



**Issue Date: 21 August 2020**

BALCA Case No: 2020-TLN-00050  
ETA Case No.: H-400-20185-694366

*In the Matter of:*

**TLC LANDSCAPING, INC.,**  
*Employer.*

Certifying Officer: Leslie Abella  
Chicago National Processing Center

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

Matthew Bernt, Esq.  
Sarah Tunney, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: John P. Sellers, III  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING FINAL DETERMINATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to TLC Landscaping, Inc.’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. §

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<sup>1</sup> On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.

655.6(b). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

**STATEMENT OF THE CASE**

The Employer is a landscape contractor located in Ohio. On July 3, 2020, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. (AF 65-122.)<sup>2</sup> The Employer requested certification for eight landscape laborers<sup>3</sup> from October 1, 2020, to November 30, 2020, based on an alleged seasonal need for workers during that period. (AF 65.)

On July 8, 2020, the CO issued a Notice of Deficiency (“NOD”), which outlined one deficiency in the Employer’s Application. (AF 54-59.) According to the NOD, the Employer failed to comply with application filing requirements at 20 C.F.R. § 655.15(f). Specifically, the CO stated that in accordance with the regulations, “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.” (AF 58.) The CO explained that the Application was for the same position in the same area of intended employment, and for an overlapping need as a prior, still valid, certification (“Certified Application”), as detailed in the chart below:

Case Number	Workers Requested	Location	Occupation Code	Occupational Title	Dates of Need	Status
H-400-20185-694366	8	38000 Aurora Rd Solon, Ohio 44139 Cuyahoga	37-3011	Landscaping and Groundskeeping Workers	10/1/2020 - 11/30/2020	Pending
H-400-20002-225868	20	38000 Aurora Rd Solon, Ohio 44139 Cuyahoga	37-3011	Landscaping and Groundskeeping Workers	4/1/2020 - 11/30/2020	Certified

In its Application, the Employer explained that it had been approved to fill twenty positions in its Certified Application. (AF 70.) However, because it could not fill all twenty positions, it was seeking certification for eight additional workers. (*Id.*) In the NOD, the CO stated that although the Employer requested eight workers for the unfilled positions from the Certified Application, an employer may only receive one certification for the same job

<sup>2</sup> “AF” refers to the Appeal File.

<sup>3</sup> SOC (O\*Net/OES) occupation code 37-3011-00 and occupation title “Landscaping and Groundskeeping Workers.” (AF 65.)

opportunity, area of intended employment, and period of employment need. (AF 58.) The CO informed the Employer that it must either provide an explanation and supporting documentation that the work described in the Application is not the same as that covered by the Certified Application, or it must provide support that it had a need for additional workers, totaling twenty-eight Landscaping and Groundskeeping Workers. (*Id.*) The CO further noted that the Employer already indicated that the Application was for the same job opportunity as that listed in the Certified Application. (AF 59.)

On July 8, 2020, the Employer responded to the NOD. (AF 24-53.) The Employer explained that it held a valid labor certification, i.e., the Certified Application, for twenty Landscaping and Groundskeeping Workers, but it was unable to fill all twenty positions because the H-2B visa cap limit was reached before it was able to obtain visas for out-of-country workers. (AF 30.) The Employer noted that it was able to fill ten positions with in-country H-2B workers. The remaining ten positions, however, were unused and the Employer did not intend to use those slots. (*Id.*) The Employer asserted that because it did not fill ten positions in the Certified Application, it should have been allowed to “return” those vacancies because it did not intend to use them. (AF 31.) The Employer further stated that it was not requesting twenty-eight workers. (AF 30.) Instead, the Application requested eight workers to fill a portion of the unused positions from the Certified Application. (*Id.*)

On July 16, 2020, the CO issued a Final Determination outlining one deficiency. (AF 17-22.) The CO concluded that because the Employer already had a valid, Certified Application for the same position, in the same area of employment, and for an overlapping period of need, it failed to comply with the application filing requirements of 20 C.F.R. § 655.15(f). (AF 21-22.) Therefore, the CO denied the Employer’s Application.

By letter dated July 29, 2020, the Employer requested administrative review of the CO’s Final Determination. (AF 1-16.) The Employer reiterated its position that it should have been allowed to return the unused positions from the Certified Application. (AF 6-8.) The Employer also stated that the Application requested Landscaping and Groundskeeping Workers for a period between October 1, 2020, and November 30, 2020, while the Certified Application requested Landscaping and Groundskeeping Workers from April 1, 2020 to November 30, 2020. (AF 4-6.) According to the Employer, because the start dates were different, the period of employment was not the same for each application. (*Id.*)

On July 30, 2020, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). Thereafter, on August 3, 2020, the undersigned received the Appeal File from the CO. The Employer filed a brief on August 11, 2020. The Solicitor filed a brief on August 12, 2020.

### **DISCUSSION AND APPLICABLE LAW**

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the

Employer actually submitted to the CO before the date of the CO's determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA 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). Therefore, a CO's denial of certification must be upheld unless shown by the Employer to be arbitrary and capricious or otherwise not in accordance with the law.

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's Application to admit H-2B workers for temporary non-agricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a). To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3).

The Employer must satisfy the application requirements at 20 C.F.R. § 655.15. Specifically, § 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."

The CO denied the Employer's Application after concluding that the Employer already had a certification for Landscaping and Groundskeeping Workers at the same worksite location covering the same period of need. In the NOD, the CO instructed the Employer to either withdraw one of its applications, or demonstrate that it had a need for twenty-eight workers. In its response, the Employer stated that it did not intend to hire twenty-eight workers. Rather, the Employer filed the Application to fill vacant positions from its Certified Application that it was unable fill because the H-2B visa cap was met. The Employer explained that the start date of October 1, 2020, made it more likely that it could hire out-of-country workers before the H-2B visa cap for the new fiscal year was met.

Moreover, the Employer asserts that the two applications are for different periods of employment because they have different start dates. The Employer's position is that the Application's start date of October 1, 2020, renders the period of employment different from that of the Certified Application, which had a start date of April 1, 2020. Therefore, according to the Employer, the Application and the Certified Application are different periods of employment for purposes of 20 C.F.R. § 655.15(f) and separate applications are necessary.

The Employer's argument is unpersuasive. Although the two applications have different start dates, they are the same job, at the same location, during the same period of need. The workers are essentially working "during the same period of employment" as stated in 20 C.F.R. § 655.15(f). While the start dates differ, both applications list an end date of November 30, 2020. Moreover, the applications have a two-month period of overlap, with the dates of employment of the Application (October 1, 2020, to November 30, 2020) entirely within the dates of employment of the Certified Application (April 1, 2020, to November 30, 2020). The Employer even concedes that the Application seeks to fill positions that were supposed to be filled by the Certified Application. The only reason the Application has a later start date is to increase the likelihood that the Employer will fill the H-2B vacancies before the H-2B visa cap is met. Therefore, I find the CO's determination persuasive, and the Employer has failed to demonstrate how the two applications represent different job opportunities.

The Employer also argued that it should be allowed to "return" the ten unused positions from the Certified Application in order to fill those vacancies with the positions requested in the Application. The CO responded that in the past, an employer was allowed to return a "fully unused" certification. The CO stated that an employer cannot return a *partially* used certification. However, the Employer's arguments do not overcome the fact that the Application requests H-2B workers for the same period of need as the Certified Application. If anything, the Employer's assertion further demonstrates that the Application is for the same period of need as the Certified Application because the Employer intended to return the ten vacancies in order to fill those positions with the positions request in the Application.

After reviewing the evidence considered by the CO and all legal arguments, I agree that the Employer has not provided sufficient information to overcome the deficiency listed in the NOD. Further, I find that the Employer has not demonstrated that the CO's decision to deny certification under 20 C.F.R. § 655.15(f) was arbitrary, capricious, or otherwise not in accordance with the law. Therefore, the Employer has not met its burden of showing that it is entitled to temporary labor certification.

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial is **AFFIRMED**.

For the Board:

JOHN P. SELLERS, III  
Administrative Law Judge