



Issue Date: 25 August 2020

BALCA CASE NO.: 2020-TLN-00053

ETA CASE NO.: H-400-20185-694930

In the Matter of:

DIXIE LAWN SERVICES, INC.,
Employer.

Appearance: Christopher J. Schulte, Esq.
For the Employer

Before: Susan Hoffman
Administrative Law Judge

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

This case arises from the Dixie Lawn Services, Inc. (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an 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); 20 C.F.R. § 655.6(b).¹ The issuance of a temporary labor certification is a determination by the Secretary of Labor that there are not sufficient qualified U.S. workers available to perform the temporary labor and that employment of the foreign workers “will not adversely affect the wages and working conditions of U.S. workers similarly employed.” 20 C.F.R. § 655.1(a); *see also* 8 C.F.R. § 214.2(h)(6)(i)(A).

¹ 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.

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 Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142” or “Application Form”). 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).

The case was assigned to the undersigned on August 3, 2020, the Administrative File (“AF”) was filed on August 5, 2020, and the undersigned issued a *Notice of Docketing and Expedited Briefing Schedule* on August 6, 2020. The CO’s brief was filed on August 14, 2020. Accordingly, this proceeding is now before the undersigned as a designated member of the Board of Alien Labor Certification Appeals. 20 C.F.R. § 655.61. This Decision and Order is based on the written record which consists of the AF, the Employer’s request for review, and the CO’s brief. The undersigned reverses the CO’s denial and remands this matter for further processing.

Procedural Background

On January 3, 2020, Employer submitted an application for temporary labor certification to the Department of Labor’s Employment and Training Administration (“ETA”). (AF pp. 38-74.)² Employer is a landscape and groundskeeping company which works in North and South Carolina. (AF p. 43.)

In its application, Employer requested certification for 80 workers to work between October 10, 2020 and November 20, 2020. (AF p. 38.) Employer represented that it had needed 125 workers for its peak season from April 1, 2020, until November 15, 2020,³ and had previously been certified for that number of workers but, due to the H-2B cap being met, had been able to hire “less than 10 [cap-exempt] workers” for this this period. (AF p. 59.) Employer explained, “[d]ue to the FY2020 cap being met, Dixie Lawn is forced to reapply for the soonest start date they can, October 1st, 2020. In order to ensure Dixie Lawn is able to finish the work for the 2020 season, they are requesting a crew of 80 workers as they have secured less than 10 workers so far from their April certification for 125 workers. These workers are requested from 10/1/2020- 11/20/2020.” (AF p. 59.)

The Office of Foreign Labor Certification issued a Notice of Deficiency on July 10, 2020. (AF pp. 32-37.) The Certifying Officer (“CO”) pointed out that Employer had previously been certified for 125 workers for April 1, 2020, to November 15, 2020, under application H-400-20002-224254 (the “first certification”), and that the current application overlapped with the first certification. (AF p. 35.) The CO acknowledged that, due to the H-2B visa cap, Employer was only able to secure less than ten workers, but nonetheless asserted that Employer’s re-application constituted a second application for “the same job opportunity, area of intended employment,

² References to the administrative file will be abbreviated with an “AF” followed by the page number.

³ Employer mentioned its certification for 125 workers from April 1, 2019 until November 15, 2019. (AF p. 59.) This reference to 2019 rather than 2020 was likely a clerical error.

and period of employment need” in violation of 20 C.F.R. § 655.15(f). (AF pp. 35-36.)⁴ The CO stated, “If the 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, this is not permitted.” (Emphasis in original.) (AF p. 36.) The CO requested additional information showing either that the current application was for a different job opportunity, or that an additional 80 workers were needed beyond the first certification. (AF p. 35.)

On July 10, 2020, Employer submitted its response to the Notice of Deficiency. (AF pp. 21-30.) Employer explained that its previous application, H-400-20002-224254, was used for six transfer workers and therefore could not be returned. (AF p. 21.) Employer stated that the current application for October 1 through November 20 requested 80 workers, and so the total workers would amount to “86 workers, not exceeding the number of workers that is typically requested for Dixie Lawn to fulfill their temporary need.” (*Id.*)

The Office of Foreign Labor Certification issued its Final Determination denying Employer’s application on July 20, 2020. (AF pp. 13-20.) In its Final Determination, the CO reiterated its reasoning that Employer had “already received a certification for Landscaping and Groundskeeping workers at the same worksite location and covering the same period of need” under its first certification, and the current application therefore violated 20 C.F.R. § 655.15(f). The CO also suggested that, had the prior certification been “fully unused”, Employer could have returned it and re-applied for the same job opportunity, area of intended employment, and period of need. But this option was not available to Employer, because Employer had hired six workers under the first certification, meaning it was not “fully unused”. (AF pp. 19-20.)

Employer requested review on July 31, 2020, and included a brief with its request.⁵ (AF pp. 1-12.) The Certifying Officer filed an appeal brief on August 14, 2020.⁶

⁴ The CO also asked Employer to resubmit its Application for Temporary Employment Certification ETA form 9142 because the signatures on the form were from 2019 and therefore out of date. (AF pp. 36-37.) Employer resubmitted the signature pages with signatures dated July 10, 2020, in its response to the NOD. (AF pp. 28-30.)

⁵ On August 14, 2020, Employer, through counsel, requested an opportunity for additional briefing. The undersigned denied Employer’s request. On August 17, 2020, Employer filed and served a copy of BALCA’s decision in *In re Green Up Lawncare*, 2020-TLC-00052 (Aug. 14, 2020). On August 21, 2020, Employer filed and served a copy of BALCA’s decision in *In re Fairfield Construction, Inc. d/b/a Fairfield Landscaping*, 2020-TLN-00055 (Aug 20, 2020). Both cases dealt with the legal issues raised here. On August 24, 2020, the CO filed *Certifying Officer’s Motion to Strike Employer’s Supplemental Authority and Arguments* (the “Motion to Strike”), arguing that the Employer’s filings of the two recent cases should be struck as improper additions to the record. In this Motion, the CO cited two other recent relevant cases, *In re TLC Landscaping, Inc.*, 2020-TLN-0050 (Aug. 21, 2020) and *In re The Nature Group, Inc. dba Nature’s Partner*, 2020-TLN-00056 (Aug. 21, 2020). (Motion to Strike p. 2.) On August 24, 2020, Employer submitted *Employer’s Opposition to Certifying Officer’s Motion to Strike*, in which it mentioned yet another recent relevant case, *In re Trinity Landscaping*, 2020-TLN-00053 (Aug 21, 2020). As Employer’s submissions contained no factual evidence or legal argument, the undersigned accepts them as submissions of supplemental legal authority and deny the CO’s Motion to Strike. *See In re John L. Bourne et al.*, (2011-TLC-00399, 00400, 00401), p. 10 n. 2 (June 6, 2011). The undersigned also accepts the CO’s references to *The Nature Group* and *TLC Landscaping* in their Motion to Strike, as well as Employer’s reference to *Trinity Landscaping* in its Response, as submission of supplemental legal authority.

⁶ References to the CO’s brief will be abbreviated with “CO Brief” followed by the page number.

Standard of Review

The Board's scope of review in the H-2B program is limited. When an employer requests review under Section 655.61(a), the Board considers "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board may not consider new evidence that was not before the Certifying Officer. *See* 20 C.F.R. § 655.61(a)(5). The Board's authority to act is similarly limited; the Board may either affirm the determination of the Certifying Officer, reverse or modify the determination, or remand the matter back to the Certifying Officer for further action. 20 C.F.R. § 655.61(e). Finally, Section 655.61(f) provides for expedited review of any request for administrative review by the Board. 20 C.F.R. § 655.61(f).

The regulations do not specify the deference that BALCA should accord to a CO's determination, nor is there a consensus in the cases as to the appropriate standard of review. Some members of the Board have applied an arbitrary and capricious standard. *See e.g., Jose Uribe Concrete Constr.*, 2019-TLN-00025 (Feb. 21, 2019) (collecting cases). Other members have rejected this standard and applied a less deferential standard. *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) (whether the basis for denial was legally and factually sufficient); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016) and *Sands Drywall, Inc.*, 2018-TLN-00007 (Nov. 28, 2017) (*de novo* standard of review). In the present case, the undersigned need not reach this issue. The undersigned would reverse the CO's denial whether the undersigned applied an arbitrary and capricious standard or reviewed the matter *de novo*.

Discussion

The CO argues that, despite the two applications having different start dates (the prior certification April 2020, and the current application October 2020), they represent the same job opportunity and therefore violate 20 C.F.R. § 655.159(f). (CO Brief pp. 5-6, citing *KDE Equine, LLC d/b/a Steve Asmussen Racing Stable*, 2020-TLN-00043, slip. op. at 9 (May 20, 2020).) The CO asserts that Employer's first certification remains valid, and that the current application impermissibly seeks certification for 80 additional workers for the same job opportunity. (CO Brief p. 5.) The CO further argues that "permitting the return of a partially-used certification conflicts with § 655.15(f), since a partial return means that the original certification was used to hire workers." (CO Brief p. 10.)

Employer argues that the CO has misconstrued Section 655.15(f) in denying the application, and that the current application is for a separate job opportunity. (AF pp. 2-3.) Employer points out that the "current application involves a different number of workers for a different period of need... [t]he period of employment here is obviously not the same, but nor is it accurate to call a 7-week position the same 'job opportunity' as a nearly 8-month position." (AF p. 3.) Employer further states that the labor market has changed since it submitted the first application in February 2020 and, by submitting a second application, it was "doing the right thing" in affording U.S. workers the opportunity to participate in a recruitment in this starkly different labor market. (*Id.*)

At issue in this dispute is 20 CFR § 655.15(f), which provides in pertinent part “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 CFR § 655.5 defines “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.”

The CO relies on *KDE Equine* in support of their argument that Employer filed two applications for the same job opportunity thereby violating Section 655.15(f). That case is distinguishable from the situation here. In *KDE Equine*, the start dates proposed in the first certification and second application differed by only a month, and the periods of need overlapped by eight months. 2020-TLN-00043, slip. op. at 3. Further, the second application was to certify 45 workers *in addition to*, not in lieu of, the 70 workers already certified in the first application. *Id.* at 6.

More instructive are BALCA’s more recent decisions. In *In re Green Up Lawn care*, 2020-TLC-00052 (Aug. 14, 2020), *In re Fairfield Construction, Inc. d/b/a Fairfield Landscaping*, 2020-TLN-00055 (Aug. 20, 2020) and *In re Trinity Landscaping*, 2020-TLN-00053 (Aug 21, 2020), the employers were certified for multiple positions for a period of approximately eight to nine months, but due to the operation of the H-2B visa cap, were able to fill only a few positions with cap-exempt workers. In these cases, the employers subsequently applied for certification for a period of approximately two to three months and for fewer workers.

In those three cases, BALCA reversed the CO’s denial of certification upon finding that the employers’ subsequent applications did not represent the same job opportunities as the first certifications and therefore did not violate the “one application” limitation under Section 655.15(f). In those cases, BALCA relied on the differences in the number of workers and the period of time to find that the job opportunities were not the same. In those cases, BALCA also noted that the employers sought certification for workers in lieu of, not in addition to, those approved in the first certifications. In *Fairfield Construction*, BALCA further found that, because there had been no violation of Section 655.15(f), any return of the first, partially-used certification was immaterial. 2020-TLN-00055 slip op. at 10 n. 37.

The undersigned has also considered *In re TLC Landscaping, Inc.*, 2020-TLN-0050 (Aug. 21, 2020), *In re The Nature Group, Inc. dba Nature’s Partner*, 2020-TLN-00056 (Aug. 21, 2020), and *In re Crystal Springs Ranch Inc., d/b/a Shooting Star*, 2020-TLN-00054 (Aug. 25, 2020). In those cases, BALCA affirmed the CO’s denial of labor certification upon consideration of facts similar to those here, finding that the application at issue presented the same job opportunity as the first labor certification. The undersigned does not find the reasoning in those cases to be altogether persuasive.

In each of these recent BALCA decisions, employers were seeking subsequent certification for fewer workers beginning on October 1, 2020, when the new H-2B cap would reset. Here, the first certification was for 125 workers for the period April 1, 2020, until

November 15, 2020 (approximately nine months), and Employer was able to fill only six positions with cap-exempt workers. The current application is for 80 workers for the period October 1, 2020, until November 20, 2020 (just less than two months).⁷ Employer affirmed in its application, its response to the NOD, and its brief, that it does not intend to hire more workers under the first certification, and therefore will hire a maximum total of 86 workers. The CO stated that permitting the return of a partially-used certification is in conflict with Section § 655.15(f), but acknowledged that Employer sought to make such a return. (CO Brief p. 10-11.)

Employer stated that, due to the passage of time, USCIS will no longer issue visas under the first certification when the H-2B cap resets on October 1, 2020. (AF p. 3.) The CO does not dispute this statement, and it is therefore unclear on what basis the CO asserts that the first certification remains “valid”. (CO Brief p. 5.) The CO’s denial of the second application is based on the Employer already having certification to hire up to 125 workers for the entire nine-month time period. It appears however, that Employer would not actually be able to obtain workers under the first certification because USCIS would not issue visas when the cap resets, which would, in practical terms, make the first certification useless.

By applying for a new certification for fewer workers and a shorter period of time, Employer commits to giving U.S. workers the opportunity to obtain those jobs by conducting a new recruitment. Employer notes that the labor market has changed since February 2020, when Employer conducted its recruitment under the first certification. At that time, North Carolina had “record low unemployment” rates, but the labor market is much different now. (AF p. 3.) Employer asserts that it makes sense USCIS would not agree to approve visa petitions now based on a recruitment for U.S. workers conducted in February. (*Id.*)

Employer proceeding with an application for temporary labor certification for fewer workers and a shorter time period than the first certification is consistent with the purposes of the H-2B program. The process ensures the evaluation of whether there are sufficient qualified U.S. workers available to perform the job that is currently available. 20 C.F.R. § 655.1(a). This job opportunity is different in that it seeks fewer workers and, more importantly, in that the period of employment is only seven weeks as opposed to nine months. The February 2020 recruitment provides little to no insight into whether there are sufficient qualified U.S. workers to perform the job opportunity identified in the current application.

The time period at issue here is different from the period authorized by the first certification, and the number of workers being sought are fewer than and in lieu of the workers authorized under the first certification. Under the reasoning of *Green Up Lawn care*, *Fairfield Construction*, and *Trinity Landscaping*, which the undersigned finds to be compelling, the current application is for a different job opportunity from the first certification. The reasoning of those cases is adopted in this Decision and Order. Accordingly, and for the reasons stated above,

⁷ Employer also asserts in its brief that the “work involves different seasons, different work, different job duties and numbers of workers, and so on.” (AF p. 3.) The undersigned does not consider the nature of work or job duties here, because of the determination that the job opportunities are different based on the difference in number of workers and period of need.

the undersigned finds no violation of § 655.15(f) and finds that the CO's denial of Employer's subsequent application was arbitrary.

Conclusion

Upon review of the record and relevant legal authority, the undersigned **REVERSES** the Certifying Officer's denial and **REMANDS** this matter for issuance of a Notice of Acceptance pursuant to 20 C.F.R. § 655.33 and other appropriate processing.

SO ORDERED.

For the Board:

SUSAN HOFFMAN
Administrative Law Judge