



Issue Date: 21 February 2012

BALCA Case No.: 2012-TLN-00015

ETA Case No.: C-11346-56196

In the Matter of:

TEXAS ECOGROW, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

Gary M. Buff, Associate Solicitor
Clarette H. Yen, 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 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 12, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary seasonal labor certification from Texas Ecogrow, LLC (“the Employer”). AF 202-230.¹ The Employer requested certification for 30 landscaping and groundskeeping workers from February 2, 2012 to December 1, 2012. AF 213. 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 215. The Employer also stated that eight months of experience as a landscaping and groundskeeping worker was required. AF 216.

On December 19, 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 196-202. The CO determined that the Employer’s eight-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). AF 199. 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.* The CO required the Employer to provide a business necessity letter detailing the reasons why

¹ Citations to the 230-page appeal file will be abbreviated “AF” followed by the page number.

eight months of experience as a landscaping and groundskeeping worker is necessary for the occupation, as well as 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. AF 200.

The Employer responded to the RFI on December 23, 2012. AF 70-195. The Employer's response regarding the eight-month experience requirement provided:

First of all our main area of work is specialized in the commercial field. On commercial projects we run the risk of our contract being terminated if we show up on a jobsite and our crews do not show competency and proper safety practices. Also on these types of projects we have to have a crew that is experienced to run heavy machinery, and do so efficiently. We are also agreeing in all contracts to warranty our work for a period of time after the job has been completed. We have to have experienced people install our material in order to guarantee we will not have problems with the final product and have to deal with warranty items. With the amount of work we have this year we do not have to [sic] time to teach a new employee how to comply with the safety regulations, install the material as specified on plan, run heavy machinery, and install the material in a non-defective manner so it does not cost our company more money in warranty issues. That is why we were requesting that all applicants have a minimum of 8 months experience.

AF 86; 143. The Employer did not discuss why it believed that the eight-month experience requirement is consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.

On January 20, 2012, the CO denied the Employer's application. AF 64-69. The CO found that the Employer failed to sufficiently explain why eight months of experience as a landscaping and groundskeeping worker 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 employment, as required by Section 655.22(h). AF 68. The CO rejected the Employer's argument that workers need eight months of experience in order to be able to work heavy machinery, because the Employer's application only indicates that workers will be using their hands or power tool equipment. *Id.* Additionally, the CO noted that the O*Net classification for landscaping and groundskeeping workers provides that a range of experience up to three months for this

occupation, and found that the Employer failed to provide evidence that eight months of experience is normal and common among non-H-2B employers in the same or comparable occupation. *Id.*

On January 27, 2012, the Employer requested BALCA review, arguing that the letter submitted with the RFI response fully explained why eight months of experience was necessary. AF 1-63. Additionally, the Employer argued that O*Net description is a rough guide for employers, but is not mandated by statute, regulation, or caselaw. AF 2. 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. 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.

The Board received the appeal file on February 3, 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 eight 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.²

² 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).

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.

Eight-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."

The CO determined that based upon the O*Net description for "landscaping and groundskeeping workers," an eight-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.³ 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.⁴

Landscaping and groundskeeping workers are classified under the OES code 37-3011.00.⁵ 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.”⁶ 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 eight-month experience requirement far exceeds the amount of experience that is considered normal for this type of work. The Employer has put forth no evidence to demonstrate that eight months of experience is normal and accepted among non-H-2B employers within the occupation of landscaping and groundskeeping workers. Accordingly, I find that the Employer’s requirements do not comply with 20 C.F.R. § 655.22(h), and the CO properly denied certification.

³ <http://www.onetcenter.org/overview.html>.

⁴ <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)).

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

⁶ <http://www.onetonline.org/link/details/45-2092.02#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