This case arises from the request for review of Shenandoah Landscape Services, Inc. ("Employer") in regard to the Certifying Officer’s ("CO") January 4, 2021 denial of Employer’s 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 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),¹ 20 C.F.R. § 655.6(b).² 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 (“Form 9142”). 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).

**BACKGROUND**

On January 1, 2021, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 22 landscape laborers for the period of April 1, 2021, to November 30, 2021. AF 38-65. Employer indicated that the nature of its temporary need was “peakload.” Employer attached a statement regarding its temporary need and its schedule of business operations. Employer stated:

Shenandoah Landscape Services, Inc. … is a landscape contractor located in Manassas, Virginia, who specializes in providing residential and commercial landscape services …

In 2020, SLS (Shenandoah Landscape Services, Inc.) was capped for our usual filing period and was subsequently certified to complete backlogged work for the period of October 1st through November 30, 2020. This certification enabled us to meet some customer demand but more importantly provided a limited number of cap exempt workers for 2021 thereby allowing us to perform early season landscaping work. This instant application, if certified, would allow SLS to address additional customer demand (peak within a peak or spike) which routinely occurs following early season work. Specifically, our early workers will manage customer demand until the full spring and summer season arrives when demand will exceed those workers capacity. Mowing, weeding, pruning, etc. must be accomplished in accordance with our contractual obligations and cannot be provided without the addition of workers requested in this application. This increased demand is normal for the industry and continues through the fall season when we will no longer require the H-2B workers and our permanent staff can manage the reduced workload.

Please note this request is for a substantially reduced number of workers from previous year’s totals as we are still experiencing the financial harm COVID-19 has done to the local economy. SLS like other businesses sincerely hopes by 2022 the economy will rebound to pre-virus levels and our filings return to normal levels and periods of proposed employment…

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on or after April 29, 2015, and that have 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.

References to the appeal file will be abbreviated with an “AF” followed by the page number.
Each year, we begin our work with clean-ups, preparation of planting areas, and mulching. Tasks such as mowing, fertilizing, planting and weeding our customers’ properties peak in the spring and summer and continue on an on-going basis throughout the fair-weather months. Flowers are planted seasonally and then maintained as necessary. Walkways and sidewalks must be neatly trimmed and kept free of debris. In the fall, mowing slows down, and seasonal clean-ups of leaves and planting beds begins. Shrubs, trees, lawns, and plants are then winterized in anticipation of the dormant season.

AF 49-50.

The CO issued a Notice of Deficiency on January 14, 2021, listing two deficiencies in the Employer’s temporary labor certification. AF 30-37. The first deficiency listed was the Employer’s failure to comply with application filing requirements at 20 C.F.R. § 655.15(f). This regulation requires that only one application for temporary employment certification may be filed for one area of intended employment for each job opportunity with an employer for each period of employment. The CO noted that in violation of this regulatory requirement, the Employer’s current application 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. The overlapping filings are summarized in the chart below:

<table>
<thead>
<tr>
<th>Case #</th>
<th>Workers Requested</th>
<th>Location</th>
<th>Occupation Code</th>
<th>Occupational Title of Need</th>
<th>Dates of Need</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-400-2102021-986846</td>
<td>22</td>
<td>7848 Bethlehem Rd., Suite 100</td>
<td>37-3011.00</td>
<td>Landscaping and Groundskeeping Workers</td>
<td>4/1/2021 – 11/30/2021</td>
<td>Pending</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Manassas, Virginia 20109</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>H-400-2033008-897100</td>
<td>30</td>
<td>7848 Bethlehem Rd., Suite 100</td>
<td>37-3011.00</td>
<td>Landscaping and Groundskeeping Workers</td>
<td>2/1/2021 - 11/30/2021</td>
<td>Determination Issued – Partial Certification</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Manassas, Virginia 20109</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

AF 34.

The CO determined that in order to receive the requested certification Employer must demonstrate that the job opportunities presented in each application are different. The CO directed the Employer to provide a detailed explanation that demonstrates that the work described in the certification application is not the same as that covered by the newly filed application. In the alternative the CO stated that the employer must provide support to show that it has a need for additional workers totaling 52 landscape laborers and demonstrate that this need was not present at the time the employer’s prior application was filed. (emphasis in
the original). The CO’s request for information and documentation included a request for contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year that identify temporary and permanent employment if the requested occupation in addition to other information supporting the total number of workers requested. AF 34-35.

Alternatively, the CO stated that if the Employer was not able to utilize its prior certification at all due to the H-2B cap, it must notify the Department of its intent to return the certification due to the H-2B cap being met, and also notify the Department of its intent to not pursue workers under that certification. The CO notified the Employer of the process by which the USCIS (United States Citizenship and Immigration Services) could be notified that the certification had been “withdrawn” and could not then be used. If the Employer elected to proceed in this manner it would also need to respond to the NOD notifying the Chicago NPC (National Processing Center). AF 35.

The CO also notified the Employer of the following:

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. The employer must notify the Department that it wishes to withdraw the current application.

Id.

The CO also noted a second deficiency regarding the Employer’s submitted job order. The CO determined that the Employer’s job order failed to include the contact information of the nearest office of the SWA (state workforce agency) in violation of 20 C.F.R. § 655.18. The CO directed the Employer to submit amended job order language in compliance with the regulation or submit an already-amended job order that contains all of the required language as noted in the regulation. AF 36-37.

Employer responded to the Notice of Deficiency by letter dated January 15, 2021. AF 27-29. Employer did not submit any additional documentation stating it had already submitted temporary need statements with both the early season contract and the peak season contract. In its response Employer stated its position that its previous certified application beginning in February 2021, is based partially on the ongoing COVID pandemic and leftover work from the 2020 season. Employer states that its busiest season “remains the April through November timeframe covered by the current application.” Employer asserts that during that peak portion of the year, April – November, it will need its full workforce of 52 workers. Thus it was certified for 30 workers to begin on February 1, 2021, and is now seeking the remaining 22 workers to supplement its workforce for the busiest part of the year, beginning April 1, 2021.

Employer argues generally that filing applications with multiple start dates of need – even where some of the periods of need will overlap within the Employer’s larger season – has been permitted by BALCA, citing several cases which, it asserts, support its position, while acknowledging that there has been a significant amount of litigation over this issue. Employer
argues that it has accurately identified its needs at different points in the season and has filed separate applications with different start dates of need to meet those different needs.

On March 4, 2021 the CO issued a Final Determination Denial to the Employer, noting that the deficiencies previously noted still remain. AF 15-25. The CO addressed the first deficiency that only one application for temporary labor certification may be filed for worksites within one area of intended employment for each job opportunity with an employer for each period of employment, consistent with the regulation at 20 C.F. § 655.15(f). The CO acknowledged the Employer’s response letter including Employer’s statement that it had an “early season contract” but found the explanation did not overcome the deficiency. The CO noted that the Employer did not provide any supporting documents to distinguish the two seasons noted in its response letter. Specifically, the CO determined that although the Employer had stated that “[t]he need for a combined workforce of 52 workers is supported by the contracts that Shenandoah has already negotiated with its customers…” the Employer had failed to submit the supporting documentation despite the request for such information contained in the “Additional Information Requested” section of the NOD. AF 21-22.

The CO also noted that the NOD had provided the Employer with the option to return its certification for case number H-400-20308-897100 (February 1, 2021 – November 30, 2021), but Employer failed to do so. The CO noted that a return of the prior certification would have allowed the current application to proceed with processing. Accordingly, the CO denied the current application on the grounds that Employer failed to comply with 20 C.F.R. § 655.15(f), which provides that 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 CO also determined that Employer failed to submit any information to correct the second deficiency noted in the NOD regarding the missing information in the job order. Accordingly this deficiency also remained. AF 24-25.

On March 8, 2021, Employer filed a timely request for administrative review of the CO’s determination. AF 1-14. Employer reiterated its argument that 20 C.F.R. § 655.15(f) does not prohibit an employer from filing multiple applications with different start dates in a single calendar year. Employer notes that this issue has been heavily litigated in the past few months. Employer cites BALCA cases which it asserts support its position while acknowledging other cases conflicting with its position which it attempts to distinguish. Employer asserts that it has demonstrated its consistent need for the full complement of workers based on its filing history.

By order dated March 15, 2021, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before March 23, 2021. Timely briefs were received from the Employer and the CO on March 23, 2021.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the
Employer’s request for review, which may contain only 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). After considering this 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).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO’s determination in H-2B temporary labor certification cases. See Brook Ledge Inc., 2016 TLN 00033 at 5 (May 10, 2016); see also J and V Farms, LLC, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUE

1) Whether the Certifying Officer properly denied the Employer’s H-2B application as an impermissible second application involving the same job opportunity, area of intended employment, and period of need, in violation of the regulation at 20 CFR § 655.15(f); and

2) Whether the Certifying Officer properly denied the Employer’s H-2B application on the basis that Employer failed to comply with 20 C.F.R. § 655.18 (a)(1) pertaining to job order assurances and contents.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. § 214.2(h)(6)(ii). This regulation states:

Temporary services or labor under the H-2B classification refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.


The DHS regulation further states in regard to the nature of petitioner’s need:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited
to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.


The employer bears the burden of proving that it is entitled to temporary labor certification under the H-2B program. See, e.g., Alter and Son General Engineering, 2013-TLN-3 (Nov. 9, 2012) (affirming denial where the employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need). Other requirements imposed on employers seeking temporary labor certification for H-2B workers are found in the regulations found at 20 C.F.R. Part 655, Subpart A.

In the current case the Employer applied for temporary labor certification for 22 landscape laborers for the period of April 1, 2021, to November 30, 2021, on a “peak load” basis. As noted by the CO in the NOD and the Final Denial, Employer was already certified in the current year for 30 landscape laborers for the period of February 1, 2021, to November 30, 2021. In the Notice of Deficiency, the CO determined that Employer’s current application is for the same position, in the same area of intended employment, and for an overlapping period of need as its prior, still valid certification. AF 34. Accordingly, the CO determined Employer was in violation of the regulation at 20 C.F.R. § 655.15(f) which states, in pertinent part:

Except as otherwise permitted by this paragraph (f), [exceptions applicable to seafood workers] 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 (emphasis added) …

The CO determined that in order to receive the requested certification Employer must demonstrate that the job opportunities presented in each application are different. The CO directed the Employer to provide a detailed explanation that demonstrates that the work described in the certified application is not the same as that covered by the newly filed application. In the alternative, the CO stated that the Employer must provide support to show that it has a need for additional workers totaling 52 landscape laborers and demonstrate that this need was not present at the time the Employer’s prior application was filed. (emphasis in the original). The CO’s request for information and documentation included a request for contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year that identify temporary and permanent employment in the requested occupation in addition to other information supporting the total number of workers requested. AF 34-35.

Alternatively, the CO stated that if the Employer was not able to utilize its prior certification at all due to the H-2B cap, it must notify the Department of its intent to return the certification due to the H-2B cap being met, and also notify the Department of its intent to not pursue workers under that certification. The CO notified the Employer of the process by which the USCIS (United States Citizenship and Immigration Services) could be notified that the certification had been “withdrawn” and could not, then, be used. If the Employer elected
to proceed in this manner it would also need to respond to the NOD notifying the Chicago NPC (National Processing Center). AF 35.

The CO also notified the Employer of the following:

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. The employer must notify the Department that it wishes to withdraw the current application.

Employer does not dispute that its current application is for the same job opportunity and for the same worksites in the same area of intended employment as its previously certified application. However, Employer argues generally, that its current application should not be considered a second application in violation of 20 C.F.R. §655.15(f) because the period of employment has a different start date, even though the end date of employment (November 30, 2021) is the same as the previously certified application. In the statement of temporary need filed with its current application Employer refers to the current application as a “peak within a peak.” AF 49.

The Employer states in its brief that the appeal “raises only one issue, namely, whether the H-2B regulations promulgated by the Department of Labor permit an employer to file separate applications with different dates of need within the same calendar year.” I would note that the appeal raises this issue, but even more importantly raises the issue of whether the Employer met its burden of proving that its second application meets the regulatory requirements in this case, and if not, whether the CO properly denied the Employer’s current application under the facts of this case.

