

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 22 June 2012

BALCA Case No.: 2012-TLN-00038

ETA Case No.: C-12111-59075

In the Matter of:

MASSEY MASONRY,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Kimberly G. Finnigan, Esquire
Cooper Erving & Savage LLP
Albany, New York
For the Employer

Gary M. Buff, Associate Solicitor
Harry S. Sheinfeld, Counsel for Litigation
Jonathan R. Hammer, Attorney
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 matter arises under the H-2B temporary non-agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These

provisions allow U.S. employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient workers who are able, willing, qualified, and available at the place where the alien is to perform such services or labor. 8 C.F.R. § 214(2)(h)(1)(ii)(D). Before filing a petition for H-2B visa classification, an employer must apply for and receive a temporary labor certification from the U.S. Department of Labor (“the Department”), Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. After ETA accepts an employer’s *Application for Temporary Employment Certification* for processing, a Certifying Officer (“CO”) will review the application and make a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies labor certification, in whole or in part, then the employer may request review before 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 employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the employer’s application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On April 20, 2012, the U.S. Department of Labor’s Employment and Training and Administration (“ETA”) received an *Application for Temporary Employment Certification* from Massey Masonry (“the Employer”) for four “Stonemason Helpers” (O*NET occupation title: “Helpers—Brickmasons, Blockmasons, Stonemasons, Tile and Marble Setters”). AF 51-82.¹ The Employer’s application described the job duties of stonemason helpers as “[b]asic stone masonry work,” including, “job site preparation, hand and power tool use, material handling, and site clean-up.” AF 59. To qualify for this position, the Employer required a minimum of four months experience in stone masonry. AF 60.

On April 26, 2012, the CO issued a *Request for Further Information* (“RFI”) notifying the Employer that, *inter alia*, its four month minimum experience requirement did not appear to be normal and accepted among non-H-2B employers in the same or comparable occupations, as required by 20 C.F.R. § 655.22(h). AF 48. Specifically, the CO noted that the Employer’s requirement exceeded the typical 0-3 month job training requirement for “Helpers—

¹ Citations to the appeal file will be abbreviated “AF” followed by the page number.

Brickmasons, Blockmasons, Stonemasons, Tile and Marble Setters” that is listed in in the Occupational Information Network (“O*NET”).² AF 48. To remedy this deficiency, the CO directed the Employer to “provide evidence that its job opportunity is a bona fide, full-time temporary position with required qualifications that are normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations,” including, but not limited to, the following:

1. A business necessity letter detailing the reasons why four months experience in stone masonry is necessary for the specific occupation listed on the employer’s ETA Form 9142; and
2. Other evidence which supports 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.

AF 48-49.

The Employer responded to the RFI on April 23, 2012. AF 18-44. In its response, the Employer included a “Business Necessity Justification” letter detailing the reasons behind its four month experience requirement. AF 18-44. This letter states, in relevant part:

Although 0-3 months of experience may be normal for a mason helper in the field of brick, cement, or poured concrete, it is insufficient for the caliber of clientele and complexity of work that Massey Masonry performs. This requirement is both for the safety of the workers, and also to protect our clients’ substantial investment in their stonemasonry finished project. An inexperienced worker would have difficulty performing the necessary work that is required when working specifically with complex stonemasonry projects. It is very important to have experienced helpers to prepare the jobsite and use the hand and power tools required, including chipping hammers, angle grinders, drills, disc sanders/cutters, air rammers, and abrasive wheels. These tools are used for tasks including cutting, carving, grinding, sanding, and polishing. Much of the stone purchased by clients for their projects is very expensive. If the helper does not have proper training, the helper not only can destroy the materials and equipment beyond repair, but can severely injure themselves.

According to the Bureau of Labor Statistics, workers in the mason industry “experience a rate of injury and illness that is much higher than the national average.” Individuals working specifically in the field of stone masonry

² The O*NET program, which is being developed under the sponsorship of ETA through a grant to the North Carolina Employment Security Commission, is the nation's primary source of occupational information. The O*NET database contains information on hundreds of standardized and occupation-specific descriptors, and is continually updated by surveying a broad range of workers from each occupation. See <http://www.onetcenter.org/overview.html>.

“experience a higher rate of injury and illness than brick masons and block masons.” Therefore, because Massey Masonry’s workers work almost exclusively in the field of stone masonry, we require our workers to have more experience. Inexperienced helpers are most likely to incur both injuries to themselves and their co-workers and damage client property and stone and the business’s equipment and tools. If Massey Masonry were a large brick, block, or concrete masonry operation then we may be able to train a new helper to minimally perform. We are not. We are trying to compete at the top of the game and we must have experienced stonemason helpers. Having inexperienced stonemason helpers would be detrimental to the working operation of the business. We provide a service to our clients that is top of the line and our staff must be equipped to meet these demands.

It is critical to note that not all stonemason helper positions are the same. This position is not a training position or an entry level position. Massey Masonry does not have the manpower or time to train inexperienced workers during the peak load season. We cannot afford to hire inexperienced workers and have to repair expensive equipment when left in the hands of workers with no or very little experience, not to mention the danger this worker would be to himself and to others around him when using masonry equipment with blades that can easily cut off a foot or anything else if the worker does not know how to properly operate this equipment. Being a Stonemason Helper is not just moving large cutting and shaping equipment; it is also a matter of knowing how to adjust the blades, how much stone to load, unload, or cut, and what degree the stone is to be cut, or if the stone is to be cut in a diagonal or straight cut. There are specified requirements on how materials must be prepped and cut and this knowledge is earned with experience.

AF 30-31, quoting from Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Brickmasons, Blockmasons, and Stonemasons, on the Internet at <http://www.bls.gov/ooh/construction-and-extraction/brickmasons-blockmasons-and-stonemasons.htm> (visited May 3, 2012).

On May 21, 2012, the CO issued a *Final Determination* denying the Employer’s application. AF 13-17. In particular, the CO found that the Employer failed to establish that its four month experience requirement was consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations. AF 17. According to the CO, the Employer’s business necessity letter merely discussed why the Employer requires four months of experience in the context of its own business, and did not address whether such an experience requirement is normal and accepted for non-H-2B employers in the same or comparable occupations. AF 16. The CO additionally noted that while the Employer explained why it requires *some* experience, it did not “explain why four months of experience are necessary

instead of three, two, or one month(s) of experience.” AF 16-17. As a result, the CO found that the Employer failed to demonstrate that its four month experience requirement was consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupation, and accordingly, denied labor certification based on the Employer’s failure to comply with 20 C.F.R. § 655.22(h). AF 17.

On June 1, 2012, the Employer requested BALCA review. The Board received the Appeal File on June 8, 2012; counsel for the CO submitted a brief on June 15, 2012.

DISCUSSION

The regulations require an employer to attest that “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.” 20 C.F.R. § 655.22(h). In determining whether an Employer’s qualifications are “normal and accepted,” the Board generally defers to the experience requirements in O*Net. *See e.g., Evanco Environmental Technologies, Inc.*, 2012-TLN-00022, slip op. at 7 (March 28, 2012); *Jourose LLC, D/B/A Tong Thai Cuisine*, 2011-TLN-30, slip op. at 5 (June 15, 2011); *Strathmeyer Forests, Inc.*, 1999-TLC-6, slip op. at 4 (Aug. 30, 1999). When an Employer’s minimum requirements exceed those listed in O*Net, it is the Employer’s burden to demonstrate that its requirements are “normal and accepted” for non-H-2B employers in the same or comparable occupations. *See e.g., Jourose LLC, D/B/A Tong Thai Cuisine*, 2011-TLN-30 (June 15, 2011), slip op. at 5.

In the instant case, the Employer classified the “Stonemason Helpers” it requested under O*NET Code 47-3011, “Helpers—Brickmasons, Blockmasons, Stonemasons, Tile and Marble Setters.” AF 57. The O*Net classifies this occupation as a Job Zone 1, meaning that little or no previous work-related skill, knowledge, or experience is needed for this occupation, and lists an SVP of “Below 4.0,” indicating experience requirements ranging from Level 1 (“short demonstration only”) to Level 3 (“over 1 month up to and including 3 months”).³ The Employer’s four month minimum experience requirement thus exceeds the zero to three month range listed in O*Net.

³ <http://www.onetonline.org/link/summary/47-3011.00#JobZone>

The Employer contends that O*Net does not take into account that a stonemason helper is a more complex position and requires more experience than other mason helpers. In support of this argument, the Employer cites to the Bureau of Labor Statistics' Occupational Outlook Handbook section on "Brickmasons, Blockmasons, and Stonemasons," which states that stonemasons "experience a higher rate of injury and illness than brickmasons and blockmasons." AF 31. But the mere fact that *stonemasons* experience a higher rate of injury and illness than brickmasons or blockmasons does not, in of itself, establish that *stonemason helpers* require more experience than other mason helpers. However, even if I accept the Employer's contention that a stonemason helper is a more complex position and requires more experience than other mason helpers, O*Net's classification for "Helpers—Brickmasons, Blockmasons, Stonemasons, Tile and Marble Setters" takes into account such a varying degree of complexity by listing experience requirements ranging from zero to three months. The Employer never explained why its stonemason helpers must have a minimum of four months experience, as opposed to three months, or how this additional month of experience is essential to the position.

Ultimately, the Employer has not put forth any probative evidence demonstrating that its four month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations. I therefore agree with the CO, and find that the positions for which the Employer requests certification require a level of experience that exceeds the qualifications required by non-H-2B employers in the same or comparable occupations. Accordingly, I find that the CO properly denied certification.

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