BALCA Case No.: 2021-TLN-00023

ETA Case No.: H-400-21001-991127

In the Matter of:

SOUTH STAR CORPORATION
Employer

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This case arises from the request of South Star Corporation ("Employer") for review of the Certifying Officer’s ("CO") decision to deny its application for temporary alien 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 ("DHS"). 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 ("Department") using a Form ETA-9142B, Application for Temporary Employment Certification ("Form 9142B"). A CO in the Office of Foreign Labor Certification of the Department’s Employment and Training Administration ("ETA") reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a).

BACKGROUND

On January 1, 2021, ETA received an application for temporary labor certification from Employer. AF 68-95. Employer requested certification for 18 landscape laborers. AF 68.

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2 On April 29, 2015, the Department of Labor and DHS 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 have a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(c). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.
3 In this Decision and Order, “AF” stands for “Appeal File.”
Employer identified the nature of its temporary need as “seasonal” and the period of intended employment as April 1, 2021, to November 27, 2021. AF 68.

Included with Employer’s application was a “Statement of Temporary Need.” AF 73, 81-83. Employer provided the following explanation regarding its seasonal need:

Our true dates of need are from 1/28 to 11/27 and the total number of temporary workers needed is 24. We received partial certification by DOL for 6 workers (case number H 400 20304 892418) because we were able to find cap exempt H2B workers. However, our operation still requires 24 workers so we are applying in April for the remaining 18 workers. This is consistent with how we had to partially refile and received approval by DOL in 2020. In filing for April 1, this is a new job opportunity since the dates of need (4/1 to 11/27) and number of workers (18) are reduced from the prior certification (H 400 20304 892418 was for 1/28 to 11/27 in request for 24 workers). This is consistent with recent BALCA cases allowing for partial refile. See BALCA Case No.: 2020 TLN 00052 and 2020 TLN 00057.

Similarly, in 2020, we had to file two labor certifications. We were affected by the first fiscal-year H-2B cap, and so were forced to first request only ten (10) in-country transfer workers under certified case number H-400-19303-117330. We then refiled for the remaining fourteen (14) under the second H-2B cap (full certification H-400-19303-117330). Unfortunately, we were not accepted under the second cap, and therefore refiled for a 10/1/2020 through 12/22/2020 start date (full certification H-400-20187-695487).

We require the assistance of H-2B workers based upon a seasonal labor need, defined as "services or labor traditionally tied to a season of the year by an event or pattern and is of a recurring nature." To establish that our need is seasonal need, we must "specify the period(s) of time during each year in which it does not need the services or labor." "The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change."

Our temporary need is based upon a seasonal need in that (1) the landscaping and grounds keeping services that the landscape laborers would provide is tied to the recurring annual growing season for plants, lawns, shrubs, and grasses, (2) our need for fulltime temporary landscape laborers consistently ceases over the winter when weather is not conducive to outdoor landscape work and plants, shrubs, and grasses are dormant, (3) our need is predictable from the changing seasons, i.e., annually from the onset spring to the onset of winter, commensurate with the fair weather months of the year that allow outdoor work and the above mentioned growing season.

Landscaping services in the East North Central part of the United States are traditionally performed in the spring, summer, and fall. Accordingly, South Star Corporation provides landscaping services starting with cleanup at winters end, spring, summer, and fall. In the East North Central part of the United States, landscaping services are not needed during the winter. In the winter months (starting in December), landscape laborers are not able to perform their tasks, i.e., they cannot lay sod, mow, trim, plant, water, fertilize, dig, rake or install sprinklers
and mortarless segmental concrete masonry wall units, because of the harsh winter weather and snow in our region. Additionally, plant life is dormant during the winter months and needs little to no care. Thus, the period of time when landscaping services are not needed is not subject to change and is not unpredictable.

Furthermore, landscaping services commence with the onset of warmer weather, when winter begins to change into spring, and workers can begin working outdoors. Our typical schedule of operations each year begins with clean-ups, preparation of planting areas, and mulching. Cleanup must commence as soon as weather permits so that mulching, fertilizing, watering, and pruning services can be provided on time. Thus, our company as well as other landscape companies in our area, hire full-time, temporary seasonal landscape laborers for the beginning of February. Winter debris cleanup efforts commence in February (i.e. spring cleanup), then tasks such as mowing, fertilizing, planting, and weeding peak in the spring and continue on an on-going basis throughout the fair-weather months. Flowers are planted seasonally and maintained as necessary. Walkways, sidewalks, and paved areas must be neatly trimmed and kept free from debris. Our irrigation work begins in early spring with checking systems and making repairs in preparation for the growing season. 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 off-season, i.e., December through January when we no longer require the temporary workers.

In support of this annually recurring seasonal need, our company hires full-time, temporary seasonal landscaper at the end of the winter. Please note that our hiring pattern is consistent and recurring and that it aligns with the end of winter cleanup commencement period. We do not employ landscape laborers in the winter months of December and the most of January, i.e., the period of time during each year when landscape services are not needed. We have never employed landscape laborers during the winter period described above.

Since 2008, we have received full labor certification from the Department of Labor and USCIS petition approval for season landscape laborers. Each year since, we have received full certification from DOL, which demonstrates that our business is recognized for our seasonal need and our inability to provide services in the winter. Accordingly, USCIS has also recognized that our business is seasonal in that we are not able to provide landscape and grounds keeping services in the winter.

Despite our recruitment efforts, we have not been able to secure the U.S. workers that we need to assist in the cleanup services. Each year we struggle more and more to find reliable U.S. workers to complete cleanup work, and thus request H-2B workers as previously approved.

AF 81-83.

On January 19, 2021, the CO issued a Notice of Deficiency ("NOD"). AF 62-67. Citing to 20 C.F.R. § 655.15(f), the CO wrote 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.” AF 66. Regarding Employer’s current application, the CO explained:

The employer has submitted an application, H-400-21001-991127, for the same position in the same area of intended employment as a previously submitted application, H-400-20304-892418, for which the employer received certification. That certification, for six workers and a period of need from January 28, 2021 to November 27, 2021, is still valid. The current filing seeks certification to employ 18 workers from April 1, 2021 to November 27, 2021; a period of need which overlaps with the period of need of the previously-certified application.

AF 66. The CO included the following chart depicting Employer’s two applications:

<table>
<thead>
<tr>
<th>Case #</th>
<th>Workers Requested</th>
<th>Location</th>
<th>Occupation Code</th>
<th>Occupational Title</th>
<th>Dates of Need</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-400-21001-991127</td>
<td>18</td>
<td>Medina, OH</td>
<td>37-3011.00</td>
<td>Landscaping and Groundskeeping Workers</td>
<td>04/1/2021 to 11/27/2021</td>
<td>Pending</td>
</tr>
<tr>
<td>H-400-20304-892418</td>
<td>6</td>
<td>Medina, OH</td>
<td>37-3011.00</td>
<td>Landscaping and Groundskeeping Workers</td>
<td>01/28/2021 to 11/27/2021</td>
<td>Certified</td>
</tr>
</tbody>
</table>

The CO further explained that in its Statement of Temporary Need, Employer “stated that it was able to locate some cap exempt H-2B workers, and is now requesting 18 workers for the remaining positions unfilled.” AF 66. According to the CO, Employer “may only receive one certification for the same job opportunity, area of intended employment, and period of employment need” and therefore 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 66.

Based on the foregoing, the CO directed Employer to “provide a detailed 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”4 or “provide support to show that it has a need for additional workers, totaling 24 Landscape Laborers, SOC Occupational Title, Landscaping and Groundskeeping Workers, and also demonstrate that this need was not present at the time the employer’s prior application was filed.” AF 66-67. In support of the latter, the CO directed Employer to submit the following: (1) An explanation with supporting documentation of why the employer is requesting 24 Landscape Laborers, SOC Occupational Title, Landscaping and Groundskeeping Workers, for Medina, Ohio during the dates of need requested. The explanation must include supporting documentation concerning why the employer is requesting an additional 18 workers for the same worksite(s) and provide information to demonstrate that this

4 The CO noted that Employer had “already indicated that the newly filed application is for the same job opportunities as those for which it had already received certification.” AF 66.
need was not present at the time the employer’s prior application was filed; (2) If applicable, documentation supporting the employer’s need for 24 Landscape Laborers, SOC Occupational Title, Landscaping and Groundskeeping Workers, such as contracts, letters of intent, etc. that specify the number of workers and dates of need; (3) An explanation of the data in submitted payroll documentation; and (4) Other evidence and documentation that similarly serves to justify the total number of workers requested, if any. AF 67.

On January 21, 2021, Employer submitted its response to the Notice of Deficiency. AF 57-61. This included a response letter and a copy of 2019-2020 summarized monthly payroll records. In its response letter, Employer asserted that its previously certified application and the current application constitute different job opportunities because the current application differs in terms of both the number of workers requested and the period of employment. AF 57. Employer cited to BALCA case law to support its position and explained how its situation is similar. AF 57-58. Employer further explained:

The Employer requires temporary workers necessary to accommodate its seasonal temporary need for labor tied to the winter debris cleanup, spring cleanup, grass growing season, and fall leaf cleanup. This period of need typically runs from 1/28 through November. The winter debris cleanup work that is part of the 1/28 start will no longer be a responsibility come April, which shows the impact of the reduction in period of employment opportunity. It is a different job opportunity in both number of workers and period of employment, and not overlapping with the prior case for these two factors.

The Employer always requests and is certified for 24 temporary workers. However, when the Employer filed its 1/28 start date application on 10/30/2020 (the first day to file for a 1/28 start date), USCIS’s first fiscal year H-2B cap was very close to being reached and in fact on 11/18/2020 USCIS announced that the cap was reached. In filing its February application, the Employer knew that they would only be able to hire cap-exempt workers if it were to then continue with the 1/28 filing, which is why they amended from 25 [sic] to 6 workers. When they amended due to the cap, the case was only at the NOA recruitment state and the Employer thus did not have an application to partially return to CNPC. They lowered their number themselves in recognition of how quickly the first cap was met, rather than having to partially return the 1/28 application post certification.

Similar to their current request to bring in temporary workers for part of their season, CNPC had allowed the Employer to bring temporary H-2B workers from October 2020 through December 2020 for part of their seasonal need (Full certification H-400-20187-695487). In 2020, the Employer also had TWO other prior applications, BOTH of which were partial refiles just as the pending application which were certified by CNPC without issue and according to how BALCA permits partial refiles due to different job opportunities.

In 2020, each subsequent application was (re)filed because the cap was preventing the Employer from obtaining the workers they needed, and CNPC certified each
application in understanding the Employer’s continued need and inability to secure the workers they needed. If the Employer could file for all 24 workers and receive them on 1/28, then they would do so each time, but it is the cap that prevents them from doing this and not the way that their proven temporary need requires. BALCA agrees that the employer should not be held at fault and that such multiple partial refiles for reduced number and shortened period of employment is permissible because they are indeed recognized as different job opportunities under guiding case law.

#1 Landscaping seeks certification for eighteen (18) workers for a reduced seven-month period separate from the previously approved six (6) workers for ten months, and with BALCA guidance as explained above, the job opportunities are therefore not the same and the Employer’s pending case should please be certified accordingly. The Employer cannot be held at fault for having no option other than to refile its case because of the cap being reached and for not being able to find H-2B cap exempt workers or U.S. workers to fill its proven temporary need. BALCA agrees that employers can proceed in refiling cases partially in this manner and it is not at the fault of the employer for proceeding according to the case law standard.

AF 58-59.

On January 9, 2021, the CO issued a Final Determination denying Employer’s application. AF 47-56. Citing to 20 C.F.R. § 655.15(f), the CO wrote 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.” AF 53. The CO wrote that Employer’s current application is “for the same job opportunity, area of intended employment, and is within a shorter period of employment within a larger period of certified employment.” AF 53. The CO speculated that Employer’s current application “does not represent the employer’s actual need, but rather is an artificial filing, timed only according to the status of the H-2B cap and unconnected from the employer’s actual need for labor.” AF 53.

The CO concluded that Employer’s explanation and supporting documentation did not overcome the deficiency identified in the NOD. AF 54. Although Employer “specified that it expects its second application will fill worker positions that it was not able to fill under its prior certification due to the H-2B cap,” the CO wrote Employer’s current application “is not a new or different job opportunity, nor is even indicative of the employer’s need for services at all, but rather a filing centered on the availability of H-2B workers.” AF 54. Based on Employer’s filing history and statements, the CO asserted that Employer “deliberately filed two duplicate applications for dates of need in 2021.” AF 54. According to the CO, “[E]mployer split its need for 24 Laborers from January 28, 2021 to November 27, 2021, into two separate application filings—one for cap-exempt workers and a second for non-cap-exempt workers--as a workaround to the H-2B visa cap.” AF 54-55. The CO further explained that the job duties described in Employer’s certified application and the current application are the same. AF 56. Thus, the CO wrote that the “job duties indicated in the two applications do not support the employer’s statement that the job duties in each application differ.”
The CO concluded the Final Determination with the following summary as to why Employer’s application was denied:

In the current application, the employer states its intention to file two applications for two certifications for the same job opportunity, same area of intended employment, and overlapping period of employer need. The employer’s explanation shows that its dividing its filings into separate applications is due to the H-2B visa cap rather than due to a situation in which it needs some workers at the start of its period of need and additional workers as the period of need progresses. This is not permitted as 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. Therefore, the employer did not overcome the deficiency.

AF 56.

On February 18, 2021, Employer submitted its request for Administrative Review, which included an appeal letter and supporting documentation.5 AF 1-46. Employer largely reiterated the argument contained in its response to the NOD. AF 2-6. That is, the job opportunities in Employer’s previously certified application and the current application are not the same. AF 2-6. Employer explained that it “followed multiple recent BALCA decisions in filing its two applications” and “did the exact same thing, i.e., a partial refile, in fiscal year 2020 and received CNPC approval with partial certification on the first application (H-400-19303-117330) and full certification on the secondary filed case (H-400-20002-228813) that was for a reduced number of workers and shorter period of employment.” AF 2.

Employer explained that on November 18, 2020, USCIS “announced that the H-2B cap for the first half of FY 2021 was reached, which is why the Employer then filed a Request to Amend its application from the 24 originally requested to 6 based on the number of cap-exempt workers the Employer had identified at that point.” AF 3-4. According to Employer, it “knew that there was no way to obtain its needed 24 workers under the first half of FY 2021 cap.” AF 4. Accordingly, like it did in 2020, Employer “proceeded to file a partial secondary application under the second FY 2021 cap for its remaining number of needed workers (i.e., 18 under the now denied application H-400-21001-991127).” AF 4.

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5 The supporting documentation included: the Final Determination; the Notice of Deficiency; Employer’s response letter to the Notice of Deficiency with receipt email; Employer’s Statement of Temporary Need; Approval of H-2B Temporary Labor Certification for H-400-20304-892418; an Amendment request letter for H-400-20304-892418; a Recruitment Report; a Submission confirmation email for H-400-20304-892418; Approval of H-2B Temporary Labor Certification for H-400-20187-565487; Approval of H-2B Temporary Labor Certification for H-400-20002-228813; Submission confirmation email H-400-20002-228813; Approval of H-2B Temporary Labor Certification for H-400-19303-117330; Amendment request letter for H-400-19303-117330; Recruitment report; and a Submission confirmation email for H-400-19303-117330.
The crux of Employer’s argument is that “multiple BALCA decisions have noted that filing a second case for a partial number of the employer’s total seasonal need is permissible method of filing a second application when an employer was not able to obtain its full number of needed workers due to the first cap being met.” AF 4. Employer notes that had its prior application been certified for 24 workers, the CO would have allowed a return of the 18 unused sports and permitted a secondary filing for 18 for the 4/1 start date.” AF 4. Employer asserted that “recent BALCA cases have allowed for partial returns wherein the employers returned part of a certified case only to then submit a second case under the next cap.” AF 4. In this case, Employer saw that the first half cap was met and amended the prior application to 6 workers “rather than waiting for certification for 24 and only to then return by email to CNPC the 18 unused spots and partially refile for 18.” AF 4. According to Employer, the results would have been the same: “[O]ne certification for 6 workers for 1/28/2021 through 11/27/2021 and the second refiled for 18 workers for 04/01/2021 through 11/27/2021.” AF 4. Employer claims it is thus being punished “for following a recognized method of partial secondary filings due to cap limitations.” AF 4.

Additionally, Employer asserted that “when a job opportunity is reduced both in the number of workers and the duration of the employment period, the job opportunities are not the same.” AF 4. Employer again cited to various BALCA cases, and explained how its case is similar, to support its argument. AF 4-6.

Regarding the job duties in the current application, Employer explained that the “winter debris cleanup work that is part of the 1/28 start will no longer be a responsibility come April, which shows the impact of the reduction in period of employment opportunity.” AF 6. Thus, Employer wrote that the current application is for a “different job opportunity in both number of workers and period of employment, and not overlapping with the prior case for these two factors.” AF 6.

Regarding the H-2B cap and its application history, Employer offered the following summation:

The Employer always requests and is certified for 24 temporary workers. However, when the Employer filed its 1/28 start date application on 10/30/2020 (the first day to file for a 1/28 start date), USCIS’s first fiscal year H-2B cap was very close to being reached and in fact on 11/18/2020 USCIS announced that the cap was reached. In filing its 1/28 application, the Employer saw the potential that the cap could be an issue (this is something the Employer knows because each year the first FY cap is met earlier and earlier than the prior year), but it could not have predicted when the cap would actually be reached. Therefore, the Employer filed for 24 originally and then amended to 6, just as it had to procedurally do in FY 2020 for which it received approval upon two secondary refiles, one for April 2020 and then again for October 2020. When they amended due to the cap, the case only at the NOA recruitment stage and the Employer thus did not have an application to then partially return to CNPC by email. They lowered their number themselves by amendment in recognition of how quickly the first cap was met, rather than having to partially return the 1/28 application post certification.
Similar to their current request to bring in temporary workers for part of their season, CNPC had allowed Employer to bring temporary H-2B workers from October 2020 through December 2020 for part of their seasonal need (Full certification H-400-20187-695487). In 2020, the Employer also had two other prior applications, both of which were partial refiles just as the denied application which were certified by CNPC without issue and according to how BALCA permits partial refiles due to legally identifying them as different job opportunities.

In 2020, each subsequent application was (re)filed because the cap was preventing the Employer from obtaining the workers they needed, and CNPC certified each application in understanding the Employer’s continued need and inability to secure the workers they needed. CNPC never called these secondary refiles “artificial” previously. If the Employer could file for all 24 workers and receive them on 1/28, then they would do so each time, but it is the cap that prevents them from doing this and not the way that their proven temporary need requires. BALCA has agreed that employers should not be held at fault and that such multiple partial refiles for reduced number and shortened period of employment are permissible because they are indeed recognized as different job opportunities under guiding case law.

On March 5, 2021, the CO submitted a brief. The CO asserts that it properly denied Employer’s application because it is a second application for the same underlying need as its previously-certified application. Br. at 6. Specifically, Employer “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.” Br. at 6.

The CO writes that Employer’s “true need was for 24 workers from January 28 through November 27, and that it split its need into two separate Applications for overlapping periods only because of the H-2B cap.” Br. at 7. Therefore, according to the CO, “neither the prior Application nor the current Application represents Employer’s bona fide need for labor. Employer amended its previous Application from 24 workers to 6 workers even though it knew at that time it truly needed all 24 workers for the full period of need.” Br. at 7.

The CO added that “Employer’s failure to represent its bona fide need in either its previous or current Application undermines the purposes of the H-2B program and OFLC’s statutory role in administering the program.” Br. at 7. Specifically, the CO wrote that an employer “that fails to accurately represent its bona fide need in an Application cannot engage in bona fide recruitment efforts.” Br. at 7. The CO also quoted relevant portions of 2012 Final Rule and the 2015 Interim Final Rule to supports its position. Br. at 7-8. The CO argues that the BALCA case law relied on by Employer inapposite to the facts of this case. Br. at 9-11.

**STANDARD OF REVIEW**
The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under § 655.61(a), the request for review may contain only legal arguments and evidence that were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). 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.” § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case 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. Brazen & Greer Masonry, Inc., 2019-TLN-00038 (Mar. 6, 2019); The Yard Experts, Inc., 2017-TLN-00024 (Mar. 14, 2017); Brooks Ledge, Inc., 2016-TLN-00033 (May 10, 2016).

Under the “arbitrary and capricious” standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. See Judulang v. Holder, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Id.

A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” Id. Inquiry into factual issues “is to be searching and careful,” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), but the Board “may not supply a reasoned basis” that the CO has not provided. State Farm, 463 U.S. at 43; see also FCC v. Fox Television Stations, Inc. 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

**DISCUSSION**

Based on the information in the preceding paragraphs, the undersigned is able to deduct the following information. Employer has an annual need for 24 temporary laborers from approximately January 28, 2021, to November 27, 2021. AF 57. Employer’s previously certified application (H-400-20304-892418) was originally filed for 24 temporary laborers from January 28, 2021, to November 27, 2021. AF 57. However, because of a concern that the H-2B cap for the first half of fiscal year 2021 would be met, Employer subsequently amended its application from 24 laborers to 6 laborers. AF 4. Indeed, Employer amended its application “rather than waiting for certification for 24 and only to then return by email to CNPC the 18 unused spots and partially refile for 18.” AF 4. Employer received certification for 6 cap-exempt workers and thereafter filed the present application for 18 laborers to satisfy its total need for 24 laborers. Employer noted that regardless of whether it received certification for 24 workers and subsequently returned the 18 unused spots, and then did partial refile for 18 workers, or whether it
applied for 6 workers and then did a refile for 18 additional workers, the results are the same. That is, “[O]ne certification for 6 workers for 1/28/2021 through 11/27/2021 and the second refiled for 18 workers for 04/01/2021 through 11/27/2021.” AF 4. According to Employer, the current application (H-400-21001-991127), which is for 18 workers from April 1, 2021, to November 27, 2021, is for a different job opportunity because it is reduced both in terms of the number of workers needed and the employment duration. In contrast, the CO asserted that it properly denied Employer’s current application for 18 laborers because Employer sought to employ H-2B workers for the same job, at the same location, and during the same period of time as its previously certified application for 6 laborers.

Upon review of the parties’ arguments and relevant BALCA case law, the Tribunal notes that similar issues have arisen in a number of other BALCA cases over the past year. The Tribunal recognizes that there are subtle differences in the case at hand. Specifically, Employer in this case did not return an unused portion of a previously certified application. Rather, because of forthcoming issues with the H-2B cap, Employer took the proactive step of amending its previous application and reducing the number of laborers requested from 24 to 6. Employer did this with the idea of submitting a subsequent application for an additional 18 laborers beginning April 1, 2021. If the subsequent application were then granted, Employer would satisfy its total need for 24 laborers.

Review of various BALCA decisions based entirely on Employer’s compliance with 20 C.F.R. § 655.15(f) indicates that different Administrative Law Judges have reached different conclusions on this issue. In fact, the undersigned has previously decided a case where an Employer filed a second application, which had a period of intended employment that overlapped with the period of employment in previously-certified application. See Green Up Lawncare, LLC, 2020-TLN-00052 (ALJ Aug. 14, 2020).

The undersigned is particularly persuaded by the legislative history analysis done by ALJ Angela Donaldson and finds that it is in accord with this Tribunal’s decision in Green Up Lawncare. See Mattamuskeet Crab Co., Inc., 2021-TLN-00004 (ALJ Nov. 13, 2020). The Tribunal agrees with this analysis and will incorporate it herein to explain why the CO’s Final Determination is arbitrary and capricious and mandates a reversal.

As referenced above, the CO denied Employer’s application because of its failure to comply with 20 C.F.R. § 655.15(f). This section reads: “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.” § 655.15(f). “Job opportunity” is defined 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.” See 20 C.F.R. § 655.5. “Period of employment” is not, however, defined in the regulations.
As explained by Judge Donaldson, the “period of employment” language was added to § 655.15(f) in 2012. The Department offered the following explanation regarding the changes to § 655.15(f):

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 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.**


Based on this passage, the undersigned deducts that the regulation was revised to clarify that separate applications are required for “each job opportunity for each date of need.” **See Id.** The final version of § 655.15(f) refers to “each job opportunity . . . for each period of employment”

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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).
while the Agency’s 2012 Final Rule indicates that the separate application requirement was intended to apply to distinct employment opportunities, which are defined by “each date of need.” As shown in the passage above, the 2012 Final Rule repeatedly referenced the need to identify separate “dates of need” as relevant to compliance with this regulation.

“Date of need” is defined as “the first date the employer requires services of the H-2B workers as listed on the Application for Temporary Employment Certification.” See 20 C.F.R. § 655.5 (emphasis added). Accordingly, the Tribunal interprets this to mean that the “date of need” is the start date of employment.

As explained by Judge Donaldson, the language of the 2015 Interim Final Rule also supports this interpretation. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042, 24060 (Apr. 29, 2015). The 2015 Interim Final Rule is “virtually identical to the 2012 final rule that DOL developed following public notice and comment . . . .” Id. at 24043. However, the Tribunal notes that the Department never implemented the 2012 Final Rule because of challenges to its rulemaking authority. Id. at 24045.

As explained in 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). The 2015 Interim Final Rule thus requires separate applications when there are different dates of need (i.e., different start dates) for the same job opportunity. Additionally, the 2015 Interim Final Rule recognizes the possibility of an employer having more than one date of need during a single season. Id. Therefore, based on the foregoing, § 655.15(f) requires separate applications when the dates of need, i.e., start dates of employment, are different.

In the Final Determination, the CO wrote that Employer’s previously certified application and the current application are for the same job opportunity, same area of intended employment, and overlapping period of need. AF 18. For the reasons discussed 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-400-21001-991127) was not prohibited under the
regulation because it was for a different start date of employment (04/01/2021) than the previous application (01/28/2021).

In summary, the sole deficiency identified by the CO in the Final Determination concerned Employer’s failure to comply with § 655.15(f). Because the Tribunal has determined that Employer did not violate § 655.15(f), and because no other deficiency was identified by the CO, the undersigned concludes that the CO’s Final Determination denying Employer’s application for temporary labor certification was arbitrary and capricious.

**CONCLUSION AND ORDER**

The Certifying Officer acted in an arbitrary and capricious manner in denying Employer’s Application for Temporary Employment Certification (Form ETA-9142B). Accordingly, the Certifying Officer’s denial of Employer's Application for Temporary Employment Certification is **REVERSED**.

For the Board:

SCOTT R. MORRIS  
Administrative Law Judge

Cherry Hill, New Jersey