The Employer cites some cases where BALCA decisions permitted a second application with different start dates, under the particular facts of those cases, but fails to cite the many cases where BALCA upheld the CO’s determination that a second application with different start dates for worksites within one area of intended employment and for the same job opportunity was a violation of the regulation at 20 C.F.R. § 655.15(f).

BALCA has upheld the CO’s denial of certification where an employer has misrepresented or altered its actual period of need in an effort to avoid the “visa cap.” AC Sweepers, 2017-TLN-00012 (Jan. 17, 2017)(“employer cannot use the H-2B visa cap as an argument to extend its temporary need”) citing Marco, LLC, d/b/a Evergreen Lawn Care & Rainmaker Irrigation, 2009-TLN-00043, slip op. at 4 (Apr. 9, 2009)(holding that because of the visa cap, “the CO must be vigilant against employers who might claim to need workers earlier than they actually do.”)

Other cases have addressed whether applications with different start dates, but overlapping periods of employment should be considered the same period of employment for purposes of the regulatory prohibition at 20 C.F.R. § 655.15(f) against the filing of more than one application for

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4 See Certifying Officer’s brief at 11, citing seven decisions where the CO’s denial was upheld and where BALCA determined that Employer’s second application was in violation of the regulation at 20 C.F.R. § 655.15 (f).
Temporary Employment Certification for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment. See 20 C.F.R. § 655.15(f). See KDE Equine, LLC d/b/a Steve Asmussen Racing Stable, 2020-TLN-00043, slip. op. at 9 (May 20, 2020)(holding that the employer’s application sought H-2B workers for the same job opportunity and period of employment as a previous certification, even though the start dates of employment differed). Crystal Springs Ranch, Inc., dba Shooting Star, 2020-TLN-00054 (Aug. 25, 2020)(a second application for workers for the same job opportunity is an impermissible application under 20 C.F.R. § 655.15(f) even though the second application indicates a truncated period of need, or subset of the original period of need listed in the original application); Nature Group Inc., dba Nature’s Partner, 2020-TLN-00056 (Aug. 21, 2021)(affirming denial of certification where CO determined a second application for certification for the same job opportunity was impermissible under the regulation at 20 C.F.R. §655.15(f)).

At least one case cited by the Employer looked at the Preamble to the 2015 regulations for guidance on this issue and whether any exceptions to the “single application” rule may have been contemplated by the agency at the time the regulation at 20 C.F.R.§655.15(f) was promulgated. See Mattamuskeet Crab Co., 2021-TLN-00004 (Nov. 13, 2020). The preamble to the 2015 interim regulations, applicable to the current case, states in regard to 20 C.F.R. § 655.15(f):

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.

This provision specifically addresses the prohibition against staggered entries under a single application with the exception of certain covered applications arising in the seafood industry. This provision appears to also acknowledge that there could be cases which warrant separate applications “when there are different dates of need for the same job opportunity or different worksites within an area of intended employment.” However, the above passage notes that employers must accurately identify their personnel needs and, for each period within their season, file a separate application for each separate date of need. This passage does not, however, address a situation where an employer alters its accurate statement of need in order to benefit from the availability of visas due to visa cap considerations. Nor does this passage relieve an Employer of its burden of providing adequate evidence to the CO regarding how it meets the peakload or other temporary need standard, on all applications filed.
In its brief, Employer attempts to justify its current filing by explaining that the 2020 visa cap prevented it from hiring all of the 58 workers for which it was certified in 2020. It asserts that its filing history across the past several years reflects a consistent need for 58 landscape workers and that Employer’s “total peak season runs from February through November, annually, corresponding to the warmer weather months of the year, with much less need for labor during December and January.” See Employer’s brief at 1. This statement appears to confirm that the accurate period of peakload need in this case is February through November, rather than the stated period of need in the current case of April through November.

Employer attempts to explain the reason it filed two applications, stating that it was not able to employ its “full complement of workers in 2020,” due to the visa cap having been met.

This left work to be completed prior to the 2021 season, so Shenandoah applied for and was certified for 30 workers for the period from February 1, 2021 through November 30, 2021. This was roughly half of Shenandoah’s total labor need … The current application covers an additional 22 workers for the period from April 1, 2021 through November 30, 2021.

Employer’s brief, citing statements at AF 9, 38-65.

Employer further states:

The combined need of 52 workers is about 10% below the typical level of 58 workers, based on projections for the 2021 season and predictions for COVID and other economic factors. The separate filings for 30 workers then building to a peak need of 52 with the additional workers requested in the current application reflects the early-season need (catching up on unfinished 2020 work and performing early season preparation) and the peak-season need from April forward.

Employer’s brief at 2.

After considering Employer’s statements above, as well as more detailed statements in the record, I can find no support for Employer’s decision to break its request for 52 workers into two filings, other than visa cap considerations, especially when it confirmed, as noted above, that Employer’s “total peak season runs from February through November, annually, corresponding to the warmer weather months of the year, with much less need for labor during December and January.” See Employer’s brief at 1. Even more importantly, Employer failed to provide any of the documentation, reasonably requested by the CO in the NOD, to support the dates of need identified in its current application, from April 1, 2021, through November 30, 2021, or its alleged “peak within a peak.”

The CO’s determination that the Employer’s current application is a second application for the same period of employment is supported by the record in this case. The CO did not act arbitrarily or capriciously, nor did she abuse her discretion in finding that the Employer’s current application is a second application for the same period of employment in violation of the regulations at 20 C.F.R. § 655.15(f), as Employer has provided no documentation or clear support.
for a separate period of need beginning April 1, 2021, and ending November 30, 2021, as requested in the current application.

While acknowledging that the preamble to the 2015 regulations contemplate a scenario where a second application may be filed “when there are different dates of need for the same job opportunity or different worksites within an area of intended employment,” it does not support, or suggest, that an Employer may misrepresent its accurate period of need, or arbitrarily split its established period of need into separate filings, in an attempt to take advantage of the opening of the visa cap. An employer’s attempt to alter or manipulate its period of seasonal or peakload need for this purpose clearly does not constitute an accurate statement of need as emphasized in the cited preamble passage.

I find no compelling BALCA authority supporting Employer’s argument that the regulations should be interpreted in such a way as to allow an employer to manipulate its stated period of need or separate an established period of need into multiple filings in order to avoid the visa cap or for any other similarly contrived reason.

As noted in the Notice of Deficiency, the agency has attempted to address the visa cap issue through other policy determinations, including its policy of allowing an unused certification to be returned to USCIS, and essentially voided, in the situation where visas for the certified workers are unavailable due to the visa cap. As the CO noted in the NOD, if this occurs the CO would consider the filing of a second application for a partial period of need. However, as noted in the NOD, the agency does not allow this option when the initial certified application is not returned unused.

BALCA is not authorized to review the propriety of such agency policy. The applicable scope and standard of review in the current case is focused on whether the CO acted arbitrarily or capriciously, or abused her discretion in the application of the regulations to the facts of this case. For the reasons noted above, I find the CO did not act arbitrarily or capriciously in her denial of Employer’s current application, especially in light of the fact that Employer produced none of the documentation requested by the CO in the NOD to support its requested dates of need in the current application of April 1, 2021, through November 30, 2021.

CONCLUSION

Accordingly, for the above stated reasons, the CO did not act arbitrarily and capriciously in denying Employer’s application for 22 landscape laborers between April 1, 2021, and November 30, 2021, as Employer failed to establish its peakload need for the requested dates and that its application was not a second application for the same period of employment in violation of 20 C.F.R. § 655.15(f).5

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5 Employer has also failed to cure the second deficiency noted by the CO in regard to an acceptable job order, despite noting in its request for review that this deficiency is easily remedied. Therefore, the CO’s denial is also affirmed on this basis.
ORDER

Accordingly, IT IS HEREBY ORDERED that the CO’s denial of Employer’s application for temporary labor certification, is AFFIRMED.

For the Board of Alien Labor Certification Appeals:

SEAN M. RAMALEY
Administrative Law Judge