

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 January 2013

BALCA Case No.: 2013-TLN-00022

ETA Case No.: H-400-12311-242180

In the Matter of:

A B CONTROLS & TECHNOLOGY, INC.,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: David E. Piver, Esquire
Law Offices of David E. Piver
Wayne, Pennsylvania
For the Employer

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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 November 6, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from A B Controls and Technology, Inc. ("the Employer"). AF 171-197.¹ The Employer requested certification for one Sales Representative, Wholesale and Manufacturing, Occupational Employment Statistics ("OES") code 41-4011, from December 17, 2012, to December 16, 2013. AF 172. Subsequently, the employer amended the relevant period to begin on December 10, 2012, and end on December 10, 2013. AF 74. The employer also subsequently amended the title of the position to Sales Engineer, OES code 41-9031. AF 28.² The Employer provided the following description of the job duties to be performed (although the position title was amended, the job description remained unchanged):

Responsible for establishing product and sales cycle protocol for a new highly technical specialized lighting product line to be used by Oil and Gas industry, lighting of oil and gas rigs off-shore and on-shore. Produce strategy for sales department and be the lead focal point from which the design team builds the specific applicable flammable hazardous location for product standards. As the flammable hazardous area specialist for technical development of the sales, service and assembly department, organize work packs for engineers, including systems for assembly of products and deliveries to meet customer orders. Coordinate with Engineering Procurement and Contracting Design companies to provide commercial and technical support for industrial flammable hazardous area sales services and installation at oil rig end user locations.

AF 174. The Employer also stated the position requires an associate's degree and 60 months' experience with hazard area lighting design and specialization in the oil and gas industry. AF 76 (discussion of experience requirement in response to request for further information).

On November 13, 2012, 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 60-71. The CO identified eight deficiencies in the RFI, seven of which the Employer later corrected and which are not at issue on appeal. AF 56. The remaining deficiency, resulting in the CO's denial of certification, was "failure to satisfy obligations of H-2B employers" under 20 C.F.R. § 655.22(h). Specifically, the CO determined that the Employer's 60 month experience

¹ Citations to the 197-page appeal file will be abbreviated "AF" followed by the page number.

² It appears that two pages of the Employer's letter in response to the request for information are not contained in a copy of that document on the AF (*see* AF 74-77). The apparently missing pages are found at AF at 27-28, attached to Employer's request for Board review.

and associate's degree requirements were not normal and accepted requirements imposed by non-H-2B employers in the same or comparable occupations, as required by 20 C.F.R. § 655.22(h). AF 56-58.

In making his determination, the CO evaluated the Employer's application using the job title originally submitted, not the job title as amended. As a result, the Final Determination refers to a "Sales Representative, Wholesale and Manufacturing," OES code 41-4011, not a "Sales Engineer," OES code 41-9031.

In the RFI, the CO noted that under the Occupational Information Network (O*Net) standardized occupational classification listing for wholesale and manufacturing sales representatives, 24 to 48 months of experience is typical, and moreover, that there is no degree requirement for this occupation. AF 63; 65-66. The CO required the Employer to provide a letter detailing the reasons why 60 months of experience and an associate's degree 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 66.

The Employer responded to the RFI on November 20, 2012, with a brief statement by the Employer's attorney, a letter dated November 19, 2012, from the Employer's Vice President, Geoff Amos, and other documents. AF 72-158. Mr. Amos's response regarding the 60 month experience and associate's degree requirements stated:

This position is not a typical sales position but is to lead one aspect of [a] business expansion project requiring a set of skills beyond the standard level of experience for several reasons. It is a highly technical sales strategy development, training and implementation position for new products we have developed for use in a hazardous environment thus requiring at least 5 years of experience (60 months). Accordingly, we believe that this additional experience requirement is not restrictive- since we have been unable to locate a U.S. worker even with less experience in a relevant skill set as detailed below.

In addition, we are willing to accept an individual with an associate degree in lieu of a full Bachelor's degree because such experience can be obtained with such a level of education combined with an extra number of years of experience. This minimum level of education and experience is consistent with the normal and accepted qualifications [of] similar employers in the same or comparable occupations in our area of intended employment. For example, the position requires the individual to be a flammable hazard sales specialist with at least 5 years of specialized experience with hazard area lighting design and specialization in the oil and gas industry. Technical knowledge and particular sales experience of internal and external hazard area lighting product[s] find [found] in the onshore and offshore industry [is] essential. This additional level of experience is necessary [to] assure compliance with safety and hazardous conditions inherent in use of electrical equipment in explosive atmospheres. Given the hazardous nature

of the equipment and location of utilization of the equipment, the position requires a combination of highly technical and analytical business and sales development experience beyond that which would be normally required in less hazardous technical sales assignments. Such additional levels of technical sales and basic advance educational experience would be prudent and compliant with industry standards when handling the sales of hazardous equipment.

This assignment is temporary in nature because we are utilizing his extensive industry experience and education in this very unique highly technical area to lead the technical sales development strategy for our U.S. employees. Therefore, as he will be developing our technical sales strategy, and training our existing sales staff to implement this protocol in the hazardous use oil and gas rig environments, not engaging in technical sales of hazardous products per se, the additional level of experience and education is essential and accepted in comparable occupations developing technical sales development strategies in similarly hazardous material and product utilization environments. As we are expanding our business in this new product, and developing the proper sales protocol, the 60 month experience requirement is a business necessity to accomplish these goals safely and compliant with industry standards.

AF 75-76. In explaining why the 60 month experience requirement is necessary, the Employer stated that the position “require[s] a set of skills beyond the standard level of experience.” In explaining why an associate’s degree is necessary, the Employer indicated that it believes this requirement is, if anything, less stringent than the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations by stating, “we are willing to accept an individual with an associate degree in lieu of a full Bachelor’s degree because such experience can be obtained with such a level of education combined with an extra number of years of experience.”

On December 13, 2012, the CO denied the Employer’s application. AF 54-58. The CO found that the Employer failed to provide evidence or documentation establishing that sixty months’ experience is a normal and accepted qualification 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 58. The CO also found that that the Employer failed to provide documentation explaining why the position requires an associate’s degree. AF 56. Additionally, the CO noted that the O*Net classification for Sales Representatives, Wholesale and Manufacturing indicates that between 24 and 48 months’ experience is typical for this occupation, and stated that the Employer failed to indicate which occupation requires 60 months’ experience. *Id.*

On December 20, 2012, the Employer submitted a request for BALCA review, arguing that the CO erred in analyzing the case under the wrong job classification (Sales Representative, Wholesale and Manufacturing, OES code 41-4011, instead of Sales Engineers, OES code 41-9031); in concluding that the position’s requirements were not normal for the occupation; in failing to address the Employer’s assertions that the position’s requirements arise from business necessity; and in finding that the Employer failed to indicate which occupation requires 60

months' experience. AF 1-53. Among other documents, the Employer submitted various job postings from other employers as an attachment to this request. AF 45-52.

The Board received the request for review on December 20, 2012, and the appeal file on January 2, 2013. On January 9, 2013, the CO filed a statement of position arguing that the CO properly denied certification because the Employer failed to provide sufficient evidence to establish that the requirements of 60 months' experience and an associate's degree are normal and accepted among non-H-2B employers in the same or comparable occupations in the area of intended employment. Also on January 9, 2013, the Employer submitted a letter summarizing the argument presented in its December 20, 2012, request for BALCA review and requesting consideration of that document as its legal argument.

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 with its request for BALCA review that was not previously submitted to the CO. None of this evidence may be considered on BALCA review. Not only is this is not the type of evidence of which it is appropriate to take official notice, *see* 29 C.F.R. § 18.201(b), but 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 in its 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 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.

Sixty-Month Experience Requirement and Wrong Job Classification

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 “Sales Representative, Wholesale and Manufacturing,” a 60 month experience requirement was not normal and accepted among non-H-2B employers in the same or comparable occupations. As noted above, in making his determination, the CO evaluated the Employer’s application using the job title originally submitted, not the job title as amended. As a result, the Final Determination refers to a “Sales Representative, Wholesale and Manufacturing,” SOC Code 41-4011, not a “Sales Engineer,” SOC Code 41-9031. This is not a material error, however, because as outlined below, the experience and educational requirements of both occupations are the same. Specifically, most positions in both occupations require a four-year degree, and both occupations require between two and four years’ experience.

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

Sales Representatives, Wholesale and Manufacturing, are classified under the OES code 41-4011.00.⁵ The O*Net occupational summary identifies the occupation as being in Job Zone 4, which states that “[m]ost of these occupations require a four-year bachelor’s degree, but some do not,” that “a considerable amount of work-related skill, knowledge, or experience is needed for these occupations” (an example is provided of an accountant, requiring four years of college and several years’ experience), and that “employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.”⁶ The O*Net summary also provides a SVP of “7.0 to <8.0.” An SVP in this range corresponds to an amount of lapsed time ranging from “[o]ver 2 years up to and including 4 years.”⁷

³ www.onetcenter.org/overview.html.

⁴ 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 www.onetonline.org/link/summary/41.4011.00

⁶ www.onetonline.org/help/online/zones#zone4

⁷ www.onetonline.org/help/online/svp

Sales Engineers are classified under the OES code 41-9031.00.⁸ The O*Net occupational summary also identifies this occupation as being in Job Zone 4. As a result, the educational and experience requirements between the Sales Representative, Wholesale and Manufacturing job title originally identified on the Employer's application and the Sales Engineer job title identified on the application as amended are the same. The CO's error in considering the application under the incorrect job title is therefore not material.

The Employer's 60 month experience requirement exceeds the amount of experience that is considered normal and accepted for the occupation of Sales Engineers. While the Employer's Vice President asserted that "additional levels of technical sales and basic advance educational experience would be prudent and compliant with industry standards" and "the additional level of experience and education is essential and accepted in comparable occupations," the Employer did not provide evidence (other than the documents at AF 45-52 that, as noted above, I cannot consider) to support its assertion that 60 months of experience is normal and accepted among non-H-2B employers within the occupation of Sales Engineers. A bare assertion without supporting evidence is insufficient to carry the Employer's burden of proof. *John Gosney*, 2012-TLC-00009 (Dec. 30, 2011), citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc). Accordingly, I find that the Employer failed to demonstrate that its 60 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).

Failure to Identify Occupation to Which Sixty Month Requirement Applies

While the CO stated in his final determination that the Employer failed to indicate which occupation required 60 months' experience, AF 56, the Employer provided this information in its response to the RFI by stating "as indicated in the advertisements, 5 years of specialized experience includes 'hazard area lighting design and specifications in the oil and gas industry'" and authorized the CO to make the appropriate amendment to the application form. AF 28. As a result, I find the CO erred in including this deficiency in his final determination. Given my determination on the issue of whether sixty months' experience is normal and accepted among non-H-2B employers in the same or comparable occupations, however, this error is not material.

Associate's Degree Requirement and Business Necessity

Having determined that the Employer failed to demonstrate that its 60 month experience requirement is normal and accepted among non-H-2B employers in the same or comparable occupations, I need not reach the issue of whether the Employer's requirement for an associate degree is normal and accepted among non-H-2B employers in the same or comparable occupations. Similarly, I need not reach the issue of whether the CO erred in failing to address the Employer's assertions that the requirements at issue arise from business necessity.

⁸ www.onetonline.org/link/summary/41-9031.00

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge