



Issue Date: 21 February 2012

BALCA Case No.: 2012-TLN-00017

ETA Case No.: C-11353-56344

In the Matter of:

EARTHWORKS, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Daniel M. Kowalski, Esquire
The Fowler Law Firm, PC
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For the Employer

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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).

STATEMENT OF THE CASE

On December 19, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from Earthworks, Inc. ("the Employer"). AF 66-89.¹ The Employer requested certification for 100 landscaping and groundskeeping workers from February 2, 2012 to December 1, 2012. AF 66. The Employer provided the following description of the job duties to be performed:

Landscape or maintain grounds of property using hand or power tools or equipment. Workers typically perform tasks, which may include any combination of the following: sod laying, planting plants and trees, mowing, trimming, watering, digging, spread[ing] dirt, raking, pruning, mulching, sprinkler installation and loading and unloading materials. Lifting required up to 50 lbs.

AF 67. The Employer also stated that six months of experience as a landscaping and groundskeeping worker was required. AF 69.

On December 22, 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 did not comply with all requirements of the H-2B program. AF 62-65. The CO determined that the Employer's six-month experience requirement was not a normal and accepted requirement imposed by non-H-2B employers in the same or comparable occupations, as required by 20 C.F.R. § 655.22(h).² AF 64. The CO noted that under the Occupational Information Network (O*Net) standardized occupational classification listing for landscaping and groundskeeping workers, one to three months of experience is typical. *Id.* Additionally,

¹ Citations to the 89-page appeal file will be abbreviated "AF" followed by the page number.

² The CO also identified one other deficiency, which is not at issue on appeal.

the CO noted that the Employer's prior H-2B application for 85 landscaping and groundskeeping workers only required one month of experience. *Id.* The CO required the Employer to provide a business necessity letter detailing the reasons why six months of experience as a landscaping and groundskeeping worker is necessary for the occupation, other evidence to support the Employer's belief that its requirements for the job opportunity are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations in the area of intended employment, and an explanation why the Employer's experience requirements have increased from one to six months in a one year time period. AF 64-65.

The Employer responded to the RFI on December 29, 2012. AF 40-60. The Employer's response regarding the six-month experience requirement provided:

The Landscape industry encompasses a broad array of activities as well as a broad array of approaches and levels of quality that apply to said quality. For instance, mowing a yard for \$35/week and contract finish mowing of a high end office park are both broadly considered "mowing grass," however, one requires only a very basic understanding of the operation of equipment and one requires in depth knowledge of the equipment and capabilities of said equipment to provide a satisfactory end result. Similarly, if a company installs a shrub with merely a "satisfaction" guarantee, it requires one level of experience, however, if the company (like ours) warrants the material for one year, the process and technical aspects of the installation are far more critical to long-term success of the planting. These are only a couple of the many examples of how similar job listings could require different levels of experience. Our company as the economy has deteriorated has been forced to not only ensure the highest quality to our commercial clients but also to extend our warranty to one year to remain competitive on larger scale jobs. Our job requirements are different from many other similar companies because our company and the projects we maintain are of a more advanced nature and as such require more experience. We are far from the only company with a need for more experience; however, we do require more experience than other less sophisticated landscape service providers.

Over the past couple of years we have been forced to become much more efficient in our operations as we are competing against many companies who turn a blind eye to the law with regard to validating workers' authorization etc. Those who avoid regulation and wage requirements create significant downward pricing pressure in our market. To remain competitive and solvent we must have well-experienced workers who require less ongoing and preliminary training and thus allow us to operate at a more efficient level.

AF 47-48. The Employer added that it began using the advanced “zero turn” mowers, which require more experience to operate, and account for its increased experience requirement over the previous year. AF 48. The Employer noted that it experienced an increase in on-the-job injuries among its less-experienced workers using its advanced equipment and installation techniques. *Id.*

On January 20, 2012, the CO denied the Employer’s application pursuant to 20 C.F.R. § 655.22(h). AF 35-39. The CO noted that the SOC/O*Net classification for landscaping and groundskeeping workers provides for up to three months of experience for this occupation, and found that the Employer failed to provide evidence that its six-month experience requirement is a normal and accepted qualification required by non-H-2B employers in the same or comparable occupations. AF 38-39.

On January 30, 2012, the Employer requested BALCA review, arguing that the letter submitted with the RFI response fully explained why six months of experience was necessary. AF 1-33. Additionally, the Employer argued that O*Net description is a rough guide for employers, but is not mandated by statute, regulation, or caselaw. AF 4. The Employer’s attorney also stated that he has more than ten other H-2B landscaping company clients in Texas that have required between three to six months of experience and have received labor certification. *Id.* The Employer also requested the Board to take administrative notice of a website advertisement posted by a Texas employer seeking a worker with one year of groundskeeping experience. *Id.*

The Board received the appeal file on February 6, 2012, and the CO filed a brief on February 10, 2012, arguing that the CO properly denied certification because the Employer failed to provide sufficient evidence to establish that six months of experience is normal and accepted among non-H-2B employers in the same or comparable occupations in the area of intended employment.

DISCUSSION

Scope of Review

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).

In this case, the Employer has submitted additional evidence, including another employer's advertisement, which was not submitted to the CO with the Employer's RFI response materials. None of this evidence may be considered on BALCA review.³ Although the Employer's attorney has requested the Board take administrative notice of an employer's website advertisement, this is not the type of evidence of which it is appropriate to take official notice. *See* 29 C.F.R. § 18.201(b). Moreover, the Board has held that it will not take official notice of any evidence which would undermine the regulations' clear restrictions on the Board's scope review. *See Albert Einstein Medical Center*, 2009-PER-379, slip op. at 9-13 (Nov. 21, 2011) (en banc). As the evidence that the Employer submitted or alluded to in his request for review is not a part of the record upon which the CO based his denial, I cannot consider it on appeal. Likewise, I cannot take official notice of the evidence.

It is appropriate to take official notice of the Occupational Employment Statistics ("OES") codes and O*Net descriptions. *See* 29 C.F.R. § 18.201; *The Cherokee Group*, 1991-INA-280 (Nov. 4, 1992). Additionally, as the CO specifically relied on this information in making his determination, it does not undermine the Board's limited scope of review to take official notice of the O*Net database.

Accordingly, my review of the denial is based solely on the evidence that the CO considered in denying the application and the legal arguments made on appeal.

Six-Month Experience Requirement

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."

³ I note that the Employer's attorney's statement in its request for review that it has more than ten other H-2B landscaping company clients that have already received certification and required between three and six months of experience is not evidence. *See Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc) (statements of counsel in a brief or otherwise presented do not constitute evidence if they are unsupported by underlying party or non-party witness documented assertions).

The CO determined that based upon the O*Net description for “landscaping and groundskeeping workers,” a six-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.⁴ 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.⁵

Landscaping and groundskeeping workers are classified under the OES code 37-3011.00.⁶ 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 a specific vocational preparation (“SVP”) of “Below 4.0.”⁷ 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

⁴ <http://www.onetcenter.org/overview.html>.

⁵ <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)).

⁶ <http://www.onetonline.org/link/summary/37-3011.00>

⁷ <http://www.onetonline.org/link/details/45-2092.02#JobZone>.

“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 six-month experience requirement considerably exceeds the amount of experience that is considered normal for this type of work. The Employer has argued that it needs workers with six months of experience in order to operate more efficiently and remain competitive, as well as for safety reasons. AF 47-48. Although the Employer’s safety justification is legitimate on its face, the Employer has 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 six 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).

Based on the foregoing, I find that the Employer failed to demonstrate that its six-month experience requirement is normal and accepted among non-H-2B employers in the same or comparable occupations, as required by 20 C.F.R. § 655.22(h), and 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