



Issue Date: 21 August 2020

BALCA CASE NO.: 2020-TLN-00057

ETA CASE NO.: H-400-20185-694922

In the Matter of:

TRINITY LANDSCAPING LLC,
Employer.

DECISION AND ORDER

This matter arises under the labor certification program for temporary non-agricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.¹ The Certifying Officer in the Office of Foreign Labor Certification denied the application of Trinity Landscaping LLC (“Trinity”) seeking temporary labor certification for twenty-one workers under the H-2B non-agricultural program. Trinity appealed this decision. The matter is now properly before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to Section 655.61(a) for review of the Certifying Officer’s denial.² Upon a review of the record and the relevant legal authority, the undersigned **REVERSES** the decision of the Certifying Officer.

I. Procedural and Factual Background

Trinity is a lawn maintenance and landscaping company located in Denton, Texas. (Appeal File (“AF”), at 115, 120.) Trinity submitted an H-2B Application for Temporary Employment Certification with the United States Department of Labor seeking certification for twenty-one workers. (AF at 115.) The application states that Trinity needs the workers on a temporary basis starting October 1, 2020, and ending December 1, 2020, due to a peakload need.

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 Order are to the IFR.

² The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61(d). Here, the Chief ALJ designated a single member of the Board to hear this appeal.

(Id.) The SOC Occupation Title for the workers sought is Landscaping and Groundskeeping Workers. (Id.)

The application set forth the job duties for the requested workers. (AF, at 117.) The duties included a number of landscaping activities such as mowing lawns, raking and blowing leaves, planting plants, weeding, pruning, and hauling topsoil. (AF, at 117, 183.) The positions require no education or training and pay between \$13.75 and \$15.50 an hour, with overtime wages of \$20.63 to \$23.25 an hour. (AF, at 117-18.)

In support of its application, Trinity stated that the temporary workers are necessary to accommodate its temporary need for labor tied to the grass growing season and fall leaf cleanup. (AF, at 120, 125-26.) This period of need typically runs from April 1 to December 1. (Id.) The company's full time staff handles the landscaping work during the remaining months. (Id.) Trinity submitted a number of documents supporting its statement of temporary need. (See AF, at 125-81.)

Trinity also stated in the application why it was only seeking workers starting in October instead of April. (AF, at 120.) Trinity explained:

As a result, we normally need workers from 4/1 through 12/1. However, we were caught in the first and second half cap for fiscal year 2020. We are currently working on transferring 3 of the original 25 we had requested via an extension application, but we could not get the remainder due to the cap. Therefore we are requesting 21 laborers on a 10/1 to 12/1 petition.

(Id.) Thus, because the fiscal year cap for H-2B workers was reached before Trinity could bring in the laborers it needed starting in April, Trinity submitted this application for twenty-one workers during the last two months of its peak need season since the new fiscal year begins October 1, 2020.³ (See AF, at 120, 126.) Trinity returned the unused twenty-two positions from the original certification to the Office of Foreign Labor Certification since it was unable to fill the positions because the yearly cap was already reached. (AF, at 105-6.)

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency, setting out a single deficiency. (AF, at 109-13.) Citing 20 C.F.R. § 655.15(f), the Certifying Officer noted that Trinity may only file a single application for temporary workers “for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.” (AF, at 112.) The Certifying Officer found that the current application matched the application H-400-20003-232766, which sought similar workers for the period from April 1, 2020, to December 1, 2020. (AF, at 112.) The Notice of Deficiency explained that:

The employer provided an explanation that while it was originally certified for 25 workers in its prior application (H-400-20003-232766), it was unable to fill all of its positions due to the H-2B visa cap. However, the employer may only receive

³ H-2B admissions are subject to a yearly, fiscal year numeric cap. See 8 U.S.C.A. § 1184(g)(1)(B); 1 Austin T. Fragomen, Jr. Gareen Shannon & Daniel Montalvo, Immigr. Law & Business § 7:29 (2nd ed. 2020).

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 opportunity with partially open positions due to the unavailability of H-2B visas in a prior certification.

(AF, at 112.) The Certifying Officer then instructed Trinity that it needed to either demonstrate that the work in the new application is different from the prior application or that it needs a total of 46 workers. (AF, at 112.)

In response to the Notice of Deficiency, Trinity explained that it had returned the prior certification for the twenty-two unused spots on May 20, 2020, because it was unable to hire the approved workers as a result of the yearly cap. (AF, at 105.) Trinity also indicated that the Department of Labor had issued certifications for other employers based on the exact same situation. (AF, at 105.) Action Visa Assistance, the entity advocating for Trinity explained that:

[w]e have already received NOAs for application in this exact same situation. We received a NOA today for an application that we received this exact same NOD on last week, that employer had filled 7 of it's [sic] 37 visas with CAP exempt workers, returned the LC to USDOL for the 30 unused, received notification from the USDOL that the return was accepted and then NOA today.

(Id.) According to Action Visa Assistance, the Department of Labor has certified application recently for other employers in the same situation when they returned the unused portion of the certification due to cap, and has done so over the last two years. (Id.)

Approximately three days later on July 17, 2020, the Office of Foreign Labor Certification issued its Final Determination. (AF, at 100-04.) The Certifying Officer denied the application, finding that the application covered the same area of intended employment as the previous application (H-400-20003-232766). (AF, at 103.) The Certifying Officer found that:

Because the employer has already employed some H-2B workers under [the prior] certification . . . , 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, at 104.)

The Certifying Officer indicated that in the past, the Office of Foreign Labor Certification allowed employers to return a fully unused certification. (Id.) An employer may then file a new application for the same job opportunity. (Id.) “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.” (Id.)

Trinity then filed a request for administrative review dated July 28, 2020. (AF, at 1-4.) In support of its appeal, Trinity included a number of additional documents, including the

certification for case number H-400-20003-232766 and the Notice of Deficiency, response, and Notice of Acceptance for case number H-400-20185-695016.

The undersigned received the Appeal File on August 5, 2020, triggering the clock for both the filing of briefs and the issuance of this decision. Upon a review of the Appeal File, the undersigned directed the Certifying Officer to file a brief. (Order, Aug. 13, 2020.) The undersigned specifically directed the Certifying Officer to address what appeared to be inconsistent determinations from the Office of Foreign Labor Certification between this case and other cases. The Certifying Officer submitted a brief on August 17, 2020. Accordingly, this proceeding is now before the undersigned as a designated member of the Board of Alien Labor Certification Appeals for the issuance of this Decision within the parameters of Section 655.61.

II. Legal Standard

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 undersigned notes that the Immigration and Nationality Act and the applicable regulations do not specify a 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, at *4 (Feb. 21, 2019) (Nordby, ALJ) (collecting cases). Other members have rejected this standard and applied a less deferential standard. Best Solutions USA, LLC, 2018-TLN-00117, at *3 n.2 (May 22, 2018) (Barto, ALJ) (determining whether the basis provided for the applications denial was legally and factually sufficient in light of the written record); Saigon Restaurant, 2016-TLN-00053, at *5 (July 8, 2016) (King, ALJ) (applying a de novo standard of review). The undersigned, however, need not address this issue at this time as the result reached in this matter would be the same regardless of whether the undersigned applied an arbitrary and capricious standard or a de novo standard.

III. Discussion

The employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; Jose Uribe Concrete Constr., 2019-TLN-00025, at *4. 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).

At issue in this dispute is 20 C.F.R. § 655.15(f). This section provides that:

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). The Certifying Officer contends that the denial of Trinity's application was proper because it represented a successive application under Section 655.15(f). The Certifying Officer primarily relies on KDE Equine, LLC, 2020-TLN-00043 (May 20, 2020) (Bland, ALJ), in support of its contention.

KDE Equine is not controlling in this case. KDE Equine involved a situation where an applicant submitted two separate applications for a total of 115 workers with overlapping periods of need; one application for forty-five workers and one for seventy workers. Id. at 3. The employer in KDE Equine did not return the unused portion of a labor certification and later file a subsequent application in an attempt to bring in workers in October after the end of the fiscal year.

Here, Trinity was granted certification for twenty-five workers from April to December. However, it was only able to fill three of the positions with cap exempt workers. Trinity then returned the labor certification to the Department of Labor for the remaining twenty-two positions. The application at issue in this appeal is for a period from October to December for twenty-one workers, a significantly shorter period for fewer workers. This is not a situation where Trinity submitted two applications for a total of 46 workers over marginally different time periods like the situation in KDE Equine. Rather, these are two applications for two different job opportunities.

On August 14, 2020, BALCA issued a decision in Green Up Lawncare, LLC, 2020-TLN-00052 (Aug. 14, 2020) (Morris, ALJ), reversing the denial of an application and remanding the matter for the issuance of the Notice of Acceptance. The situation in Green Up, is nearly identical to the situation in this case. The employer in Green Up received a certification for thirty workers for April 1, 2020, to November 30, 2020. Id. at 3. Because of the cap, the employer was only able to fill five of the positions with cap exempt workers. Id. The employer returned the unused portion of the labor certification. Id. The employer subsequently sought certification for fifteen of the workers for October 1, 2020, to November 20, 2020. Id. The Certifying Officer denied the application for the same reasons stated by the Certifying Officer in this matter. Moreover, the Certifying Officer in Green Up made the same legal arguments that the Certifying Officer is making in this case. Since the publication of Green Up, other members of BALCA have reached a similar result. See Fairfield Constr., Inc., 2020-TLN-00055 (Aug. 20, 2020) (Annos, ALJ).

Judge Morris found that the application in Green Up did not violate Section 655.15(f). Id. at 12. "The undersigned finds that while the area of intended employment is the same in both applications, the job opportunity is not. Here, unlike in Employer's pervious [sic] application, the number of job opportunities has been reduced both in terms of the number of workers needed

and the employment duration.” Id. Judge Morris went on to determine that the request was consistent with the goal of the H-2B program to protect U.S. workers. Id. at 13.

This case is indistinguishable from Green Up. The undersigned finds the reasoning of Judge Morris in Green Up compelling and adopts the same reasoning in this decision. Just like the situation in Green Up, the application at issue in this matter is not for the same job opportunity. Trinity only seeks certification for twenty-one workers for a two month period rather than the previously approved twenty-five workers for approximately seven months. And it is not the fault of Trinity that it was unable to fill the prior slots before the cap was reached for the fiscal year. For the reasons explained at length in Green Up, the undersigned finds Trinity’s application did not violate 20 C.F.R. § 655.15(f) and the decision to deny the application was arbitrary.⁴ Accordingly, the undersigned **REVERSES** the decision of the Certifying Officer.

IV. Conclusion

Upon a review of the record and the relevant legal authority, the undersigned **REVERSES** the decision of the Certifying Officer and **REMANDS** this matter for the issuance of the Notice of Acceptance for the requested temporary workers.

SO ORDERED

STEWART F. ALFORD
Administrative Law Judge

⁴ In fact, it appears that the Office of Foreign Labor Certification is interpreting 20 C.F.R. § 655.15(f) in an arbitrary manner granting certifications in one case and denying certifications in identical cases. Such inconsistent interpretations of a regulation by a single agency further demonstrate the arbitrary nature of the decision of the Certifying Officer in this case.