In the Matter of:

TRINITY LANDSCAPING, LLC,
dba SOUTHERN SERVICES,
Employer.

DECISION AND ORDER REVERSING
DENIAL OF TEMPORARY LABOR CERTIFICATION AND
REMANDING TO THE CERTIFYING OFFICER

This matter arises under the labor certification program for temporary non-agricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and the associated regulations promulgated by the Department of Labor at 20 C.F.R. section 655, subsection (a).1 Here Trinity Landscaping, LLC, dba Southern Services (“Employer”) requests review of the Certifying Officer’s (“CO”) decision to deny its application for temporary alien labor certification under the H-2B non-immigrant program.2 The CO denied Employer's request for 11 H-2B Landscape Laborers for the period of October 1, 2021, to December 1, 2021, after finding Employer’s application deficient. Following the CO’s denial of its

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2 The H-2B program permits employers to hire foreign workers to perform nonagricultural work within the United States where the employer has established a temporary need. 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).
application, Employer timely requested review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). BALCA’s scope of review is limited to the legal arguments and evidence submitted to the CO before issuance of the final determination. The request for review may contain only legal arguments and evidence submitted to the CO before issuance of the final determination.

I now REVERSE the CO’s denial of the labor certification application and find the application sufficient to continue processing accordingly.

Statement of the Case

Employer provides landscaping services in and around Denton, Texas (AF, p. 2), and currently employs 15 H-2B Landscape Laborers for its “full-season period of March 15, 2021 through December 1, 2021” (Id.). On July 3, 2021, Employer filed its H-2B Application for Temporary Employment Certification for 11 Landscape Laborers for the period of October 1, 2021, through December 1, 2021, (AF, p. 44), which “would supplement the current group of 15 workers for the busy fall season” (AF, p. 3). Employer refers to the application at issue here as its “fall contract” (Id.)

On July 14, 2021, Employer received a Notice of Deficiency (NOD) (AF, p. 35), for deficiencies arising under 20 C.F.R. sections 1) 655.15, subsection (f), and 2) 655.18, subsection (a)(1) – failure to comply with application filing requirements and job order assurances and contents, respectively (AF, pp. 38-41). Regarding the former deficiency, the NOD instructed Employer to demonstrate the job opportunity presented in its “fall contract application” is different than that within its “full sea-

3 By designation of the Chief Administrative Law Judge, I am BALCA for purposes of this administrative review. 20 C.F.R. § 655.61, subsection (d).

4 Before the current regulations became effective on March 15, 2010, the regulatory standard of review was “legal sufficiency.” 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted “legal sufficiency” to imply an “arbitrary and capricious” standard of review. See J and V Farms, LLC, 2015-TLC-00022, slip. op. at 3, n. 1 (Mar. 4, 2016) (citing Bolton Springs Farm, 2008-TLC-00028, slip op. at 6 (May 16, 2008)). But the earlier regulations did not define “legal sufficiency.” See id.; 20 C.F.R. § 655.112(a) (2008). The current regulations omit the reference to “legal sufficiency” and do not address the deference, if any, BALCA should give to the Certifying Officer’s decision. See 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations’ silence leaves the question open, and requires BALCA judges to determine an appropriate standard of review. In this case it makes no difference, since I would reach the same result even under an “arbitrary and capricious” standard.

5 “AF” refers to the Administrative Appeal File.
son contract” (AF, p. 38). Or, in the alternative, Employer should demonstrate 1) its need for 26 Landscape Laborers and 2) this need was not present at the time it filed its full season application (Id.). The NOD also allowed Employer to elect to “return” its prior full season certification if it was unable to utilize this certification “at all” due to the H-2B cap (AF, p. 39). On July 19, 2021, Employer timely filed its response to the NOD (AF, pp. 29-33).

On August 18, 2021, the CO issued a Final Determination (AF, p. 7). It found Employer’s application still deficient under section 655.15, subsection (f). The CO wrote, “Pursuant to 655.15(f), only one Application for Temporary Employment Certification may be filed for worksite(s) within one are of intended employment for each job opportunity with an employer for each period of employment” (AF, p. 23) (emphasis added). The CO concluded,

The employer’s filing of a second application for the same job opportunity, area of intended employment, and is within a shorter period of employment within a larger period of certified employment.

The 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.

...The employer has specified that it filed a second application to fill worker positions that it was not able to fill under its prior certification due to the H-2B cap. The second filing is not a new or different job opportunity but rather a filing centered on the availability of H-2B workers.

(AF, p. 23) (emphasis added). The CO found Employer had a singular temporary need for H-2B workers but had “split its need for 26 Laborers from March 15, 2021 to December 1, 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” (Id.).

The CO further concluded Employer had failed to submit adequate documentation establishing its need for an additional 11 workers for the same worksites. In its reply to the NOD, Employer provided news articles confirming unprecedented winter storms. It explained the winter storms increased the demand for Employer’s services, forcing their current H-2B workforce to work “excessive overtime to try and meet these demands” (AF, p. 29). Employer explains the increase in demand for their services as a result of unprecedented storms is both “massive” and “unexpected,” and argued this need was unanticipated at the time of filing its full season application (Id.). In addition to providing news articles, Employer provided payroll
records documenting the increased hours performed by its current H-2B workforce (Id. at 29-33). The CO found this evidence unsatisfactory, having specifically requested in the NOD supporting documentation in the form of “contracts, letters of intent, etc. that specify the number of workers and dates of need” (AF, p. 24).

Additionally, the Final Determination echoed the language within the NOD regarding Employer’s option to “return” its prior certification in its entirety (AF, pp. 12-13). But it proscribed Employer from doing so as a way to evade the cap system:

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.

(AF, p. 12).

On August 28, 2021, Employer filed its Request for Appeal, arguing its current application reflects a job opportunity and period of employment different than its prior application for 15 workers, and is, therefore, compliant under section 655.15, subsection (f) (AF, p. 5). It further argues the two applications represent two different needs, requiring separate applications:

Filing separate applications with different start dates to align with an employer’s unique dates of need is specifically called for in the Department’s 2015 H-2B Rule. The key is that the employer can justify a need for the combined workforce – which Southern clearly has done.

(AF, p. 3). It asserts it is not merely permitted, but required, to file a separate application for each separate date of need under section 655.15, subsection (f):

[The 2015 Interim Final Rule … [states] … that “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.” 80 Fed. Reg. 24042-01, 24060 (Apr. 29, 2015). That is the rule currently in effect, and the rule that the CO purports to enforce by denying Southern’s current application. So, while the Department of Labor explicitly stated that employers must “file a separate application for each separate date of need,” the Denial states that employers like Southern are prohibited from doing exactly that.

(AF, p. 4). In sum, Employer argues it “has identified two separate dates of need [with] two different ‘job opportunities’ and ‘periods of employment,’ which Section 655.15(f) not only permits but requires” (AF, p. 5). Employer asks I reverse the CO’s denial and remand its application for further processing.
Discussion

The employer bears the burden of proving it is entitled to a temporary labor certification. 8 U.S.C. section 1361; Jose Uribe Concrete Constr., 2019-TLN-00025, at *4. The issuance of a temporary labor certification is a determination by the Secretary of Labor that there are not sufficient qualified U.S. workers available to perform the temporary labor and that employment of the foreign workers “will not adversely affect the wages and working conditions of U.S. workers similarly employed” 20 C.F.R. section 655.1, subsection (a); see also 8 C.F.R. section 214.2, subsection (h)(6)(i)(A). Principally at issue is section 655.15(f), (“One Application Rule”):

Except as otherwise permitted by this paragraph (f), only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.

20 C.F.R. section 655.15, subsection (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 with the petition employer is seeking workers.” 20 C.F.R. section 655.5. “Period of employment” is not defined within the regulations (see, e.g., Mattamuskeet Crab, infra, for commentary).

Here, the CO denied Employer’s fall season application as successive and duplicative of its prior full season certification, still in effect. The CO found no distinction in job opportunity and period of employment between the two, given the two-month period of employment for the fall season application falls entirely within the full season application period, and the job opportunity and duties for both are identical (See AF, p. 11). The CO consequently found Employer’s application duplicative of a previously-established need, in violation of the One Application Rule under section 655.15, subsection (f). Employer, on the other hand, asserts the fall and full season applications represent “two different dates of need,” reflecting distinct job opportunities and periods of employment, and requiring two separate applications (See AF, p. 5).

a. “Return” of Prior Labor Certification

Employer cites to Matter of Trinity Landscaping, LLC, 2020-TLN-00057 (August 21, 2020) (Alford, ALJ) (“Trinity 1”), involving the same Employer as here, as conclusive of its case. Within Trinity 1, Judge Alford found Employer’s application did not violate section 655.15(f). In Trinity 1, as here, Employer had filed a second application for landscape laborers for a shorter period of employment, overlapping with its previous (and still in effect) certification’s date of need. But in Trinity 1,

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6 Employer refers to its prior certification as its “full-season contract” (AF, pp. 2-3) and the application at issue here as its “fall contract” (AF, p. 3). I adopt the terminology – “full season” and “fall season” – for ease of reading and understandability.
unlike here, Employer had also returned its unused 22 positions from the original certification since it was unable to fill the positions due to the yearly cap being already reached (Trinity 1 at 2). There the CO relied heavily on the case of KDE Equine, LLC, 2020-TLN-00043 (May 20, 2020) (Bland, ALJ) in support of its denial of Employer’s certification. Judge Alford differentiated KDE Equine from the matter before him:

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

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

(Trinity 1 at 5) (emphasis added). Importantly, Judge Alford found the denial improper because Employer had returned its unused portion of its labor certification, unlike the employer within KDE Equine. But Employer has not returned its full season certification in the matter before me,7 either wholly or in part, and, therefore, I find Trinity 1 inapplicable here.

b. Separate Application under Section 655.15(f)

