DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from KY South Central Pools, LLC’s (“Employer”) request for review of the Certifying Officer’s (CO) decision to deny an application for temporary labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural 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). 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. A certifying officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If an employer receives an unfavorable determination from the certifying officer, it may request administrative review by the Board of Alien Labor Certification Appeals (“BALCA”). 20 C.F.R. § 655.61(a).

Statement of the Case

On January 1, 2021, Employer filed its Application for Temporary Employment Certification. Appeal File (AF) 59-159. Employer requested certification for two General Laborers (Janitors and Cleaners, Except Maids and Housekeeping Cleaners) for the period April 1, 2021 through November 30, 2021. AF 59. On January 14, 2021, the CO issued a Notice of Deficiency. AF 53-58. The CO wrote:

In accordance with Departmental regulations at 20 CFR 655.15(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.

The employer has submitted an application, H-400-21001-988243, for the same position in the same area of intended employment as a previously submitted application, H-400-20308-896613, for which the employer received certification. That certification, for six workers and a period of need from February 1, 2021 to November 30, 2021, is still valid. The current filing seeks certification to employ two workers from April 1, 2021 to November 30, 2021 - a period of need which overlaps with the period of need of the previously-certified application.

Further, the employer’s additional Statement of Temporary Need upload to the Form ETA-9142B states, "the employer received a temporary labor certification under the first half cap for FY 2021 for six (6) workers, which is the minimum number of supplemental temporary workers need to operate at a minimum to maintain status quo. Fortunately, the employer was able to successfully file its visa petition for four (4) cap exempt beneficiaries. However, the employer still has a need for the balance of the workers sought who will be categorized as "new" workers requiring consular processing. Since there are no visas remaining under the first half cap, the employer is forced to herein submit a second application for temporary certification as its need for temporary workers remains unfulfilled."

[...]

The employer provided an explanation that while it was certified for six workers in its prior application (H-400-20308-896613), it was unable to fill all of its positions due to the H-2B visa cap. 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.

AF 28. The CO requested a “detailed explanation and supporting documentation that demonstrates the work described in the certification application is not the same as that covered by the newly filed application,” even though “the employer has already indicated that the newly filed application is for the same job opportunities as those for which it has already received,” or evidence demonstrating “it has a need for additional workers, totaling eight General Labors … and also demonstrate that this need was not present at the time the employer’s prior application was filed.” AF 29 (emphasis in the original).

On January 18 2021, Employer filed its response to the Notice of Deficiency. AF 43-52. Employer wrote:

The Department’s Notice of Deficiency asserts that the petitioner is seeking certification of a period of temporary need that is the same as the period of temporary need for which the petitioner sought and received temporary certification approval pursuant to case number H- 400-20308-896613. In fact, based on basic interpretation of the plain faced and simple language contained in the subject NOD, the same period of temporary need identified in this 2nd half cap application is quite simply on its face not for the same period of temporary need for which the employer previously applied. Rather, it is for a distinct and different temporary period of need that begins on April 1, 2021 and expires November 30, 2021. Therefore, the Department fundamentally cannot simply and arbitrarily declare that the distinct periods of temporary need are the same, when they clearly are not. The Department’s assertion will obviously lead to future litigation based on very simple plain faced language. What does the “same” mean?
The Department also asserts in its NOD that the job duties included in both applications for temporary labor certification under the H-2B visa program include the same job duties. The employer does not dispute this fact. The job duties in both applications are the same. However, the job duties identified in the second half cap will occur at a later date in time and will be performed while working on a newly executed contracts that require the workers sought to perform the same job duties, but on new pool installation projects that were not identified in the initial 1st half cap labor certification application submission.

In the fall of 2020 the employer found itself in a very precarious and confusing situation after having to severely cut back on its work in order to provide the safest possible work environment for its employees and clients during a period of time in which the coronavirus global pandemic surged again, not knowing what the future would hold for its business with regards to the administration of the United States government and the impact of the global COVID-19 pandemic on the future of its enterprise. The employer was forced to take a wait and see approach before entering into any additional pool installation projects.

Therefore, in September 2020 with the limited information and foresight that the employer had at that time resulted in the petitioner making the calculated and conscious decision to apply for the extension of status for a limited number of beneficiaries knowing that its business could be severely curtailed and possibly lost as a result of a new COVID-19 surge amid a presidential election and the possibility of a new and unknown administration and transition of power. The employer simply did not have insight at the time of its initial 2021 application to know what impact a new federal administration and ongoing global pandemic would have on the labor market and on immigration law and specifically H-2B guest worker program. The employer’s instant application for temporary labor certification is being submitted now that the employer has access to more insight into the future of its operation. The employer now knows that a new president has been elected and will be sworn into office on January 20, 2021. This provides the employer some measure of certainty with regards to the future of its H-2B visa program as the Biden administration indicates that it is pro-immigration and will move forward in the early days of the new administration to revise immigration laws that will benefit American employers, intending non-immigrants, and U.S. workers. Further the employer now knows that several coronavirus vaccines are now available to the American public and that the United States government has a much better grasp on curtailing the impact of the global pandemic than it did prior to the release of the vaccines when the employer filed its initial application in September 2020. With this new insight both into the next administration of the United States as well as our country’s response to the Covid-19 global pandemic and availability of vaccines allows the employer to enter into with much more confidence to enter into new and additional pool installation contracts for work to begin on April 1, 2021.

In September 2020 the employer feared that its entire business would be negatively affected by the United States political climate and the coronavirus. Therefore, the circumstances under which the employer is now filing the subject application for temporary labor certification for an April 1, 2021 start date are much clearer and far different than the position the employer was in in September 2020. The employer feels that it may assume a reasonable risk of accepting entering into new contracts that are attached hereto for reference and that it will need the additional workers sought in this application in order to meet the demands of this additional production.
The employer should not be penalized because of its inability to foresee the future during one of the darkest times our country has ever faced. American employers were forced to be extremely conservative in September 2020 when strategizing regarding their upcoming period of peakload temporary need. The employer’s change in vision, clarity, and strategy after the results of the presidential election and release of coronavirus vaccines have resulted in the subject application being submitted to your attention for the April 1st period of upcoming temporary need.

The employer most respectfully requests that Department not punish it for its fear of hiring supplemental staff or entering into additional pool installation projects that it was unsure it could complete during the dark days of the fall of 2020. To that end, the employer is seeking a Notice of Acceptance of its April 1, 2021 application for much needed “new beneficiaries” based on the company’s changed circumstances and the company’s new strategy with regards to its future.

AF 44-46. Employer attached to its response a list of new pool contracts with a scheduled April 1, 2021 start date. AF 46, 52.

On March 11, 2021, the CO issued a Final Determination denying Employer’s application for temporary labor certification. AF 34-42. The CO wrote:

While the employer initially explained that its need in application H-400-21001-988243 was based upon being affected by the H-2B visa cap following certification of H-400-20308-896613, the employer is now stating that it has a staggered need.

The employer’s previous certification history under SOC code 37-2011 does not support the new claim of a staggered need as indicated by the chart below:

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Workers Requested</th>
<th>Dates of Need</th>
<th>Case Status</th>
</tr>
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<tbody>
<tr>
<td>H-400-14182-764823</td>
<td>4</td>
<td>2/1/2015 – 11/30/2015</td>
<td>Certified</td>
</tr>
<tr>
<td>H-400-15146-964594</td>
<td>6</td>
<td>2/15/2016 – 11/15/2016</td>
<td>Certified</td>
</tr>
<tr>
<td>H-400-16315-573425</td>
<td>6</td>
<td>2/15/2017 – 12/15/2017</td>
<td>Certified</td>
</tr>
<tr>
<td>H-400-17305-539279</td>
<td>6</td>
<td>2/1/2018 – 11/30/2018</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>H-400-17361-506203</td>
<td>6</td>
<td>4/1/2018 – 11/30/2018</td>
<td>Certified</td>
</tr>
<tr>
<td>H-400-18204-412657</td>
<td>6</td>
<td>10/15/2018 – 11/30/2018</td>
<td>Rejected</td>
</tr>
<tr>
<td>H-400-18221-117251</td>
<td>6</td>
<td>2/1/2019 – 11/30/2019</td>
<td>Certified</td>
</tr>
<tr>
<td>H-400-19307-123792</td>
<td>7</td>
<td>2/1/2020 – 11/30/2020</td>
<td>Certified (capped)</td>
</tr>
<tr>
<td>H-400-20002-224271</td>
<td>7</td>
<td>4/1/2020 – 11/30/2020</td>
<td>Certified (refiling from H-400-19307-123792)</td>
</tr>
<tr>
<td>H-400-20308-896613</td>
<td>6</td>
<td>2/1/2021 – 11/30/2021</td>
<td>Certified</td>
</tr>
<tr>
<td>H-400-21001-988243</td>
<td>2</td>
<td>4/1/2021 – 11/30/2021</td>
<td>Denied</td>
</tr>
</tbody>
</table>

The employer provided an explanation that while it was certified for six workers in its prior application, H-400-20308-896613, 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 four H-2B workers already in the U.S., providing I-797A Notices of Action in
support, and is now requesting two workers for the remaining positions unfilled. However, the employer is reminded that it 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.

The employer’s filing history and statements indicate that it deliberately filed two duplicate applications for dates of need in 2021 splitting its need for six General Laborers from February 1, 2021 to November 30, 2021 into two separate applications. The first was certified for six workers in H-400-20308-896613 but was only able to obtain four cap-exempt workers, and the second was for two non-cap-exempt workers. Both applications were filed as a “workaround” to the H-2B visa cap.

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The employer is reminded a labor certification needs to reflect an employer’s need and not based on the availability of H-2B workers. H-2B regulations specify that an employer must establish that its need for non-agricultural services or labor is temporary. See 20 CFR 655.6(a). H-2B program regulations specifically tie the certification of an H-2B application to the employer’s need and not to artificial timing related to the availability of H-2B workers as a result of the H-2B cap. Therefore, the employer did not overcome the deficiency.

In accordance with Departmental regulations at 20 CFR 655.50, the Department of Labor has made a final determination on the employer’s application. Based on the foregoing, the employer’s application is denied.

AF 41-42.

On March 23, 2021, Employer filed its request for administrative review. AF 1-33. The case was docketed with BALCA on March 24, 2021 and assigned to me shortly thereafter. By Notice of Assignment/Scheduling Order dated March 26, 2021, the Solicitor was invited to file a brief in support of the CO’s determination. The Administrative File was transmitted to BALCA on March 31, 2021, and the Solicitor filed a brief on April 9, 2021.

**Legal Analysis**

When an employer requests review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal argument and evidence that was submitted to the CO prior to issuance of a final determination. The Board “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case back to the CO for further action. *Id.* “Although neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing a CO’s determinations.” *Guadalupe Mountain Fencing*, 2020-TLN-00014, slip op. at 6 (Dec. 5, 2019). Employer must therefore demonstrate the CO’s final determination was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law.

In this case, the CO denied Employer’s application because Employer requested certification for the same job opportunity, at the same location, during the same period of need for which Employer has already applied and received
certification. The relevant regulation provides “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 contends § 655.15(f) permits the filing of separate applications for different dates of need and “the application at issue … identified a job opportunity for a period of employment, or date of need, and an additional work project that differ from the previous application.” AF 5. Employer cites several cases, which, it argues, support its position. AF 5-6 (citing Green Up Lawncare, LLC, 2020-TLN-00052 (Aug. 14, 2020); Dixie Lawn Services, Inc., 2020-TLN-00053 (Aug. 25, 2020); Fairfield Landscaping, Inc., 2020-TLN-00055 (Aug. 20, 2020); Trinity Landscaping, LLC, 2020-TLN-00057 (Aug. 21, 2020); JFD Landscapes, Inc., 2020-TLN-00058 (Aug. 28, 2020)). The Solicitor counters the CO may properly determine that successive applications represent the same job opportunity and underlying need for labor, even if the start and end dates differ within that period. Solicitor’s Brief at 8-9 (citing Crystal Springs Ranch, Inc., 2020-TLN-00054 (Aug. 25, 2020); The Nature Group, 2020-TLN-00056 (Aug. 21, 2020); TLC Landscaping, Inc., 2020-TLN-00050 (Aug. 21, 2020)).

Based on my review of the above cases and the Administrative File, I am not persuaded by Employer’s arguments. The CO’s interpretation of § 655.15(f) is reasonable and Employer has not demonstrated the CO’s denial of the application here was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The record demonstrates Employer’s current application represents the same job opportunity as the one presented in ETA No. H-400-20308-896613, therefore the current application is barred by § 655.15(f). Accordingly, the CO’s decision will be affirmed.

ORDER

Based on the foregoing, IT IS ORDERED that the Certifying Officer’s Final Determination denying KY South Central Pools, LLC’s Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/PML/ksw
Newport News, Virginia