



Issue Date: 28 March 2012

BALCA Case No.: 2012-TLN-00022

ETA Case No.: C-11353-56354

In the Matter of:

EVANCO ENVIRONMENTAL TECHNOLOGIES, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Randall Cooper
President, Evanco Environmental Technologies
Chester, Virginia
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).

STATEMENT OF THE CASE

On December 19, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Evanco Environmental Technologies, Inc. ("the Employer"). AF 115-123.¹ The Employer requested certification for one pipeline engineering technologist (SOC/O*Net occupation title "Civil Engineering Technician") from January 16, 2012 to January 16, 2013. AF 115. The Employer stated that it had an intermittent or other temporary need, and provided the following statement of temporary need on its application:

Evanco Environmental Technologies Inc. provides trenchless evaluation of raw water intake systems. We will be working at the DuPont Sabine River plant in January 2012 and the scope of work is such that we will require an additional Pipeline Engineering Technologist who is proficient in CIPP and GIPP linings. The request is temporary in that this job, depending on what we find during our initial evaluation, will take anywhere from 3 months to a year and is larger than any of our previous projects.

The projects we work on are intermittent as once we finish in one plant we bid for other projects. The DuPont Sabine River project is much larger than our past projects and therefore we are only looking to hire one additional employee for this job specifically.

Id. The Employer stated that the job duties involve designing and installing trenchless rehabilitation of process sewer systems, reviewing project documents prior to issuance for scope and presentation, coordinating and working with project team members, and developing and maintaining positive sustainable client relationships. AF 117. The Employer also stated that the position required a high school diploma or GED and 180 months of experience as a pipeline engineering technician. AF 118. Additionally, the Employer indicated that applicants must be OSHA excavation

¹ Citations to the 123-page appeal file will be abbreviated "AF" followed by the page number.

competent, have 40 hour Hazardous Waste Operations and Emergency Response (“HAZWOPER”) training, and butt fusion certification. *Id.*

On December 22, 2011,² 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 108-114. The CO determined that the Employer had failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.6(b). AF 110. The CO required the Employer to submit a description of the Employer’s business history and activity and schedule of operations through the year, an explanation regarding why the nature of the Employer’s job opportunity and number of foreign workers requested reflects a temporary need, and an explanation regarding how the request meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need. AF 111. In addition, the CO required the Employer to submit supporting documentation, including a detailed training schedule or plan that explains what the worker will do during the entire requested dates of need, signed work contracts and/or monthly invoices from previous calendar years showing that work will be performed for each month during the requested period of need, annualized and/or multiyear contracts or work agreements specifying when work will commence and end during each year of service, and summarized monthly payroll reports identifying the total number of permanent and temporary employees, total hours worked, and total earnings received. AF 112.

The CO also determined that the Employer failed to establish that the Employer’s 180-month experience requirement is consistent with the normal and accepted qualifications imposed by non-H-2B employers in the same or comparable occupations, as required by 20 C.F.R. § 655.22(h).³ *Id.* Additionally, the CO questioned whether the

² Although the RFI is dated December 22, 2011, the Employer indicated that it did not receive the RFI until January 6, 2012. AF 101.

³ The CO’s RFI incorrectly references a 10-12 month server experience requirement, in addition to correctly identifying the Employer’s 180-month pipeline engineering technician experience requirement. Presumably, this is a reference to another employer’s experience requirement. Although this may have caused some confusion to the Employer in this case, it does not appear that it in anyway prevented the Employer from responding to the relevant issue raised in the RFI. Additionally, on January 9, 2012, the CO clarified that the RFI should have indicated that the O*Net indicates that 12 to 24 months of experience is typical for the occupation of civil engineering technicians, rather than waiters and waitresses. AF 109.

OSHA excavation competency, 40 hour HAZWOPER training, and butt fusion certification requirements are consistent with the normal and accepted qualifications required by non-H-2B employers. The CO required the Employer to provide evidence to support its belief that these requirements are consistent with the normal and accepted qualifications required by non-H-2B employers.⁴ AF 112-113.

The Employer responded to the RFI on January 17, 2012. AF 77-103. The Employer's response regarding its temporary need provided, in relevant part:

Evanco bids on contracts and performs work as contracts are awarded, but these contracts are not continuous in nature, causing peaks and valleys in demand for labor. Our schedule of operations throughout the year depends entirely on the work that is awarded to us either through the bid process or through negotiations with our customers. Project work is not steady and is difficult to predict and schedule in advance of successful award of the work.

Each and every project has unique technical challenges and requirements. Sometimes we are required to repair or replace pipes; other times we are required to line a pipe with a specialized process or liner that demands specialized knowledge and skills. Given the intermittent nature of project work and the intermittent need for specific pipeline specialist skills, Evanco does not retain pipeline engineering technologists that have every specialist skill. We cannot afford to do so. We hire them intermittently to meet the needs of a project for the duration of that project, and when the project is over, we release them.

For this specific project at DuPont's Sabine River Plant in Orange, Texas, we are now in direct negotiations with the customer to perform a design-build contract to rehabilitate the plant's raw water supply pipeline that feeds the entire plant with fresh water. We estimate that this project will take between three months and one year to complete from initial investigations and design to the completion of rehabilitation operations. Once the project is complete, we will no longer need a pipeline engineering technologist with the job duties and skills outlined [on the application]. Should we ever need these skills again in the future, we would seek to hire a suitably qualified pipeline engineering technologist again at that time and for that particular project. We only intermittently need temporary workers with these skills to perform project-based, short term specialty work.

Given that negotiations are currently underway for this project between Evanco and DuPont, there are many unknowns that will need further

⁴ The CO also identified one other deficiency, which is not at issue on appeal.

investigation to develop a fixed-price, design-build contract. While the contract is under development (DuPont has identified Evanco as the confidential, preferred vendor), we do not have a signed contract yet, and schedules that clearly show the work that will be performed have not been agreed to as a result.

AF 89. With respect to its 180-month experience requirement, the Employer explained that it is imperative that an applicant have extensive experience as a pipeline engineering technologist, because the work is complex and high-risk, and the operational plant where the work will be performed insists that there be minimal or no plant interruptions. AF 91. The Employer also submitted evidence of examples of pipeline engineering job advertisements where employers required 10 to 20 years of experience in the occupation. Both of these positions are for project managers with 4-year college degrees.

Regarding the OSHA Excavation competency, HAZWOPER training, and Butt-fusion certification, the Employer stated that its customer, DuPont, requires that prior to entry into an open excavation, the excavation needs to be examined and verified by an OSHA-certified excavation competent person. AF 92. The Employer asserted that this certification ensures that personnel have an appropriate level of skill and knowledge needed to reduce the risk of injury. *Id.* The Employer argued that because the project takes place at a large chemical manufacturing plant, HAZWOPER training is necessary so that the employee can respond appropriately and safely in a hazardous chemical or contaminated waste situation. *Id.* Additionally, the Employer stated that the butt-fusion certification was required so that the employee could perform the necessary repairs to the pipeline being rehabilitated. *Id.* The Employer explained that in order to make the repairs to the pipe, the water needs to be diverted into a temporary bypass, and the butt-fusion process is used to construct the temporary bypass. *Id.*

On January 25, 2012,⁵ the CO denied the Employer's application. AF 69-76. The CO found that the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.6(b). AF 69-76. The CO determined that because no binding agreement exists between DuPont and the Employer, the Employer's temporary

⁵ The record shows that there was an issue with the delivery of the mail, and the CO had to resend the determination on February 21, 2012. It is unclear when the Employer received the denial letter. AF 36-68.

need for a pipeline engineer technician has not been established. AF 74. The CO also found that the scope and specific time frame of the project with DuPont are unknown. *Id.* Additionally, noting that O*Net indicates that 12 to 24 months of experience is typical for civil engineering technicians, the CO found that the Employer failed to establish that its 180-month experience requirement is consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupation, as required by 20 C.F.R. § 655.22(h). AF 76.

On March 5, 2012, the Employer requested BALCA review, arguing that it will have to cease negotiations and lose the project with DuPont if it is unable to obtain certification for the skilled worker requested. AF 1-35. The Employer contends that obtaining a qualified specialist is a prerequisite to solidifying the contract with DuPont. The Employer also reiterated the reasons that it is necessary for the pipeline engineering technician to have 180 months of experience. The CO filed a brief, arguing that the Employer failed to establish the existence of a temporary need and failed to demonstrate that 180 months of experience is normally required for this occupation.

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: 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). The DHS regulations provide that employment “is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). To establish an intermittent need, the employer “must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

The Employer in this case has failed to demonstrate that it has a temporary need for a pipeline engineering technician. The Employer has stated that it has an intermittent

temporary need for the pipeline engineering technician to work on the DuPont Sabine River project, a project that the Employer is in the process of bidding on and negotiating with DuPont to be awarded. That the Employer has not been awarded the contract to perform this labor is fatal to the Employer's application of temporary labor certification. As the Employer has not been awarded the DuPont Sabine River contract, the Employer cannot demonstrate that it has any work for a pipeline engineering technician to perform during the dates requested on the application. The possibility that the Employer will have a temporary need for the pipeline engineering technician is too speculative to meet the regulatory definition of temporary need. Accordingly, I find that the CO properly denied certification because the Employer has not established that it has a temporary need for a pipeline engineering technician, as required by 20 C.F.R. § 655.6(b).

Moreover, I find that the Employer failed to establish that its 180-month experience requirement is consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations, in violation of 20 C.F.R. § 655.22(h). The CO determined that based upon the O*Net description for "civil engineering technician," a 180-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 Earthworks, Inc.*, 2012-TLN-17 (Feb. 21, 2012); *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.⁶ 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

⁶ <http://www.onetcenter.org/overview.html>.

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.⁷

The Employer stated that the occupational title for the pipeline engineering technician position is “civil engineering technician,” OES code 17-3022.00.⁸ The O*Net occupational summary identifies the occupation as a Job Zone 3, meaning that employees in the occupation usually need one or two years of training involving both on-the-job experience and informal training with experienced workers.⁹ The SVP for the occupation of civil engineering technician is 6.0 to less than 7.0, meaning that usually over one year and up to two years of experience is required.

The Employer’s 180-month experience requirement considerably exceeds the amount of experience that is considered normal for this type of work. Although the Employer submitted evidence of two advertisements to support its contention that a 180-month experience requirement is normal and accepted, both of these jobs, which required a 4-year college degree and between 10-20 years of experience, were for pipeline project management positions, not a pipeline technician position. As such, they do not demonstrate that it is normal and accepted to require more than 15 years of experience for a pipeline technician.

Based on the foregoing, I find that the CO’s two grounds for denial of temporary labor certification were proper.

⁷ <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)).

⁸ <http://www.onetonline.org/link/summary/17-3022.00>

⁹ <http://www.onetonline.org/link/summary/17-3022.00#JobZone> .

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