



Issue Date: 25 August 2020

BALCA Case No.: 2020-TLN-00054
ETA Case No.: H-400-20185-694323

In the Matter of:

CRYSTAL SPRINGS RANCH, INC. d/b/a SHOOTING STAR,
Employer.

Appearances: Devon Kenevick¹
MAS Labor H2B, LLC
Lovingsston, Virginia
For the Employer

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

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Crystal Springs Ranch d/b/a Shooting Star’s (“Employer”) request for review of the Certifying Officer’s (“CO”) July 24, 2020 Final Determination in the above-captioned H-2B temporary labor certification matter.² The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).³ 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” or “DOL”). 8 C.F.R. § 214.2(h)(6)(iii). Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

¹ In Employer’s Brief, Ms. Kenevick is described as “Associate Counsel,” but MAS Labor H2B, LLC is described as Employer’s “Non-Attorney Agent Representative.” These two descriptions appear inconsistent in that Ms. Kenevick’s title of “Associate Counsel” tends to indicate that she is an attorney but the company with which she is associated is a “Non-Attorney Agent Representative.” Given this apparent discrepancy, and having no definitive information indicating that Ms. Kenevick is an attorney, I have not added “Esq.” after her name.

² On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“2015 IFR”) to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the “2008 Rule” found at 73 Fed. Reg. 78,020 (Dec. 19, 2008). *See* 80 Fed. Reg. 24,042, 24,109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015, whose period of need begins after October 1, 2015. Accordingly, the 2015 IFR applies to this matter.

³ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). 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 legislation. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On July 3, 2020, Employer filed an *H-2B Application for Temporary Employment Certification* (“Form 9142B” or “Application”), seeking certification to hire 14 greenskeepers, Standard Occupational Classification Code 37-3011.00, Landscaping and Groundskeeping Workers. Appeal File (“AF”) 65-135. The Application stated that the period of temporary need begins on October 1, 2020, and ends on November 5, 2020. AF 65. On July 13, 2020, the CO issued a *Notice of Deficiency* (“NOD”) stating that the Application could not be accepted because the Employer had already received certification for an application covering the same position, area of intended employment, and period of need (the “Prior Application”). AF 60-64.

Specifically, the NOD stated;

The employer has submitted an application that matches a filing for which the employer previously received certification. 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.

...

The employer provided an explanation that while it was certified for 10 workers in its prior application (H-400-20002-225971), 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 10 H-2B workers already in the U.S., providing I-797 Notices of Action in support, and is now requesting 14 workers for the remaining 14 positions unfilled. However, the employer may only receive one certification for the same job opportunity, area of intended employment, and period of employment need. The employer is not permitted to file for a new application for the same job with partially open positions due to the unavailability of H-2B visas in a prior certification.

AF 63 (chart comparing the Prior Application (for a period of need from April 1, 2020, to November 15, 2020) and the Application (for a period of need from October 1, 2020, to November 15, 2020) omitted).

On July 22, 2020, Employer submitted a response to the NOD, AF 25-59, explaining that it was unable to obtain all the workers certified in the Prior Application due to the visa cap and that it was only seeking certification in the Application for the number of workers it was authorized to obtain in the Prior Application but was not able to obtain:

Crystal Springs Ranch, Inc. (the Employer) is requesting fourteen (14) temporary Greenskeepers at its Wilson, Wyoming location from October 1, 2020 through November 15, 2020. The Employer holds a valid labor certification (H-400-20002-225971) for 24 temporary Greenskeepers, but was unable to utilize the entire labor certification to cross the 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 ten (10) in-country workers to transfer from another company using its valid labor certification with the start date of April 1, 2020. Following the transfer, the Employer had fourteen (14) remaining slots, which went, and will continue to go, unused under that labor certification. The Employer does not intend to use the remaining fourteen (14) slots from the earlier labor certification due to being unable to locate additional in-country workers.

The Employer is only requesting fourteen (14) temporary Greenskeepers on its current application (H-400-20185-694323), which represents its total need for Greenskeepers at this location for the requested time period.

...

This application represents a portion of the Employer'[s] need that was not satisfied under its April 1, 2020 application due to visa cap limitations.

AF 26. The Employer then argued that “[t]he Employer’s current application is for a different start date [than the prior application], making this a different period of employment,” and “[t]he [periods of employment should not be viewed as a cumulative labor need, as they are separate and distinct from one another by virtue of the differing start dates.” AF 24. Finally, the Employer argued that in other cases, employers were able to obtain labor certification when they partially used a prior labor certification. AF 27-28. Employer also takes issue with the CO’s position that only completely unused labor certifications can be returned: “Since there is no distinction made between unused and partially used labor certifications, it is questionable that the Department now makes an arbitrary determination that only one type can be returned.” AF 27

On July 24, 2020, the CO issued a Final Determination denying the Application. AF 18-24. The CO addressed the arguments made by Employer as follows:

In its current application, H-400-20185-694323, the employer is now requesting 14 workers to fill the positions [from the Prior Application] 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-400-20002-225971, 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 [the Office of Foreign Labor Certification] 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.

AF 24.

On Friday, July 31, 2020, Employer submitted a Request for Expedited Administrative Review Pursuant to 20 C.F.R. § 655.61 With Respect To CO's Notice of Denial. AF 1-17. This matter was docketed in the Office of Administrative Law Judges ("OALJ") that same day and was assigned to me the following Monday, August 3, 2020. On August 4, 2020, I issued a Notice of Docketing and Expedited Briefing Schedule (the "Notice"). On August 5, 2020, OALJ received the Appeal File. On August 13, 2020, OALJ received Employer's Request for Reversal of Certifying Officer's Denial ("Employer's Brief"). On August 14, 2020, OALJ received the Certifying Officer's Brief ("CO's Brief"). As the Notice stated in relevant part that "the Employer and the Solicitor may file briefs in time to reach the undersigned by the close of business (4:30 p.m. Eastern time) **within seven business days of receiving the Appeal File.** 20 C.F.R. § 655.61(c)," Notice at 1 (emphasis in original), each party's brief is timely. As this Decision and Order is being issued within seven business days of the submission of the CO's Brief, it is also timely. 20 C.F.R. § 655.61(f).

Employer has two main arguments. First, it argues that the CO did not correctly apply 20 C.F.R. § 655.15(f) because the Application at issue in this case was not for the same period of employment as the Prior Application. Employer's Brief at 1, 4-7 (Employer's Brief is not paginated). Second, it argues that the CO acted improperly in determining "that partially-utilized H-2B labor certifications must be treated differently than H-2B labor certifications that were wholly utilized." Employer's Brief at 2, 8-13.

The CO argues that 20 C.F.R. § 655.15(f) states that an employer can only file one application for the same job opportunity within the same area of intended employment for the same time period. CO's Brief at 4-9. The CO also argues that permitting the return of a wholly unused labor certification is consistent with the regulations but that permitting the return of a partially-used labor certification would be inconsistent with 20 C.F.R. § 655.15(f) "since a partial return means the original certification was used to hire workers." CO's Brief at 9-10. The CO also argues that other employer's certifications do not assist Employer in this matter. CO's Brief at 11-13.

STANDARD OF REVIEW

BALCA's standard of review is limited in H-2B cases. 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 actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon 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).

I recognize that there is some question as to what standard of review BALCA should apply when considering applications for temporary labor certification under the H-2B program. For example, including myself, at least three administrative law judges have concluded that BALCA should apply an arbitrary and capricious standard when reviewing the CO's determination in these cases. *Jose Uribe Concrete Construction*, 2018-TLN-00044, slip op. at 5-6 (ALJ Feb. 2, 2018, clarified by order of Feb. 12, 2018) (footnote and citations omitted); *Jose Uribe Concrete Construction*, 2019-TLN-00025, slip op. at 4 and n. 6 (ALJ Feb. 21, 2019, orders denying reconsideration dated Apr. 1, 2019, and Apr. 16, 2019) (noting that the Preamble to the 2015 IFR, 80 Fed. Reg. 24042, 24081, states that 20 C.F.R. § 655.61 "does not provide for de novo review"); *Jose Uribe Concrete Construction*, 2020-TLN-00026, slip op. at 9-10 and n. 5 (ALJ Mar. 25, 2020). On the other hand, at least two administrative law judges have concluded that that *de novo* review is appropriate in these matters. *Best Solutions USA, LLC*, 2018-TLC-00117, slip op. at 3 and note 2 (ALJ May 22, 2018); *Fairfield Landscaping*, 2020-TLN-00055, slip op. at 7 and n. 19 (ALJ Aug. 20, 2020) (citing *Best Solutions*).

I find the Preamble to the 2015 IFR's categorical statement that "[t]his provision [20 C.F.R. § 655.61] does not provide for de novo review" definitively answers this question. 80 Fed. Reg. 24081. I thus decline to apply a *de novo* standard of review. Following the reasoning of the *Jose Uribe* cases cited above, I conclude that BALCA reviews the CO's determination in an H-2B temporary labor certification matter under the arbitrary and capricious standard.

DISCUSSION

As outlined above, the period of need in the Application is from October 1, 2020, to November 15, 2020, while the period of need in the Prior Application is from April 1, 2020, to November 15, 2020. Employer argues that the CO errs in concluding that 20 C.F.R. § 655.15(f) bars the Application because the difference in the start dates between the Application and the Prior Application means that the two applications are not for the same period of employment, and thus the Application does not run afoul of 20 C.F.R. § 655.15(f).

The regulation at issue states:

Separate applications. 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.

20 C.F.R. § 655.15(f).

Employer sought 24 groundskeepers in the Prior Application from April 1, 2020, to November 15, 2020. For reasons including the H-2B visa cap, it was only able to obtain 10 groundskeepers. It then filed the Application, seeking the difference between the number of groundskeepers it sought in the Prior Application and the number of groundskeepers it was able

to obtain, but for a subset of the original period of need—only October 1, 2020, to November 15, 2020, as opposed to April 1, 2020, to November 15, 2020. In its Response to the NOD, the Employer made clear that it was not seeking additional groundskeepers beyond those sought in the Prior Application—instead, it was only seeking groundskeepers to make up the difference between the number of groundskeepers it sought in the Prior Application and the number of groundskeepers it was able to obtain. AF 26; *see also* AF 79 (H-2B Detailed Statement of Temporary Need dated November 7, 2019: “we anticipate needing 24 temporary H-2B workers between April and November”).

In the Prior Application, the Employer stated it had a need for 24 groundskeepers from April 1, 2020, to November 15, 2020. In the Application, the Employer further explained that its actual period of need for groundskeepers is that stated in the Prior Application, and that the dates of need provided in the Application is simply the result of its being unable to obtain a sufficient number of workers due to the visa cap:

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. [Employer] ... 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) 2002, 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 application does not represent additional seasonal workers, as the statutory visa cap impeded the full use of the earlier labor certification (H-400-20002-225971). While we were able to locate 10 H-2B workers in the US, we still have a need for the remaining 14 workers to meet our previously approved need.

...

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.

...

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).

AF 70 (reformatted as original was in all capital letters).

In this statement, Employer establishes the following: (1) the 14 employees it seeks in the Application are a subset of the 24 employees it sought in the Prior Application; (2) the period of need stated in the Application is a subset of the period of need stated in the Prior Application; and (3) the number of workers and period of need stated in the Prior Application was accurate. In short, this statement establishes that the Application seeks a subset of the immigrant workers that were sought in the Prior Application.

In the Application, the Employer thus does not seek any non-immigrant workers in addition to those it sought in the Prior Application. Nor does the Employer seek any non-immigrant workers performing tasks other than the tasks to be performed by the workers it sought in the Prior Application. Nor does the Employer seek non-immigrant workers to perform tasks at a location different from the location at which it sought non-immigrant workers to perform tasks in the Prior Application. I therefore find that the Application seeks non-immigrant workers performing the same tasks and at the same location as specified in the Prior Application.

I find that, in seeking a subset of the workers sought in the Prior Application, Employer in filing the Application seeks the same number of H-2B workers as it sought in the Prior Application. This is because the number of workers sought in the Application, 14, is simply the 24 workers sought in the Prior Application minus the 10 workers the Employer was able to obtain. In both the Prior Application and in the Application, Employer has sought to satisfy its stated need of 24 H-2B workers.

I find that, in seeking workers for a portion of the previously identified period of need, Employer in filing the Application seeks – so far as is possible – to fulfill the same period of need as it sought in the Prior Application. This is because it confirmed that the reason it filed the Application was because additional visas would be available for the period of need starting October 1, 2020:

As is common practice among employers who depend on the H-2B program, the Employer again sought to mitigate its own irreparable harm by filing a subsequent application for the period of need beginning October 1, 2020 and ending November 15, 2020. This strategy arises from the fact that October 1 marks the start of a new fiscal year, meaning that a new allocation of H-2B visas will be available. Because the Employer's aggregate need stretches through November, and demand for "October 1 visas" is significantly less than that of "April 1 visas," the subsequent filing would therefore allow the Employer to

obtain much-needed relief from its labor shortage by employing H-2B workers at the tail end of its season; the period of employment representing one component of the Employer's aggregate labor need.

Employer's Brief at 4-5. Employer's reference to its "aggregate need" or its "aggregate labor need" indicates that it needs H-2B workers through November 15, 2020. More significantly, Employer's explanation as to why it filed the Application, especially in light of the text quoted above from the Application itself at AF 70, underscores that Employer's true period of need for groundskeepers is for the period of time stated in the Prior Application and that the truncated period of need stated in the Application is simply the result of Employer's attempts to mitigate the effects of the visa cap.

Employer correctly notes that "period of employment" is a term that is defined neither in the statute nor in the regulations. Employer argues that "the term 'period of employment' should refer to the period of time in which the employer seeks to employ H-2B workers, beginning with the start date of need requested in its application and ending with the end date of need requested in its application." Employer's Brief at 5-7. The CO does not explicitly argue what the term, "period of employment" should mean. By implication, however, the CO argues that a "period of employment" includes periods of employment with staggered start dates within that larger period of employment:

In 2015, Congress permitted employers in the seafood industry to "stagger" their H-2B workers' start dates—*i.e.*, bring workers into the U.S. at any time during the first 120 days of a certified period of employment. However, the prohibition on staggered entries for all other workers in the H-2B program remained. Here, ... [Employer] should not be permitted to receive a second certification for an already-certified labor need, as it would effectively permit—in violation of both the Department's regulations and the will of Congress—staggering the entry of workers for which ... [Employer] already holds a valid certification.

CO's Brief at 6 (citation omitted; *see* 20 C.F.R. § 655.15(f)(1)).

Employer's definition of "period of employment" would render 20 C.F.R. § 655.15(f) meaningless. Consider the following hypothetical: An employer files one application for non-immigrant workers to do job X at location Y from March 1 to September 30, and another application to seek workers to do the same job X at the same location Y from March 2 to September 30. Under Employer's definition, there would be no violation of 20 C.F.R. § 655.15(f). Moreover, under Employer's definition, there would have been no need for the exception at 20 C.F.R. § 655.15(f)(1) to permit employers in the seafood industry to use staggered start dates.

In contrast, the CO's implicit argument that a "period of employment" includes shorter periods of employment with staggered start dates within that larger period of employment is consistent with 20 C.F.R. § 655.15(f). Indeed, if a "period of employment" did not include shorter periods of employment with staggered start dates within that larger period of

employment, as explained above the exception at 20 C.F.R. § 655.15(f)(1) would not have been necessary.

I thus find that a “period of employment” in 20 C.F.R. § 655.15(f) includes shorter periods of employment with staggered start dates within that larger period of employment. Thus, to use the hypothetical above, a period of employment from March 1 to September 30 would include a period of employment from March 2 to September 30.⁴ It thus follows that a period of employment from April 1, 2020, to November 15, 2020, includes a period of employment from October 1, 2020, to November 15, 2020.

Employer argues that it has been harmed as a result of the visa cap. Employer’s Brief at 4 (“[d]espite the Employer’s efforts to mitigate its own irreparable harm due to lack of an adequate labor force....”). On this record, there can be no dispute that Employer did not obtain all 24 H-2B workers it sought in the Prior Application. The issue before me, however, is not whether Employer was harmed as a result of the visa cap. Nor is the issue what can be done to mitigate that harm. Nor is the issue how to interpret 20 C.F.R. § 655.15(f) in such a way so as to avoid harming employers whose period of need may be affected by the visa cap. *Cf. Green Up Lawncare, LLC*, 2020-TLN-00052, slip op. at 13 (ALJ Aug. 14, 2020) (“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.”).⁵

Rather, the issue is whether the CO acted arbitrarily or capriciously in finding that the Application violated 20 C.F.R. § 655.15(f)’s prohibition on filing more than one application “for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.” As the Application sought the same workers for the same job at the same location within the same period of employment as sought in the Prior Application, I find that the CO did not act arbitrarily or capriciously in finding that the Application violated 20 C.F.R. § 655.15(f).

Given my resolution of the “period of employment” issue, I need only summarily address Employer’s argument that it was denied due process because it did not have the ability to return a partially-used labor certification, whereas employers have had the ability to return completely unused labor certifications. The Employer has not identified any regulation that prohibits the CO from permitting an unused labor certification to be returned. In contrast, the CO has identified a regulation that prohibits a partially-used labor certification from being returned – 20 C.F.R. §

⁴ Given my finding as to what a “period of employment” includes for purposes of 20 C.F.R. § 655.15(f), I need not address Employer’s argument that the CO impermissibly conflates “period of employment” with “dates of need.” See Employer’s Brief at 5.

⁵ My colleagues have reached differing conclusions on facts similar to the facts of this case as to whether a subsequent application for a period of need included within the period of need in a prior application violates 20 C.F.R. § 655.15(f). Compare *Green Up Lawncare* and *Fairfield Landscaping*, 2020-TLN-00055 (ALJ Aug. 20, 2020) (reversing denial of certification) with *Nature’s Partner*, 2020-TLN-00056 (ALJ Aug. 21, 2020) and *TLC Landscaping, Inc.*, 2020-TLN-00050 (ALJ Aug. 21, 2020) (affirming denial of certification). See also *KDE Equine, LLC*, 2020-TLN-00043 (ALJ May 20, 2020) (affirming denial of certification in a case where employer sought additional non-immigrant workers in the subsequent application).

655.15(f) – “since a partial return means the original certification was used to hire workers.” CO’s Brief at 10. I thus find the CO has not acted arbitrarily and capriciously in not permitting the return of partially-used labor certifications.

For the reasons stated above, the CO did not err in denying certification in this matter.

ORDER

Based on the foregoing, the Certifying Officer’s **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

For the Board:

PAUL R. ALMANZA
Associate Chief Administrative Law Judge