

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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



Issue Date: 19 September 2012

BALCA Case No.: 2012-TLN-00046

ETA Case No.: C-12184-59355

In the Matter of:

S&B CONSTRUCTION, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Jamie B. Naini, Esq.
Law Offices of Jamie B. Naini
For the Employer

No appearance for the Certifying Officer

Before: **PAUL C. JOHNSON, JR.**
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 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 July 2, 2012, the United States Department of Labor (the "Department"), Employment and Training Administration ("ETA"), received an ETA Form 9142 *Application for Temporary Labor Certification* ("Application") from S&B Construction, LLC ("Employer"), requesting H-2B labor certification for 15 "Construction and Related Workers, All Other" positions from August 1, 2012 to June 15, 2013. AF 162-195.¹ Employer selected a "peakload" standard under "Nature of Temporary Need" (Section B, Item 8 of ETA Form 9142).

On July 6, 2012, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that the Department was unable to render a final determination for its application for failure to satisfy all requirements of the H-2B program. The CO identified seven deficiencies in the RFI. Among the seven deficiencies was a finding that the Employer failed to satisfy the obligations of H-2B employers, by requiring terms and conditions of employment that were not normal to U.S. workers performing the same activity in the intended area of employment, as required by 20 C.F.R. § 655.22(h). Specifically, the Employer required 36 months of experience, while the O*Net requirement for Drywall and Ceiling Tile Installers was for experience of over one year and up to two years.²

The CO requested that the Employer take certain steps to correct the identified deficiencies within 7 calendar days of the date of the RFI. Specifically, the CO instructed the Employer to include the following in its response to the RFI with regard to its experience requirement:

The employer's response must include, but is not limited to, a signed, written document explaining why the employer requires 36 months experience as a construction worker. The employer must also explain why its terms and conditions of employment are (a) normal to similarly employed U.S. workers in

¹ Citations to the 195-page appeal file will be abbreviated "AF" followed by the page number.

² The CO based his ultimate denial on this ground and two additional grounds: (1) failure to satisfy the obligations of H-2B employers by listing multiple worksites that were not in the same area of intended employment and (2) failure to meet pre-filing recruitment requirements related to newspaper advertisements and the job order placed with the State Workforce Agency. Because I will uphold the CO's denial based on the Employer's failure to justify its requirement for 36 months' experience, I need not discuss these grounds for denial. Further, in the RFI, the CO identified four additional deficiencies; however, the CO accepted the Employer's response to the RFI with respect to those deficiencies and did not base his denial on them, so again I need not discuss them here.

the area of intended employment, (b) not less favorable than those offered to the H-2B workers, and (c) are not less than the minimum terms and conditions required by the regulation.

The Employer responded to the RFI by email dated July 13, 2012, although the “received” stamp from OFLC reflects that it was received on July 19, 2012.³ AF 82-152. The response included the following statement dated July 13, 2012, signed by the Employer’s president:

I felt it was necessary to have 36 months experience on this job because of the type of work that is going to be involved. This job requires knowledgeable and skilled workers who are aware of all aspects of large construction jobsites, not limited to construction but the safety issues on a jobsite of this size. It is proven that people who have had more onsite construction experience, are more safety conscious. For this reason, it was decided to request 36 months experience.

AF 152.

On August 22, 2012, the CO issued a Final Determination denying the Employer’s Application. AF 73-81. As to the issue of required experience, the denial was based on the CO’s determination that the Employer did not adequately respond to the RFI. Specifically, the CO explained:

The employer states that the 36 month experience requirement is necessary because, “It is proven that people who have more onsite construction experience, are more safety conscience [sic].” The employer provided no evidence to support this assertion. O*Net allows for 2 years (24 months) experience for Construction Laborers. Further, the Employer did not provide documentation as to how 36 months of experience is normal to similarly employed U.S. workers in the area of intended employment as requested in the RFI.

AF 78-79. Accordingly, the CO denied the Employer’s application for H-2B labor certification.

By letter dated August 30, 2012, the Employer requested review of the CO’s denial. AF 1-72. In this letter, the Employer summarized its President’s response to the RFI as quoted above. Additionally, the Employer asserted:

The Dept of Labor stated in its Final Determination Letter that O*Net shows the occupation of Drywall and Ceiling Tile Installers requires over one year, up to

³ According to the CO, the Employer’s response to the RFI was received by UPS on July 19, 2012. The Employer argues that it was permitted to submit its response by email, and did so on July 13, 2012, and that its response was timely. The CO did not address timeliness, and by addressing the merits appears to have accepted the Employer’s position that its response was timely. I find that it was timely, and will therefore address the merits of the denial.

and including two years of experience (*See Tab 1*). The Dept of Labor also stated that O*Net shows “Construction Laborers” need up to 24 months of experience. (*See Tab 1*). But neither of these occupations as the same job duties as listed by S&B for the occupation of Construction Worker (*See Tabs 10 and 11*). Therefore, how can the Dept of Labor contend that the experience level should be the same? The construction worker that S&B needs must be knowledgeable of all aspects of large construction jobsites and therefore must be more experienced than construction laborers and drywall and ceiling tile installers. (*See Tab 13*). In addition, the construction worker that S&B needs must be knowledgeable of all the safety regulations required on large construction sites. (*See Tab13*). Therefore, S&B’s explanation for why it requires 36 months experience was sufficient and it was error for the Dept of Labor to find otherwise.

AF 4.

The Employer filed a brief on September 13, 2012, arguing that 20 C.F.R. §§ 655.22(a) and (h) “have not even been written yet,” and that it is impossible to be in noncompliance with a nonexistent regulation.⁴ The CO did not file an appellate brief.

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, supra*, slip op. at 5. In the instant case, the Employer classified the workers it requested as Construction and Related Workers, All Other under O*NET-SOC Occupation Code 47-4799. There is no such occupation code. Construction and Related Workers, All Other are assigned O*NET-SOC Occupation Code 47-4099. The O*NET

⁴ This argument is incorrect. A final rule amending the H-2B labor certification regulations, including the entirety of 20 C.F.R. § 655.22, was promulgated in the Federal Register in 2008, and became effective January 18, 2009. 73 FR 78020 (Dec. 19, 2008).

has no job zone or SVP requirements for this code, because “All Other” titles represent occupations with a wide range of characteristics which do not fit into one of the detailed O*NET-SOC occupations. Turning to the description of job duties for the positions for which certification is sought, the Employer stated on the Form 9142:

Install piping insulation, siding, scaffolding, sheet rock, and other construction duties. Must have working knowledge of how to cut and set up various types of insulation material. Also, when installing siding, must be able to erect scaffolds in order to perform specific construction duties. Each worker will be required to wear any and all necessary safety equipment including hard hats, safety glasses, steel toe boots, gloves, and when necessary, a harness.

AF 164. The Employer repeated the same job duties in its response to the RFI. AF 91, 97.

In considering the work-experience requirement, the CO initially applied the standards for Drywall and Ceiling Tile Installer, O*NET-SOC Occupation Code 47-2081.00. O*NET classifies this occupation as a Job Zone 2, meaning that some previous work-related skill, knowledge, or experience is needed, and lists an SVP of 4.0 to less than 6.0, indicating experience requirements ranging from over 3 months up to and including two years. After receipt of the Employer’s response to his RFI, the CO applied the standards for Construction Laborer, O*NET-SOC Occupation Code 47-2061.00. 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). The Employer’s minimum experience requirement of 36 months thus exceeds the range for either of the occupation codes identified by the CO.

The Employer contends that the actual duties of its positions are different from either a Drywall and Ceiling Tile Installer or a Construction Laborer, and that the O*NET classifications for those positions are not applicable. The Employer has not, however, identified an alternative O*NET classification that it believes would apply. The duties of the positions it seeks to fill include working with sheet rock, which is another term for drywall, and the CO’s application of the standards for Drywall and Ceiling Tile Installer was not unreasonable. The duties of the positions also includes construction of scaffolding, which is included in the duties for Construction Laborer, and again the CO’s application of standards for that occupation was not unreasonable. As discussed above, the burden is on the Employer to show that O*NET does not

properly take into account the duties of the positions for which it seeks certification, and the Employer has failed to do so.

Further, regardless of the correct O*NET-SOC Occupation Code classification, the Employer has provided no evidence demonstrating that its 36-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations in the intended area of employment. It has simply expressed its own preference for applicants with that length of experience. 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:

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge