



Issue Date: 13 November 2020

BALCA Case No: 2021-TLN-00004

ETA Case No: H-400-20234-781300

In the Matter of:

MATTAMUSKEET CRAB CO., INC.,
Employer

Appearances:

For the Employer: Amanda Wright
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And

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For the Certifying Officer: Sarah Tunney, Esq.
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**DECISION AND ORDER REVERSING THE DENIAL
OF TEMPORARY LABOR CERTIFICATION AND
REMANDING TO THE CERTIFYING OFFICER**

This matter arises under the H-2B temporary non-agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A.¹ The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the 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).²

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Mattamuskeet Crab Company, Inc.’s request for administrative review of the Certifying Officer’s denial of a temporary labor certification under the H–2B non-immigrant program.

Applications

1. February 18, 2020, Application (H-400-20002-226608)

On February 18, 2020, Mattamuskeet Crab Company, Inc. (“Employer”) applied for temporary labor certification through the H-2B program to fill 100 positions for “crab processors” at Swan Quarter, North Carolina, for the period of April 1, 2020 through December 31, 2020. AF at 63-65.³ Employer described duties involving:

Processing seafood and picking whole, cooked crabs for consumption by the general public; sorting and packing picked crab meat by grade (jumbo lump, backfin, special and claw); loading and unloading seafood into freezers or trucks for wholesale/retail distribution; preparing and cleaning work stations as well as other general labor.

Id. Employer’s February application was fully certified on February 18, 2020. Id. at 61.

2. August 21, 2020, Application (H-400-20234-781300)

On August 21, 2020, Employer filed another application for temporary labor certification through the H-2B program for 60 crab processors for the period of November 4, 2020 through December 15, 2020. AF at 39. In its August application, Employer again requested seasonal workers for its worksite in Swan Quarter, North Carolina. Id. The description of duties was the same as before. Id. at 41.

To supports its request, Employer explained in its Statement of Temporary Need:

Crab meat processing is contemporaneous with the Mid-Atlantic fishing industry and the principle crab harvest. Typically, crab availability begins in April, increases in June and increases again

² 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.

³ In this decision, AF is an abbreviation for “Appeal File.”

in late summer and early fall to a maximum supply in mid-fall. As crab production becomes more plentiful during the season, we need an adequate number of workers to accommodate the supply. Our decline in worker numbers is commensurate with the decline in availability of product during the off season, thus we do not employ crab pickers/seafood processors during this period.

Id. at 44, 51.

To support its request for 60 workers, Employer stated,

Based upon recent, current, and projected business volume, we anticipate needing 60 temporary H-2B workers. We were certified for 100 H-2B workers on February 18th. However, the H-2B cap closed on February 18th and we were shut out. We were able to successfully locate and transfer 22 in country H-2B workers, but that left us 78 workers short.

AF at 52. Employer stated the need for 60 workers was “for a short period ending 12/15 to assist with fall crab processing.” Id.

Notice of Deficiency

On August 28, 2020, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) as to Employer’s August application. The CO cited one deficiency under 20 CFR § 655.15(f). AF at 36-39. Specifically, the CO found that under the regulation, “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.” Id at 39. The CO noted that the Employer submitted an application “that matches a filing for which the employer previously received certification” Id.

The NOD further stated:

The employer was able to locate 22 H-2B workers already in the U.S., and is now requesting 60 workers for the remaining 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 opportunity with partially open positions due to the unavailability of H-2B visas in a prior certification.

Id. at 36.

Under “Additional Information Requested,” the CO requested Employer provide an “explanation and supporting documentation that demonstrates that the work described in the

certification application is not the same as that covered by the newly filed application.” Id. at 36-37. Alternatively, the CO also gave the option for Employer to show “that it has a need for additional workers, totaling 160 crab processors” and demonstrate that this need was not present at the time the prior application was filed. Id. at 37. Regarding the latter request, the employer was required to provide an explanation with supporting documentation of why Employer was requesting 160 crab processors; if applicable, letters of intent supporting the need for 160 workers; summarized monthly payroll reports for a minimum of one previous calendar year (identifying full-time permanent and temporary employment in the requested occupation, total number of staff workers or staff employment, total hours worked, and total earnings received); an explanation of the payroll data; and other evidence to justify the total number of workers requested, if any. Id.

On September 8, 2020, the Employer submitted a response to the NOD.⁴ Id. at 21. Employer acknowledges that it was certified for 100 H-2B workers on February 18, 2020. However, the H-2B cap closed on February 18, 2020, and they were shut out from hiring foreign workers. According to Employer, it was able to successfully locate and transfer 22 in-country H-2B workers, which was a “legal path” to employ camp-exempt workers, but was not enough to meet its need. Id. Employer clarified that it was not requesting 160 workers total, rather the application seeking 60 workers was solely in addition to the 22 previously hired, for a total of 82 workers. Id. Employer submitted that its assignment to Group B for purposes of processing H-2B applications put it at a disadvantage for obtaining the workers previously certified in connection with its February application, in that groups after Group A were typically limited by the visa cap. Id. at 22. Further, Employer submitted that the present application was “not the same as the spring [application] as the ending dates are different.” Id. Employer also contended that other applications like its August application had been approved recently, and thus suggested inconsistent treatment of applications.

Employer attached documentation to its response, including: a copy of pages 7399-7403 of the Federal Register Vol. 84, No. 42 dated Monday, March 4, 2019 (selection procedures for reviewing applications, highlighting the group assignment process); an email dated January 6, 2020 notifying the employer of its Group B assignment for the February application; two reports showing Purchases by Item Summaries comparing sales data from January through July 2019 and from January through July 2020; and a 2019 payroll report showing employment of total workers in October through December 2019. Id. at 23-31.

Final Determination

On September 22, 2020, the CO issued a Final Determination denying Employer’s application, stating that “Employer’s explanation and documentation did not overcome the deficiency” pertaining to application filing requirements found at 20 C.F.R. § 655.15(f). AF at 12, 15, 19. The Final Determination stated:

⁴ The CO’s brief states Employer responded to the NOD on August 28, 2020 and cites AF pages 21-31 but the cited sections do not show the August 28th date. The AF file on page 18 in the NOD states that the response to the NOD was due September 11, 2020 and the response was received at the Chicago NPC on September 10, 2020.

The employer indicated that although its prior application, H-400-20002-226608, was certified for 100 Meat, Poultry, and Fish Cutters and Trimmers in Swan Quarter, North Carolina, it was unable to fill all of its positions due to the H-2B visa cap. The employer stated that it was able to successfully locate and transfer 22 in country H-2B workers. In its current application, H-400-20234-781300, the employer is now requesting 60 workers to fill a portion of the 78 positions that remain unfilled. However, the employer has already received a certification for Meat, Poultry, and Fish Cutters and Trimmers 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-400-20002-226608, 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.

Id. at 18.

The CO noted that in the past, the OFLC allowed employers to return “full unused” certifications. In such cases, USCIS is notified that the certification is not available for use. Id. Employers then have the option to file a new application “for the same job opportunity, area of intended employment, and period of need without violating 20 C.F.R. 655.15(f).” However, the CO stated a partially “used” certification, when the employer hired only a portion of the H-2B workers for which it received certification, cannot be returned in this manner. Id.

As far as the Employer’s observation regarding inconsistent approvals of similar applications, the CO asserted that each application is evaluated on its own merits. Id. at 19. In this case, the CO considered Employer’s August application to identify a “period of need” from 11/4/20 to 12/15/20, which was wholly within the “period of need” from 4/1/20 to 12/31/20 in the previous certified application. Id. Therefore, the CO determined that the “current application appears to be a duplicative filing of a previously established need.” Id.

Finally, the CO reviewed Employer’s sales data from January to July 2019 and January to July 2020 and found it was “unclear how the data...demonstrate that the work described in the certified application...is not the same as that covered by the current application[.]” Id. at 20. The CO also found the payroll information to be “incomplete” based on its history of being certified for crab processors in 2019. Id.

The Employer requested Administrative Review on September 29, 2020. Id. at 1. The CO and Employer submitted briefs on November 3, 2020.

Certifying Officer’s Brief

In her brief, the CO argues that Employer’s application “matche[d] a filing for which the [E]mployer previously received certification.” Certifying Officer’s Brief at 2. Specifically, the CO argues that:

[T]he CO properly denied Mattamuskeet’s application under 20 C.F.R. § 655.15(f) because it sought to employ H-2B workers for the same job, at the same location, and during the same time period as a previously certified application, and failed to establish that it had a bona fide need for the new application.

Id. at 4. The CO argues that the denial was proper because the Employer applied for “successive applications are for the same job, at the same location, during the same time period—even if start and end dates differ within that period—the CO may properly determine that they represent the same job opportunity and underlying need for labor.” Id.

The CO also found that for Employer to hire workers for the same job but starting on different dates, “the rule required employers to file separate applications, each of which would need to satisfy the requirements for certification, including to establish temporary need for the requested labor.” Id. at 5. The CO argued that based on 20 C.F.R. § 655.1(f), the Employer “could not receive certification for all the workers needed for the season and then attempt to bring those workers in on different start dates.” Id. The CO further argues that the 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 Mattamuskeet already holds a valid certification.” Id. at 6. The CO additionally argues that “the Employer has neither alleged nor established that the application at issue is premised on a distinct need from its prior application (*i.e.* one-time occurrence; a seasonal need; a peakload need; or an intermittent need).” Id. at 7.

Employer’s Brief

In its brief, the Employer submits essentially the same arguments made in the NOD response, including its argument that “it had every intention of utilizing all H-2B workers on its spring application, but did not have the opportunity to do so because of its Group assignment and being shut out by the USCIS cap.” Employer’s Brief at 1.

However, the Employer states that by operation of an Executive Order issued May 14, 2020, some workers were deemed essential to the food supply chain and Employer had the opportunity to pursue hiring of in-country workers. Employer explains that hiring in-country workers after being limited by the H-2B visa cap was its “ONLY option” because “[w]hen the cap closed, this employer was unable to obtain a final approval from USCIS to cross workers from a foreign country.” Id. As such, some in-country workers were hired but not enough to meet its need. Id.

Further, Employer addresses the regulation, or apparent lack of regulation, the Department uses to permit employers to return “fully” unused certifications but not partially used ones in order to seek to fill slots that employers have not been able to fill for “same time period, same job and effectively same number of workers in most cases.” Id. at 2. Employer questions, “Why should the Department allow companies who used none of their slots on a certification file

a new application for the same need while prohibiting companies who could only use a few of their slots from doing the same?” Id.

Finally, the Employer argues that the “Department is not applying the policy across the board” and asserts that Employer has been treated more harshly than a number of landscape companies. Id. Employer cites a different application, with a different employer, arguing that it was based on the same circumstances and the employer was able to obtain laborers sought in a fall application for the balance of workers it was unable to obtain on the spring application. Id. at 2-3.

STANDARD OF REVIEW AND DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20.

After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer, who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

In seeking review, the employer’s request must: (1) clearly identify the particular determination for which review is sought; (2) set forth the particular grounds for the request; (3) include a copy of the CO’s determination; and (4) only contain legal argument and “such evidence as was actually submitted to the CO before the date the CO’s determination was issued.” 20 C.F.R. § 655.61(a).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012) (“[t]he 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 argument and such evidence that was actually submitted to the CO in support of the application.”) (citing 20 C.F.R. § 655.33(a), (e)).

After considering the evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; or (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e). BALCA may overturn a CO’s decision if it finds the decision is arbitrary or capricious. *See Brook Ledge, Inc.*,

2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016).

Here, the Notice of Deficiency identifies Employer's failure to comply with 20 C.F.R. 655.15(f) ("Separate applications"), which provides,

Except as otherwise permitted by this paragraph (f),⁵ 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.*

Id. (emphasis added).

"Period of employment," as used in the regulation and cited in the NOD, is not defined. "Job opportunity" is defined under 20 C.F.R. § 655.5 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." As such, the regulation on its face does not identify or define the meaning of "period of employment."

The "period of employment" language was added to § 655.15(f) in 2012.⁶ While the term is not defined in the regulations, the Department provided some guidance regarding the purpose of inclusion of this term in the 2012 Final Rule. *See* 77 Fed. Reg. 10038-01, 10061-62 (Feb. 21, 2012) (*Temporary Non-Agricultural Employment of H-2B Aliens in the United States*). Concerning changes to § 655.15(f), it was noted that:

One worker advocacy group expressed support for requiring separate applications for work occurring at separate worksites, with separate employers, or for different positions that have different job duties or terms and conditions of employment. We also received comments opposing the proposal to continue to require employers to file separate applications when there are different **dates of need** for the same job opportunity within an area of intended employment. Commenters argued that their business ramps up during the period of need, resulting in a need for some, but not all, of the workers requested on the **date of need** provided in the Application for Temporary Employment Certification. These commenters asserted that they also need flexibility to respond to changes in the market. We acknowledge that business is not static and an employer's need for workers during its period of greatest and least need may not be consistent. However, employers should accurately identify their personnel needs and, **for each period within its season, file a separate application containing a different date of need.** An

⁵ Although § 655.15(f) contains an exception for employers in the seafood industry, permitting some staggering of start dates of employment where a petition for H-2B nonimmigrants has been approved, Employer does not contend that the exception at 655.15(f)(1)-(3) applies here or that it met the requirements of that part of the regulation.

⁶ *See* 20 C.F.R. § 655.20(e) (2009) ("[O]nly 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."); 20 C.F.R. § 655.15(f) (2012) ("[O]nly 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.*") (emphasis added).

application with an accurate **date of need** will be more likely to attract qualified U.S. workers to fill those open positions, especially when the employer conducts recruitment closer to the actual **date of need**. This prohibition against staggered entries based on a single **date of need** is intended to ensure that employers provide U.S. workers the maximum opportunity to consider the job opportunity and is consistent with USCIS policies. It ensures that U.S. workers are not treated less favorably than H-2B workers who, for example, may be permitted to report for duty 6 weeks after the stated **date of need**. We recognize that there may be industries whose participation in the H-2B program may be constrained as a result of this revised 90- to 75-day timeframe filing in years in which the statutory cap of for the six-month intervals beginning October 1 and April 1 is at issue. However, this is largely a function of the statutory cap on the available visas over which we have no control. We are, therefore, retaining the provision as proposed **and only slightly revising the language to further clarify** that an 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**.

Id. (emphasis added).

Accordingly, the regulation was revised to clarify that separate applications are required for “each opportunity for each date of need.” *See id.* The language ultimately included in the regulation referred to “each opportunity... for each period of employment.” 20 C.F.R. § 655.15(f). Even so, the available guidance per the Agency’s 2012 Final Rule indicates that the separate application requirement was intended to apply to distinct employment opportunities defined by “each date of need.” In fact, the 2012 Final Rule repeatedly referred to identification of distinct “dates of need” as relevant to compliance with this regulation.

“Date of need” is defined in 20 C.F.R. § 655.5 as “the **first** date the employer requires services of the H-2B workers as listed on the Application for Temporary Employment Certification.” In other words, the “date of need” is the start date of a worker’s employment services.

The language of the 2015 Interim Final Rule also supports this reading of the regulation. *See* 80 Fed. Reg. 24042-01, 24060 (Apr. 29, 2015) (*Temporary Non-Agricultural Employment of H-2B Aliens in the United States*). The 2015 Interim Final Rule is “virtually identical to the 2012 final rule that DOL developed following public notice and comment,” but did include the seafood industry exception at § 655.15(f) noted herein. *Id.* at 24043. However, DOL never implemented the 2012 Final Rule because of challenges to the agency’s rulemaking authority. *Id.* at 24045.

According to the 2015 Interim Final Rule,

Paragraph (f) requires that, with one exception discussed below applicable to employers in the seafood industry, employers file separate applications when there are different **dates of need** for the same job opportunity or different

worksites within an area of intended employment. Employers must accurately identify their personnel needs and, **for each period within their season for which they have more than one date of need**, file a separate application **for each separate date of need**. An application with an accurate **date of need** will be more likely to attract qualified U.S. workers to fill those open positions, especially when the employer conducts recruitment closer to the actual **date of need**. This prohibition against staggered entries based on a single **date of need** is intended to require that employers provide U.S. workers the maximum opportunity to consider the job opportunity and is consistent with USCIS policies. It is intended to provide that U.S. workers are not treated less favorably than H-2B workers who, for example, may be permitted to report for duty 6 weeks after the stated **date of need**.

Id. at 24060 (emphasis added). Accordingly, the 2015 Interim Final Rule continues to identify the need for separate applications with distinct *dates of need*, even describing the potential for “more than one date of need” within a particular season. *Id.* The undersigned remains cognizant of the “date of need” definition under § 655.5, and there is no indication that the Department meant to apply a different meaning than the regulatory definition when repeatedly referring to “date of need” in the Final Rule and Interim Final Rule.

For these reasons, § 655.15(f) is properly read to require separate applications when dates of need, or start dates of employment services, differ. As DOL recognized in the 2012 Final Rule and 2015 Interim Final Rule, focusing on accurate dates of need, and requiring single applications for such dates of need, is consistent with the Agency’s requirement that employers provide U.S. workers an appropriate and timely opportunity to consider the job opportunity. Further, it is consistent with avoiding staggering start dates within a season under one certified application, which is only specifically authorized under the exception applicable to the seafood industry (within certain time constraints and other regulatory requirements). *See* 20 C.F.R. § 655.15(f)(1)-(3).

Here the CO contends that the denial of the instant application was proper because the Employer’s “successive applications are for the same job, at the same location, during the same time period—even if start and end dates differ within that period.” For this reason, the CO contends the more recent August application (seeking workers from 11/4/20 – 12/15/20) represents the same job opportunity and underlying need for labor that was the subject of the February application (seeking workers from 4/1/20 – 12/31/20). Employer argues, among other things, that the job opportunity in the instant application is distinct from the February application because Employer now seeks crab processors for the end of the season only and the dates for this employment period differ from its February application.

For the reasons noted above, the undersigned concludes that Employer was permitted under § 655.15(f) to file separate applications for different dates of need, and the application at issue (H-400-20234-781300) was not prohibited under the regulation because it identified a job opportunity for a period of employment, or date of need, that differed from the previous application. Therefore, Employer did not violate the “one application” limitation under the cited regulation, and the CO’s determination to the contrary is thus arbitrary and requires reversal.

This determination is consistent with that reached in other recent cases where employers have been certified to hire workers under the H-2B program but were unable to do so by operation of the visa cap and thereafter filed separate applications for workers for different dates of need, although the need arose within the same seasonal need covered by the first application. *See JFD Landscapes, Inc.*, 2020-TLN00058 (Aug. 28, 2020); *Dixie Lawn Servs., Inc.*, 2020-TLN-00053 (ALJ Aug. 25, 2020); *Trinity Landscaping, LLC*, 2020-TLN-00057 (ALJ Aug. 21, 2020); *Fairfield Landscaping, Inc.*, 2020-TLN-00055 (ALJ Aug. 20, 2020); *Green Up Lawncare, LLC*, 2020-TLN-00052 (ALJ Aug. 14, 2020). *Cf. Morel Landscaping, LLC*, 2020-TLN-00051 (ALJ Aug. 25, 2020, errata issued Aug. 26, 2020); *Crystal Springs Ranch, Inc.*, 2020-TLN-00054 (ALJ Aug. 25, 2020); *The Nature Grp., Inc.*, 2020-TLN-00056 (ALJ Aug. 21, 2020); *TLC Landscaping, Inc.*, 2020-TLN-00050 (ALJ Aug. 21, 2020); *KDE Equine, LLC*, 2020-TLN-00042 (ALJ May 20, 2020).

In light of this conclusion, the undersigned need not reach the issue of whether the Department has typically permitted the return of unused or partially used certifications, and any regulatory support for same. As for Employer's contention that there has been inconsistency in the grant of certifications under similar circumstances, that matter is not before me, as BALCA's review is limited to the information contained in the record before the CO at the time of the final determination. Employer also did not demonstrate with specificity such factual similarities between the instant application and applications of other employers to demonstrate arbitrariness or capriciousness of the CO's decision.

Further, the sole deficiency identified by the CO concerned Employer's compliance with § 655.15(f). Although the CO commented on the sufficiency of Employer's 2019 and 2020 sales data and 2019 payroll information, or lack thereof, the CO did so only in connection with whether the documents explained Employer's compliance with § 655.15(f). Also, the CO only requested additional supporting information *if* the Employer was seeking to show a need for 160 total workers, which Employer clarified was not the case and the record supports Employer's position. *See* AF at 21, 37-38.

Having found that Employer did not violate § 655.15(f), and since no other deficiency was identified by the CO, the Employer met its burden of proving the temporary need for workers stated in the application (H-400-20234-781300).

ORDER

Based on the foregoing, the denial 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 this 13th day of November, 2020.

For the Board:

ANGELA F. DONALDSON
Administrative Law Judge