



**Issue Date: 30 March 2012**

**BALCA Case No.: 2012-TLN-00024**

ETA Case No.: C-12032-57870

*In the Matter of:*

**A ABBY GROUP, INC.**

**d/b/a**

**A ABBY LAWN CARE,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Melissa K. Orme, Esquire  
Lindsey Law Firm  
Peachtree City, Georgia  
*For the Employer*

Gary M. Buff, Associate Solicitor  
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Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

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

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

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 occurrence, 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). The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

### **STATEMENT OF THE CASE**

On February 1, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Creation Landscape d/b/a Automatic Rain ("the Employer") for 50 landscaping and groundskeeping workers from March 15, 2012 to November 15, 2012. AF 46-70.<sup>1</sup> The Employer stated that 12 months of experience as a landscape laborer was required. AF 49.

On February 7, 2012, 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 did not comply with all requirements of the H-2B program. AF 40-45. The CO determined that the Employer's 12-month experience requirement was not consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations. AF 42. The CO noted that O\*Net indicates that little or no experience is typical for the occupation of landscaping and groundskeeping workers. *Id.* CO required the Employer to provide a business necessity letter detailing the reasons for its 12-month experience requirement and other evidence to support the Employer's belief that the 12-month experience requirement is consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations in the area of intended

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<sup>1</sup> Citations to the 70-page appeal file will be abbreviated "AF" followed by the page number.

employment. AF 43. Additionally, the CO found that the Employer's job order with the State Workforce Agency ("SWA") failed to comply with Section 655.17(e) because it did not include the 12-month experience requirement. *Id.*

The Employer responded to the RFI on February 14, 2012. AF 18-39. The Employer stated that based on its hiring experience, workers who do not have any previous landscape labor experience are often unprepared and unwilling to perform the physical requirements of the position. AF 18-19. As a result of the high turnover rate and unnecessary expenses that the Employer encountered when it hired inexperienced workers, the Employer asserted that it is its policy to require a minimum of 12 months of relevant work experience. AF 19. The Employer also stated that it is willing to waive the 12-month experience requirement for domestic workers. *Id.*

On March 1, 2012, the CO denied the Employer's application. AF 12-17. The CO determined that the Employer failed to submit evidence that 12 months of experience is normal and accepted among non-H-2B employers hiring landscaping and groundskeeping workers. AF 15.

On March 8, 2012, the Employer requested BALCA review. In its brief, the Employer contends that it provided sufficient evidence that its 12-month experience requirement is normal and accepted among non-H-2B employers, and that it has waived the experience requirement for U.S. workers. The CO requests the denial be affirmed because the Employer failed to provide any information that addresses whether a year of experience is normally required by other employers.

## **DISCUSSION**

Twenty C.F.R. § 655.22(h) requires the job opportunity that is the subject of the H-2B labor certification application to be "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 CO determined that based upon the O\*Net description for "landscaping and groundskeeping workers," a 12-month experience requirement was not normal and accepted among non-H-2B employers in the same or comparable occupation. O\*Net job classifications are probative evidence regarding whether an occupational requirement is

normal and accepted. *See Strathmeyer Forests, Inc.*, 1999-TLC-6, slip op. at 4 (Aug. 30, 1999); *Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter at 6 (May 8, 1998).

O\*Net is a comprehensive database developed by the U.S. Department of Labor, Employment and Training Administration, containing information on hundreds of standardized and occupation-specific descriptors. O\*Net replaced the Dictionary of Occupational Titles (“DOT”) and is the country’s primary source of occupational information.<sup>2</sup> O\*Net job descriptions contain several standard elements, one of which is a “Job Zone.” An O\*Net Job Zone “is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work.” The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation. Each Job Zone level specifies the applicable specific vocational preparation (“SVP”), which is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.<sup>3</sup>

Landscaping and groundskeeping workers are classified under the OES code 37-3011.00.<sup>4</sup> The O\*Net occupational summary identifies the occupation as a Job Zone 1, meaning that little or no previous work-related skill, knowledge, or experience is needed for occupations falling in this zone, and provides an SVP of “Below 4.0.”<sup>5</sup> An SVP of below Level 4 corresponds to an amount of lapsed time ranging from Level 1, which is “short demonstration only,” Level 2, which is “anything beyond short demonstration up to and including 1 month,” to Level 3, which is “over 1 month up to and including 3 months.”

The Employer’s 12-month experience requirement considerably exceeds the amount of experience that is considered normal for this type of work. The Employer has

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<sup>2</sup> <http://www.onetcenter.org/overview.html>.

<sup>3</sup> <http://www.onetonline.org/help/online/svp> (citing U.S. Department of Labor. (1991). *Dictionary of Occupational Titles* (Rev. 4th ed.). Washington, DC: U.S. Government Printing Office)).

<sup>4</sup> <http://www.onetonline.org/link/summary/37-3011.00>

<sup>5</sup> <http://www.onetonline.org/link/summary/37-3011.00#JobZone>

argued that in its experience, it has to spend time and resources to replace workers who are hired without any relevant work experience. Assuming this is true, the Employer has still failed to put forth any evidence that non-H-2B employers have a similar experience requirement. Moreover, absent any evidence that non-H-2B landscaping employers require 12 months of experience, it is contrary to the Immigration and Nationality Act to permit employers to hire foreign workers with experience for reasons of increased efficiency and profitability. See *Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter at 6, n.10; *Zera Farms*, 1998-TLC-8, slip op. at 5 (Apr. 13, 1998). Finally, the Employer cannot cure its noncompliance with Section 655.22(h) by waiving the 12-month experience requirement for U.S. workers only. As Employer has not demonstrated that its 12-month experience requirement is normal and accepted among non-H-2B employers in the same or comparable occupations, it may not impose it on foreign workers.

Accordingly, I find that the CO's denial of labor certification was proper.

### **ORDER**

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

For the Board:

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge