This case arises from a request for review of a United States Department of Labor Certifying Officer’s (“the CO”) denial of an 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 nonagricultural work within the United States on a one-time, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO’s denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On April 14, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Jourose LLC d/b/a Tong Thai Cuisine (“the Employer”) for two “Specialized Bangkok Thai Cuisine Cooks.” AF 78-85. The Employer stated the minimum experience requirement as 120 months of experience as a Bangkok Thai cuisine cook, and described the job duties as follows:

Position requires preparation of all authentic Thai dishes and sauces specific to Bangkok and the Central Thailand region, including but not limited to: curries, spicy salads, hot and sour soups, Thai noodles, satays, spicy salads, and a multitude of dipping sauces. Must be able to prepare these delicate, complex foods immediately upon being hired.

AF 80-81.

On April 19, 2011, the CO issued a Request for Further Information (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer failed to satisfy all the requirements of the H-2B program. AF 70-74. Among the three deficiencies identified, the CO determined that the 120 month experience requirement was not normal to U.S. workers similarly employed as cooks, noting that O*Net allows up to six months of experience for the occupation. AF 73-74. The CO required the Employer to submit a signed, written document explaining why the Employer included 120 months of experience as a term and condition of employment and why the Employer believes that 120 months is: (a) normal to similarly employed U.S. workers in the area of intended employment, (b) not less

1 Citations to the 125-page appeal file will be abbreviated “AF” followed by the page number.
favorable than those offered to the H-2B workers, and (c) is not less than the minimum terms and conditions required by the regulation. AF 74.

The Employer responded to the RFI on April 27, 2011. AF 39-69. Regarding the 120 month experience requirement, the Employer stated:

The 120 month experience would be normal to similarly employed US workers in the Belfast Maine region, if such specialty cooks existed in that region. It is the understanding of [the Employer] that Tong Thai Cuisine will be the first specialty Thai restaurant serving cuisine from Central Thailand and Bangkok in the Belfast region.

That O*Net allows up to six months of experience for Cooks, Restaurant (35-2014.00) is not relevant to Tong Thai Cuisine’s need. In Thailand, people do not go to school to learn how to cook and are not formally trained. They usually learn how to cook from their parents, or informally on the job. Therefore, the Specialty Bangkok Thai Cuisine Cooks can only be designated cooks, rather than chefs.

As set forth in the Employer[‘s] letter, learning to cook Thai cuisine is a long process because the dishes and sauces are complex – it is an art form.

AF 51. On May 6, 2011, the CO issued a second RFI, requesting additional information and documentation. AF 34-38. The CO again found that the Employer had not established that the 120 month experience requirement was a normal term and condition of employment, as required by 20 C.F.R. § 655.22(a), and requested the same documentation as previously requested in support of the requirement. AF 36-37. The Employer responded to the second RFI on May 13, 2011, explaining:

If one were to poll all cooks at all Thai restaurants in the region, they would all very likely have more than 10 years cooking experience. […] To cook any type of Thai food, not to mention Specialty Bangkok Thai Cuisine, it takes at least 10 years of experience. Unfortunately, Karjana Jacobs [the Employer] does not have the financial resources to conduct a market research study which would prove what she already knows.

AF 26.

The CO denied the Employer’s application on May 20, 2011. AF 10-13. The CO determined that the Employer failed to establish that 120 months of experience was a normal term and condition of employment, as required by 20 C.F.R. § 655.22(a). AF 13. On May 27, 2011, the Employer appealed the denial, arguing Specialized Bangkok Thai
Cuisine Cooks are highly skilled artists carrying on a centuries-old tradition. AF 1-9. The Employer added that if one were to poll all cooks at all Thai restaurants in the region, they would all very likely have more than ten years cooking experience. AF 4. The CO filed a letter brief on June 13, 2011, arguing that the Employer offered no meaningful explanation as to why it should be permitted to demand experience far beyond what is normal for the occupation.

DISCUSSION

The CO may only grant an employer’s petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the U.S. if there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing the petition and in the place where the foreign worker is to perform the work. 20 C.F.R. § 655.5(b)(1). The relevant H-2B regulations at 20 C.F.R. § 655.22 require an employer to attest that:

(a) The employer is offering terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, meaning that they may not be unusual for workers performing the same activity in the area of intended employment, and which are not less favorable than those offered to the H-2B worker(s) and are not less than the minimum terms and conditions required by this subpart.

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(h) The job opportunity is a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.

The regulation cited by the CO in denying the Employer’s application was Section 655.22(a), although the issue cited in denial related to the 120 month experience requirement. In general, BALCA’s review of the CO’s denial is limited to the ground cited by the CO. Loews Anatole Hotel, 1989-INA-230 (April 26, 1991) (en banc). However, BALCA has held that where the CO gave the employer adequate notice of the issue, failure to cite the precise regulation does not prevent BALCA review of that issue. See National Institute for Petroleum and Energy Research, 1988-INA-535 (March 17,
1989) (en banc); *Custom Card d/b/a Custom Plastic Card Company*, 1988-INA-212
(March 16, 1989) (en banc). Even though Section 655.22(h) was not cited by the CO, I
find that the Employer had sufficient notice that the CO took issue with the 120 month
experience requirement, which is best characterized as a qualification for employment,
rather than a term and condition of employment. As the Employer’s attorney understood
the 120 month experience requirement to be the basis for denial, and fully briefed the
relevant issue, I will consider whether or not the 120 month experience requirement is
consistent with the normal and accepted qualifications required by non-H-2B employers
in the same or comparable occupations.

The job opportunity for Specialized Bangkok Thai Cuisine Cook is classified
under O*Net Code 35-2014.00 - Cooks, Restaurant. Af 78. The CO found that for this
standard occupational classification (“SOC”) code, O*Net permits up to six months of
experience. In fact, O*Net provides that the job training for this occupation ranges from
three months up to and including one year. Based on this information, it would appear
that a requirement for 120 months of experience is not a normal or accepted qualification
for the job opportunity.

The Employer’s argument that the O*Net occupational code for cooks is too
generalized for the Specialized Bangkok Thai Cuisine Cook is duly noted. However, the
burden to establish eligibility for certification is squarely on the Employer, and therefore,
it is the Employer’s burden to establish that the 120 month experience requirement is in
fact a normal and accepted qualification for Thai cooks. The Employer asserts that if one
were to poll all cooks at all Thai restaurants in the region, they would likely have more
than ten years of cooking experience. (Af 26). The Employer provided no such poll to
the CO, or any other documentation to support its assertion that the 120 month
experience requirement is normal and accepted. Likewise, the Employer has indicated
that it takes at least ten years of experience to learn to cook any type of Thai food, and
noted that there are two other Thai restaurants in the Belfast, Maine area. (Af 26, 87).
However, the Employer failed to offer any evidence as to the amount of experience that

2 O*Net is a database containing information on hundreds of standardized and occupation-specific

3 [http://www.onetonline.org/link/summary/35-2014.00](http://www.onetonline.org/link/summary/35-2014.00) (See Job Zone Detail section providing the specific
vocational preparation (“SVP”) range of 4.0 to < 6.0, which corresponds to three months up to one year).
those two Thai restaurants require of their cooks. Based on the foregoing, I find that the Employer has failed to establish that the ten year experience requirement is a normal and accepted qualification of employment. See *Lodoen Cattle Company*, 2011-TLC-109 (Jan. 7, 2011) (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof)).

Accordingly, I find that the CO’s denial of certification was proper under 20 C.F.R. § 655.22(h).

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

For the Board:

**A**

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge