DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

On February 17, 2021, the Board of Alien Labor Certification Appeals (“BALCA”) received a request for review from Pro Lawns, Inc., (“Employer”), dated February 12, 2021, requesting administrative review of a Certifying Officer’s (“CO”) February 8, 2021 Final Determination denying an H-2B temporary labor certification application.¹ The case was assigned to me on February 24, 2021, and I issued a Notice of Docketing and Expedited Briefing Schedule on February 25, 2021, permitting Employer and counsel for the CO to file briefs within seven business days of receiving the Appeal File (“AF”). 20 C.F.R. § 655.61(c). The CO filed the AF on February 26, 2021. The Solicitor filed a brief on March 9, 2021; the Employer did not.


Employers who seek to hire foreign workers under this program must apply for and receive a labor certification from the U.S. Department of Labor. 8 C.F.R. § 214.2(h)(6)(iii). Applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”). If the CO denies certification the employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).
For the reasons set forth below, I find the CO did not act arbitrarily or capriciously in deciding that Employer could not file more than one application for a worksite within one area of intended employment for each job opportunity for each period of employment as a work around to the statutory cap on H-2B visas, and affirm the denial of certification.

**Statement of the Case**

Employer is a landscaping maintenance, planning, and design business located in Foristell, Missouri. On November 17, 2020, Employer filed an Application for Temporary Employment Certification, Form ETA 9142B, and supporting documentation, for nine (9) Laborers, Landscaping and Groundskeeping Workers for the period February 15, 2021 to November 15, 2021 (“First Application”). In a statement submitted in support of this First Application, Employer acknowledged, “our actual need is for 10 workers, as we request every year for our peak load need. Solely due to cap limitations, we are currently filing for nine (9) workers who are cap-exempt and will file for one (1) worker under the 4/1 H-2B cap.” (AF 18, 25).

On January 1, 2021, Employer filed an Application for Temporary Employment Certification, Form ETA 9142B, and supporting documentation, for one (1) Laborer, Landscaping and Groundskeeping Workers, for the period April 1, 2021 to November 15, 2021 (“Second Application”). In a statement submitted in support of this Second Application, Employer declared:

> [O]ur true dates of need are 2/15 to 11/15 and the total number of temporary workers needed is 10. . . . We received partial certification from DOL for 9 workers (case number H-400-20322-915935) because we were able to find cap exempt H-2B workers. However, our operation still requires 10 workers so we are applying in April for the remaining 1 worker. In filing for April, this is a new job opportunity since the dates of need (4/1 to 11/15) and the number of workers (1) are reduced from the prior certification. In our partial 2/15 application, we explained that our peak load need is for 10 but we could only file for 9 because the first fiscal year cap had been reached.

(AF 33). Employer contended that “this [second application] is a new job opportunity, since the dates of need (4/1 to 11/15) and number of workers (1) are reduced from the prior certification.” (AF 25).

A CO with the Chicago National Processing Center issued a Notice of Deficiency (“NOD”) on January 8, 2021, noting that Employer had submitted two applications for the same position and the same period of need during the same period of intended employment. The CO advised Employer it “may not submit more than one application for the same job opportunity within the same area of intended employment for the same dates of need” and “must either withdraw one of the applications or demonstrate that the job opportunities presented in each application are not the same.” (AF 18).


Employer responded to the January 8, 2021 NOD on January 20, 2021, explaining that it was unable to obtain all the workers certified in the First Application, arguing that “the job opportunities were not the

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2 Application No. H-400-20322-915935.

3 Application No. H-400-21001-990932.
same when the number of workers and period of employment were reduced in the subsequent filing” and cited to several BALCA decisions in support of its position. See In the Matter of Trinity Landscaping, LLC, 2020-TLN-00057 (Aug. 21, 2020); In the Matter of Green Up Lawncare, LLC, 2020-TLN-00052 (Aug. 14, 2020); In the Matter of J.F.D. Landscape, Inc., 2020-TLN-00058 (Aug. 28, 2020); and In the Matter of Fairfield Construction, Inc. d/b/a Fairfield Landscaping, 2020-TLN-00052 (Aug. 20, 2020). In other words, Employer contended that because it “seeks certification for one (1) worker for a reduced seven-month period rather than the previously approved nine (9) workers for nine months, . . . the job opportunities are therefore not the same.” (AF 11-13).

The CO denied the Second Application on February 8, 2021, stating that the H-2B program ties certification to an Employer’s need and not to artificial timing related to the availability of workers as a result of the H-2B visa cap. The CO concluded that Employer’s Second Application was for the same job opportunity and area of intended employment and simply within a shorter period of employment within the larger period of employment of the First Application, a violation of Section 655.15(f) which provides that only one Application may be filed for worksite(s) within the same area of intended employment for each job opportunity with an employer for the each period of employment. The CO declared that the regulations do not permit dividing filings into separate applications because of the cap on H-2B visas. (AF 2-9).4

Employer’s February 12, 2021 request for review restates its position in response to the NOD. Employer concedes that it previously requested, and received, certification for nine (9) workers for the period February 15, 2021 to November 15, 2021. With this Second Application, Employer is seeking certification for one (1) worker for the period April 15, 2021 to November 15, 2021. Employer again avers the practice of filing two applications for the same job opportunity with different start dates is consistent with Section 655.15(f).

**Legal Standard and Discussion**

BALCA’s scope and standard of review in H-2B cases is narrow and limited. BALCA may only consider the Appeal File prepared by the CO, any legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued a Final Determination. 20 C.F.R. § 655.61.5 BALCA cannot substitute its view for the CO or impose its personal will or belief and must affirm a CO’s determination denying an application unless it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Brook Ledge, Inc., 2016-TLN-00033, at 5 (May 10, 2016); see also J and V Farms, LLC, 2016-TLC-00022 (Mar. 4, 2016). A determination is arbitrary and capricious if it is not based on reason or judgment.

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4 The CO also opined that the BALCA cases cited by Employer in support of its position involved cases where “each employer had already received certification...Once impacted by the H-2B cap and unable to secure its workers, each employer filed a new application for the remainder portion of its need to obtain H-2B workers for at least a portion of its need.” (AF at 9). The Employer disagrees, averring each BALCA decision cited is either indistinguishable or consistent with the facts in this case. I need not determine if the cited cases are factually similar to the instant case as none have precedential value or are binding on my determination whether the CO’s denial of certification here was arbitrary and capricious.

5 An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).
The regulations permit one application for “worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.” 20 C.F.R. § 655.15(f). This CO found that neither of the Employer’s two applications represented its bona fide need for labor, as “Employer knew when it submitted its previous Application that it needed one worker from February 15 through November 15 – but deliberately excised that worker from its previous Application prior to certification because of the H-2B cap,” reasonably rejecting Employer’s stated explanation of filing multiple applications as a workaround to the visa cap. (Br. at 7). In other words, this CO denied the Second Application because she logically concluded Employer was seeking to employ an H-2B worker for the same job, at the same location, and during the same time period as the First Application, a violation of Section 655.17(f). See Sequoia Landscape Services, LLC, 2021-TLN-00010 (Feb. 1, 2021); Crystal Springs Ranch, Inc., d/b/a Shooting Star, 2020-TLN-00054 (Aug. 25, 2020), recon. denied (Aug. 27, 2020).

Employer admits that it filed a second application for the same location and job opportunity and would have filed only one application for the initial period of need but for the visa cap being met, as its true dates of need are February 15, 2021 to November 15, 2021, and was merely requesting a “reduced” period of need based on the “actual” period of need. The CO’s decision to deny certification, given Employer’s stated reasons for filing the Second Application, was based on a plausible and logical interpretation of Section 655.15(f) and one supported by the record. In other words, the CO’s decision to reject Employer’s plan to address its peak load need by splitting applications as a workaround to the visa cap limitation was neither arbitrary or capricious nor an abuse of discretion.

ORDER

It is hereby ORDERED that the Certifying Officer’s decision denying Employer’s Second Application for Temporary Employment Certification is AFFIRMED. 6

SO ORDERED.

For the BALCA:

STEPHEN R. HENLEY
Chief Administrative Law Judge

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6 To be clear, I affirm based solely on the finding that the CO acted reasonably in rejecting the Employer’s explanation for filing multiple applications as a means of circumventing the visa cap without explicitly finding whether “period of employment” includes multiple periods of employment, with a smaller period falling within another, or whether this particular issue—filing a second application as a workaround to visa cap limitations—otherwise merits a finding that the two applications are for the same period of employment.