



**Issue Date: 28 August 2020**

**BALCA Case No.: 2020-TLN-00058**  
**ETA Case No.: H-400-20185-694399**

*In the Matter of:*

**J.F.D. LANDSCAPES, INC.,**  
*Employer.*

Before: Jonathan C. Calianos  
Administrative Law Judge

Appearances: Devon Kenefick, Esq.  
Lovingson, VA  
*For Employer*

Edward Waldman, Esq.  
U.S. Department of Labor, Office of the Solicitor  
Washington, D.C.  
*For the Certifying Officer*

**DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION**

This matter arises under 8 U.S.C. § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, and the H-2B rules and regulations governing temporary labor certification. 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup>

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). *See Further Consolidated Appropriations Act, 2020*, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

<sup>2</sup> 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*

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Application”). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) 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).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is reversed.

### **STATEMENT OF THE CASE**

Employer in this case previously received labor certification for 15 Landscape Laborers for the period of April 1, 2020, to December 9, 2020, but was unable to fill all of its positions because of the H-2B visa cap.<sup>3</sup> (AF 39).<sup>4</sup> On July 3, 2020, Employer filed a new application, seeking to hire 10 full-time Landscape Laborers from October 1, 2020, to December 9, 2020. (AF 45). In support of its application, Employer explained:

J.F.D. Landscapes, Inc. was most recently certified to employ H-2B workers beginning in April 2020. Because the Department of Labor 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....

Our requested end date of need remains unchanged from our prior certification and our truncated period of employment remains within our previously established season....

This application does not represent additional seasonal workers, as the statutory visa cap impeded the full use of the earlier labor certification ... While we were able to locate 4 in-country H-2B workers in the US that plan to transfer to our

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*Final Rule*, 80 Fed. Reg. 24042 *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.

<sup>3</sup> The H-2B program has a statutory cap of 66,000 visas per year, divided into two equal portions of 33,000 visas for each half of the fiscal year.

<sup>4</sup> References to the appeal file will be abbreviated with an “AF” followed by the page number.

company, we still have a need for 10 of the remaining workers to meet our previously approved need....

We require one less worker 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 adjustments to our initial labor expectation.

(AF 50).

On July 14, 2020, the CO issued a Notice of Deficiency (“NOD”), on the basis that the newly submitted application was in violation of 20 C.F.R. § 655.15(f), which permits the filing of only one application “for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.” (AF 43). Specifically, the CO stated that “[t]he current filing is for the same position in the same area of intended employment, and for an overlapping period of need as a prior, still valid, certification.” (AF 43). According to the CO, employers are “not permitted to file for a new application for the same job opportunity with partially open positions due to the unavailability of H-2B visas in a prior certification,” and “[i]f 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.” (AF 44) (emphasis in original).

On July 20, 2020, Employer filed a Response to the NOD. (AF 27). Employer argued that the new application contains a different start date from its previously certified application, representing a different “period of employment,” and therefore, the new application does not run afoul of the regulation at 20 C.F.R. § 655.15(f). (AF 28). Employer further asserted that there is no basis in the regulations or Department of Labor (“DOL”) guidance to support the CO’s statement that an employer cannot use a portion of its slots from an approved certification for cap-exempt workers and also file a new application under a new cap. (AF 28). Employer referred to a DOL policy that allows employers to return unused labor certifications, in order to file a new application for a different period of need. (AF 28). Consistent with this policy, Employer notified USCIS of its partial use-only of its certification and its intent to no longer utilize the certification. (AF 29). Employer acknowledged that the DOL policy only addresses certifications that were not used to obtain any workers, but stated that no distinction has been made for partially-used certifications. (AF 29). Employer stated that “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 28).

On July 27, 2020, the CO issued a Final Determination, denying certification pursuant to 20 C.F.R. § 655.15(f). (AF 25). The CO stated that because Employer has already employed some H-2B workers under its prior certification, it 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 Employer “returns” the unused portion of the certification. (AF 25). The CO acknowledged that in the past, employers have been able to return fully unused certifications by marking the certification as returned and notifying USCIS that the certification is unavailable for use. (AF 25). The CO stated that in these scenarios, the employer may file a new application for the same job opportunity without violating 20 C.F.R. § 655.15(f). (AF 26). The CO stated, however, 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.” (AF 26).

On August 6, 2020, Employer timely requested administrative review of the denial of its application before the Board. (AF at 1). Employer again stated that the new application is for a different, significantly shorter, period of employment, and therefore, does not violate 20 C.F.R. § 655.15(f). Employer further argued that the CO’s position in the denial that an employer cannot return a partially used certification, is “counter to the long-established practice of returning both unused and partially used labor certifications, implemented by the Department, and has no basis in the H-2B regulations.” (AF 7). Employer claimed that “[i]t is nonsensical that an employer with an unused labor certification can return it without being questioned and can file an application for a different period of employment, but an employer who partially uses its earlier labor certification and subsequently notifies the correct authorities is denied.” (AF 8). Employer cited to six specific examples of DOL issuing acceptances on applications where an employer partially used its initial labor certification, to establish that the “Department has previously and continuously allowed employers to return partially used and unused labor certifications in order to file new applications.” (AF 10) (emphasis in original).

The matter was referred to BALCA and assigned to me. On August 18, 2020, I held a conference call with the parties, and on August 19, 2020, I issued a Notice of Docketing and Expedited Briefing Schedule. On August 21, 2020, both Employer and the CO filed appellate briefs. Employer in its brief expanded upon its arguments made in previous filings, again

arguing that the application was not for the same “period of employment” in violation of 20 C.F.R. § 655.15(f) and that the CO’s refusal to allow the return of partially-used certifications was arbitrary and capricious. The CO, in its brief, argued that “applications [] for the same job, at the same location, during the same time period – even if the start dates differed within that period,” represent the same job opportunity in violation of section 655.15(f). CO Br. at 5. The CO further argued that, contrary to Employer’s position, there is a valid basis for differentiating between fully unused and partially used certifications in relation to section 655.15(f), stating that unlike the return of a partially used certification, the return of an unused certification “effectively ensures that only one certification is available to the employer.” CO Br. at 11. Lastly, the CO asserted that Employer’s reference to other employers who were permitted to partially use a labor certification and then file a subsequent application for the remaining positions, is irrelevant because each employer must establish that they are eligible for certification. CO Br. at 13-14.

### **STANDARD OF REVIEW**

The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties and the request for review, which may only contain legal arguments and such evidence that was actually submitted to the CO in support of the Application. 20 C.F.R. § 655.61(a), (e). The regulations do not specify a standard of review for BALCA but the Board has adopted the arbitrary and capricious standard. *Brook Ledge*, 2016-TLN-00003 (May 10, 2016); *Three Season Landscape Contracting Services*, 2016-TLN-00045 (June 15, 2016).

### **DISCUSSION**

At issue in this matter is whether Employer complied with the filing requirements at 20 C.F.R. § 655.15(f). Pursuant to 20 C.F.R. § 655.15(f), “only one [application] may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.” Employer concedes that its current application is for the same job opportunity and area of intended employment as its previously certified application, but asserts that it does not represent the same “period of employment.” Er. Br. at 5.

Employer argues that its present application is not for the same “period of employment” as its previously certified application because it is for a different start date and a significantly abbreviated period of time, from October 1, 2020, to December 9, 2020, compared with the

initial employment period of April 1, 2020, through December 9, 2020. *See* Er. Br. at 5-9. Conversely, the CO argues that “when successive applications are for the same job, at the same location, during the same time period—even if start dates differ within that period—the CO may properly determine that they represent the same job opportunity and underlying need for labor.” CO Br. at 5.

The term “period of employment” is not defined by statute or regulation. BALCA, however, has recently issued three decisions addressing the exact issue raised herein. *See Green Up Lawncare, LLC*, 2020-TLN-00052 (Aug. 14, 2020); *Fairfield Construction Inc. d/b/a Fairfield Landscaping*, 2020-TLN-00055 (Aug. 20, 2020); *Trinity Landscaping, LLC*, 2020-TLN-00057 (Aug. 21, 2020). In all three cases, the employer received labor certification for a period of employment commencing on April 1, 2020, but was only able to partially utilize the certification because of the H-2B visa cap. The employer in each case then filed a subsequent application with a start date of October 1, 2020, (representing the new fiscal year without the visa cap) for the remaining unfilled positions. The Administrative Law Judges (“ALJs”) in each of these decisions held that the subsequent application did not violate section 655.15(f) because while the area of intended employment was the same in both applications, the job opportunity was not because the number of job opportunities had been reduced both in terms of the number of workers needed and the employment duration. The ALJ in *Fairfield* further cited to the regulatory history to the 2012 Final Rule and 2015 Interim Rule,<sup>5</sup> to support the interpretation of “period of employment” as meaning the start and end dates of need. Specifically, the ALJ noted that in the regulatory history, the DOL “effectively equates ‘period of employment’ with ‘dates of need,’”<sup>6</sup> and according to 20 C.F.R. § 655.5, “date of need” is defined as “the first date the employer requires services of the H-2B workers as listed on the [Application.]” I find the decisions in *Green Up*, *Fairfield* and *Trinity Landscaping* to be persuasive and adopt the

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<sup>5</sup> *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, Final Rule, 77 Fed. Reg. 10038, 10114 (Feb. 21, 2012); *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, Interim Final Rule, 80 Fed. Reg. 24042, 24060 (Apr. 29, 2015). While the DOL never implemented the 2012 Final Rule due to challenges to the agency’s rule making authority, the 2015 Interim Final “is virtually identical to the 2012 final rule.” 80 Fed. Reg. at 24043, 24045.

<sup>6</sup> The 2012 Final Rule states: “[A]n employer must file only one Application for Temporary Employment Certification for worksite(s) within one area of intended employment for each job opportunity for each date of need.” 77 Fed. Reg. at 10114 (emphasis added). The regulatory history to the 2015 Interim Final Rule similarly states: “Paragraph (f) requires that...employers file separate applications when there are different dates of need for the same job opportunity.” 80 Fed. Reg. at 24060 (emphasis added).

holdings and supporting rationales discussed in those cases herein.

I further find that interpreting “period of employment” as the start and end dates listed on the application is consistent with DOL policy considerations. As stated in the regulatory history, employers must file separate applications for each separate period of need, to ensure that there is an accurate test of the labor market at the time of the actual date of need and to “provide U.S. workers the maximum opportunity to consider the job opportunity.” 77 Fed. Reg. at 10062. In the present case, by filing a subsequent application with a later start date, Employer will again be required to conduct additional U.S. recruitment upon approval of the application, allowing for a more accurate test of the labor market as of October 1, 2020.<sup>7</sup>

The CO relies on *KDE Equine LLC, d/b/a Steve Asmussen Racing Stable*, 2020-TLN-00043 (May 20, 2020), to support its position to the contrary. In *KDE Equine*, the employer requested 45 workers from May 1, 2020, to November 30, 2020. The CO found the application violated section 655.15(f) because the employer had previously submitted an application for 70 workers involving the same job opportunity in the same area of intended employment, from April 1, 2020, to November 30, 2020. The ALJ, in affirming the CO’s denial, found that although the two applications had different start dates, they were “the same job, at the same location, during the same time of need, and although the start dates differ by one month, the workers are essentially working ‘during the same period of employment.’” *Id.* at 9.

BALCA, however, has distinguished *KDE Equine* from the facts presented in this matter. As discussed in *Green Up, Fairfield* and *Trinity Landscaping*, the *KDE Equine* decision did not involve a previously certified application that was only partially used due to the visa cap followed by a later application to fill the remaining positions. Rather, the employer’s subsequent application in *KDE Equine* sought 45 additional workers over and above the 70 workers previously certified. Moreover, unlike the facts present in this case and the other recent BALCA decisions, where the period of employment was significantly reduced in the subsequent application, the start date in *KDE Equine* was only one month after the start date of the prior certified application. *Fairfield*, 2020-TLN-00055 at 10; *Green Up*, 2020-TLN-00052 at 12 &

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<sup>7</sup> Similarly, the CO’s argument that Employer’s current application is tantamount to a “post-certification amendment,” which is prohibited under the regulations, is unpersuasive because unlike a post-certification amendment, the filing of a new application with a different start date will trigger an updated test of the labor market, alleviating the concern associated with post-certification amendments that the job opportunity would not match the recruitment for the opportunity. *See* CO Br. at 7.

n.20; *Trinity Landscaping*, 2020-TLN-00057 at 5. I agree with the ALJs in *Green Up, Fairfield* and *Trinity Landscaping* that the facts in *KDE Equine* are distinguishable from the present matter.<sup>8</sup> I further find that even based on the facts presented in *KDE Equine*, the holding in that case is questionable, in light of recent BALCA precedent suggesting that different start and end dates are sufficient to constitute different “period[s] of employment” under section 655.15(f).

For the reasons discussed above, I find that Employer’s current application does not violate section 655.15(f), as it is for a different start date and a significantly shortened period of time, and therefore, represents a different “period of employment” than its previously certified application.<sup>9</sup> As the CO relied solely on a violation of 655.15(f) to support the denial of certification, the denial must be reversed.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s decision is **REVERSED** and the case is **REMANDED** to the CO for the issuance of a Notice of Acceptance pursuant to 20 C.F.R. § 655.33 and for other appropriate processing in accordance with the regulations.

**SO ORDERED.**

**JONATHAN C. CALIANOS**  
Administrative Law Judge

Boston, Massachusetts

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<sup>8</sup> I acknowledge that in another recent decision, *The Nature Group Inc., d/b/a Nature’s Partner*, 2020-TLN-00056 (Aug. 21, 2020), the ALJ relied on *KDE Equine* to find that the employer’s subsequent application violated section 655.15(f) because the requested period of employment was contained with the requested period of need in the previously certified application. *Id.* at 8. The ALJ in that case, however, failed to address the recent line of cases since *KDE Equine*, starting with *Green Up*, which found no violation of § 655.15(f) based on the same set of facts.

<sup>9</sup> Because I find that Employer’s application does not violate section 655.15(f), I need not address the parties’ additional arguments regarding the DOL policy of “returning” used versus partially used certifications for the purpose of allowing the employer to file a new application.