



Issue Date: 21 February 2012

BALCA Case No.: 2012-TLN-00016

ETA Case No.: C-11349-56279

In the Matter of:

WEEKS LANDSCAPING MANAGEMENT
d/b/a
MANDERS MAINTENANCE,
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

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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 15, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from Weeks Landscape Management d/b/a Manders Maintenance ("the Employer"). AF 55-77.¹ The Employer requested certification for 60 landscaping and groundskeeping workers from February 2, 2012 to December 1, 2012. AF 55. 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 30 lbs.

AF 57. The Employer also stated that six months of experience as a landscaping and groundskeeping worker was required. AF 58.

On December 21, 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 50-54. 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). AF 52. 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

¹ Citations to the 77-page appeal file will be abbreviated "AF" followed by the page number.

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, 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 54.

The Employer responded to the RFI on December 27, 2012. AF 40-47. The Employer's response regarding the six-month experience requirement provided:

There are several reasons we feel it is important to have 6 months of experience to be a landscape laborer. The reason we started using the H2B program back in 2000 was because we were having trouble trying to retain seasonal workers. Each year prior to our use of the H2B program we had to find new workers to fill the landscape laborer positions. The quality of work was compromised due to a lack of experience. This effected our production and many other elements of our business as well. The problem with hiring workers who reside in this country is that they are ultimately looking for full-time employment. On average employees who are hired by our company and reside in the United States will work for about 3 – 6 months before moving on to another job. They recognize when they are hired that our business is seasonal and will not provide them full-time employment. The reason the H2B program was started and exists today was to provide seasonal businesses with part-time employment. Americans want and need full time employment. Also, in previous years we have been certified for a level two position, which is up to six months of experience.

Safety is also an important factor in experienced employees. Our company spends countless hours on safety instruction. Safety instruction helps reduce the risk and cost of injury, lost productivity, property damage, medical claims and lawsuits. We strive to keep our insurance costs down, and requiring 6 months of experience brings knowledgeable and well trained landscape laborers, who also have safety experience, into the field with fewer accidents. Keeping accidents to an absolute minimum allows our company a larger cash flow which can be utilized by having the funds available for new equipment, training classes, and safety incentives. Our company has never had a lost time accident or injury using experienced employees.

A list of some other workplace skills that our HR department rated as more important on average for experienced employees than new workers includes:

- Critical thinking/problem solving
- Leadership
- Professionalism/work ethic
- Teamwork/collaboration
- Adaptability/flexibility percent

AF 42. The Employer did not discuss why it believed that the six-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 24, 2012, the CO denied the Employer's application. AF 35-39. The CO found that the Employer failed to sufficiently explain why six 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 37-38. The CO found that the Employer failed to make any mention of the normal and accepted qualifications for non-H-2B employers in the same or comparable occupations in the area of intended employment, and failed to provide any additional documentation or evidence to support a six-month experience requirement as being normal and accepted for Landscaping and Groundskeeping workers. AF 38. Additionally, the CO noted that the O*Net classification for landscaping and groundskeeping workers provides for up to three months of experience for this occupation. *Id.*

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 3. 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. AF 3-4.

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.² 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.

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).

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.”

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.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

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)).

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 six-month experience requirement exceeds the amount of experience that is considered normal for this type of work. The Employer has put forth no evidence to demonstrate that six months of experience is normal and accepted among non-H-2B employers within the occupation of landscaping and groundskeeping workers. Furthermore, the Employer’s business necessity letter emphasizes its reliance on experienced workers as a means to reduce its operation costs. Not only is this response wholly non-responsive to the fundamental issue of whether non-H-2B employers have similar experience requirements, but it also contrary to the spirit of the Immigration and Nationality Act to permit employers to hire foreign workers with experience for reasons of increased profitability. *See Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter at 6, n.10. Accordingly, 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).

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