Employer also argues Matter of Mattamuskeet Crab, Co., 2021-TLN-00004 (November 13, 2020) (Donaldson, ALJ) is dispositive of the present case. While the issues of visa cap limitation and permitted certification “returns” were raised, Judge

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7 At issue in Trinity 1 was whether Employer’s application was improper because Employer had returned its prior labor certification in part, rather than in full. But as Employer has neither returned its full season certification in part nor in whole here, I need not consider this differential now.
Donaldson did not reach the issue, resting her reasoning for reversal on other grounds.\(^8\)

In *Mattauskeet Crab*, the employer received labor certification for one hundred H-2B workers for the period of April 1, 2020, to December 31, 2020 (*Id.* at X). Due to visa cap restrictions, the employer was only able to fill 22 of these positions. It later applied for 60 laborers, to begin work from November 4, 2020, to December 15, 2020 (*Id.*). The CO denied its application as a duplicative application of a pre-established and already certified need, in violation of the One Application Rule, under section 655.15(f). Judge Donaldson turned to the legislative history of the Department’s implementation of section 655.15(f) as guidance in her decision. She cites the Department had advised “employers should accurately identify their personnel needs and, for each period within it season, file a separate application containing a different date of need” (*Id.* at 8) (citing 77 Fed. Reg. 10038-01, 10061-62 (Feb. 21, 2012) (*Temporary Non-Agricultural Employment of H-2B Aliens in the United States*)). She found,\(^9\)

\[\text{§ 655.15(f) is properly read to require *separate* applications when dates of need, or start dates of employment services, differ. As DOL recognized in the 2012 Final Rule and 2015 Interim Final Rule, focusing on accurate dates of need, and requiring single applications for such dates of need, is consistent with the Agency’s requirement that employers provide U.S. workers an appropriate and timely opportunity to consider the job opportunity.} \]

(*Mattauskeet Crab* at 10) (emphasis added). I find Judge Donaldson’s reasoning compelling and well-reasoned, and so adopt it here.

Employer is presently certified for 15 H-2B Landscape Laborers for the period of employment from March 15, 2021, to December 1, 2021 (AF, p. 2). In February of 2021, the area Employer services experienced an unprecedented winter storm, resulting in “devastating” effects on the surrounding landscape” (AF, p. 29). As a result, the demand for Employer’s landscaping services increased significantly (*Id.*). Employer cannot satisfy its need with its current workforce (*Id.*). Employer provided documentation supporting its increased need and payroll records evincing the “excessive overtime” hours being fulfilled by its current staff (*Id.* at 29-33).\(^9\)

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8 “In light of this conclusion, the undersigned need not reach the issue of whether the Department has typically permitted the return of unused or partially used certifications, and any regulatory support for same” (*Mattauskeet Crab* at 11).

9 In the Final Determination, the CO concluded Employer failed to supply satisfactory evidence of its increased need (AF, p. 24). Employer offers payroll records of overtime and news articles documenting the occurrence of winter storms, while the CO requested evidence by way of contracts, letters of intent, or other proof of increased service requests. However, the NOD prescribed this as resolution to justify Employer’s need for 26 laborers (AF, p. 38). But here Employer’s application is not for a
Consequently, Employer applied for an additional 11 H-2B Landscape Laborers, to begin work on October 1, 2021 (AF, p. 44), and specifically to address the additional need which resulted from the February 2021 winter storm.

An employer may avail itself of the H-2B non-immigrant program where it establishes a temporary need based on a “one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.” 20 C.F.R. section 655.5, subsection (b). Where an employer has more than one need with differing dates of need or start dates of employment, it must file a separate application for each need, under section 655.15(f) (See Mattamuskeet Crab at 10).

Here, I find Employer has established a temporary peakload need under section 655.5(b). Employer has sufficiently documented the occurrence of a winter storm, leading to unexpected demand for its landscaping services. It has also sufficiently documented the inability of its current staff, including its prior certification, to meet this newly developed need. Furthermore, I find this need distinct from the need reflected within its prior certification, and, thus, necessitating a separate application. Employer’s application is for 11 laborers to address a need which arose after the filing of its prior application. Consequently, the need is not only distinct from, but also was not foreseeable at the time of, its prior certification. Moreover, the present application is for a start date of October 1, 2021, whereas its prior certification is for period of employment beginning in March of 2021. As the current application is for a need arising after its full season application and necessitates a different start date of employment, it requires a separate application (See Mattamuskeet Crab at 10).

In Final Determination, the CO denies Employer’s application based solely on its noncompliance with section 655.15, subsection (f). For the foregoing reasons, I find Employer’s application is not in violation of section 655.15, subsection (f). Furthermore, I find Employer has established a temporary need under section 655.5, subsection (b).

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single need necessitating 26 laborers. Rather, Employer seeks 11 laborers for an additional and separate, rather than a duplicative, need (see infra). The CO should be willing to consider relevant evidence, even when submitted in a form she may not originally have envisioned.
**Order**

Accordingly, I REVERSE the denial of Employer’s application, and REMAND the application to the CO for further processing.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge