expressed policy as found in the preamble to the regulations, the Solicitor asserts that to do so would risk undermining the H-2B program's integrity, as there is no formal process in place for employers to submit evidence of how many workers were ultimately hired, and there is no way for OFLC to efficiently verify such evidence. *See, e.g.*, 80 Fed. Reg. 24,042, 24,080 (discussing limitations on the validity of certifications, including transfers of certification, as a means to ensure program integrity).

After considering the record, as well the arguments of the parties, the undersigned finds that the CO had a rational basis for her determination that the Employer's current application is a second application for the same job opportunity, area of intended employment and period of need which is in violation of the regulation at 20 C.F.R. § 655.15(f). Further, the CO did not act arbitrarily and capriciously, nor did she abuse her discretion or act contrary to law, in finding that a partially used certification could not be returned and a second application filed without violating the regulation noted. The regulatory history noted by the Solicitor supports that the CO's determination is consistent with the program goals which are in place to protect U.S. workers and to preserve the administrative integrity of the program.

CONCLUSION

For the foregoing reasons, the undersigned concludes that Employer has failed to meet its burden of establishing that it complied with the regulatory requirements imposed on

Employers applying for H-2B labor certification, and specifically, failed to show that it complied with the regulation at 20 C.F.R. § 655.15(f). The CO did not act arbitrarily or capriciously, nor did she abuse her discretion, or act contrary to law, in denying the Employer's application for certification for 40 landscape laborers for the period of need of October 1, 2020 –November 25, 2020.

ORDER

Accordingly, it is hereby ORDERED that the CO's denial of Employer's application for temporary labor certification, is AFFIRMED.

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK
Administrative Law Judge