



Issue Date: 20 March 2013

BALCA Case No.: 2013-TLN-00040
ETA Case No.: H-400-12352-217789

In the Matter of:

DESTIN FIRE CONTROL DISTRICT,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Kendra S. Elliott, Esquire
Law Offices of Kendra S. Elliott
Enola, Pennsylvania
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Constantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **PAUL R. ALMANZA**
Administrative Law Judge

**DECISION AND ORDER VACATING AND REMANDING
CERTIFYING OFFICER'S 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 January 24, 2013, Destin Fire Control District (the “Employer”) submitted an application for temporary labor certification to the Department of Labor’s Employment and Training Administration (“ETA”). AF 99-112.¹ The Employer requested certification for four Lifeguard IIs to be employed from April 1, 2013, to October 31, 2013. AF 99, 101. Lifeguard positions are coded under Occupational Employment Statistics (“OES”) code 33-9092, which is entitled “Lifeguards, Ski Patrol, and Other Recreational Protective Service Workers. AF 99.

The Employer provided the following description of the job duties to be performed:

Responsible for safety & General well being of all beach patrons in designated recreational area. Perform open water rescues & medicinal treatments.

AF 101. The Employer also stated the position requires 24 months’ “[r]elevant lifeguarding experience” and that the job requires candidates to “be able to perform the following tasks: 1000 meter run, 1000 meter swim, + 1000 meter board paddle in 30 minutes or less, a 1.5 mile run in 12 minutes or less, + an 800 meter swim in 14 minutes or less.” AF 102.

On January 31, 2013, 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 96-98. The CO identified one deficiency in the RFI, “failure to satisfy obligations of H-2B employers” under 20 C.F.R. § 655.22(h). Specifically, the CO determined that the Employer’s 24 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 98.

In the RFI, the CO noted that under the Occupational Information Network (O*Net) standardized occupational classification listing for lifeguards, only up to one year’s experience is typical. AF 98. The CO required the Employer to provide a letter detailing the reasons why 24 months of experience 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-

¹ Citations to the 112-page appeal file will be abbreviated “AF” followed by the page number.

H-2B employers in the same or comparable occupations in the area of intended employment. AF 98.

The Employer responded to the RFI on February 6, 2013, with a brief statement by the Employer's attorney, a letter dated February 1, 2013, from the Employer's Beach Safety Division Chief, Joseph D'Agostino, and an article from *USA Today*. AF 84-95. Mr. D'Agostino's response regarding the 24 month experience requirement stated:

There are several reasons why the Destin Fire Control District requires its employees who are classified as lifeguard II to have at least two years of prior lifeguarding experience.

The first is that our lifeguards are responsible for the safety and well-being of the beach patrons. In congruence with that, there is also a physical requirement that accompanies the position of lifeguard II. They must be able to swim 800 meters in 14 minutes or less, run 1.5 miles in 12 minutes or less and complete a 1,000 meter swim, 1,000 meter run, and 1,000 meter board paddle in less than 30 minutes. This high standard is difficult to achieve with a new employee, nonetheless one that only has up to one year of experience. The ability to accomplish this physical requirement for most of our employees is a result of our exploitation [sic]. While most lifeguard agencies cover 500 yards of beach from one fixed position, our lifeguards must cover one mile of beach from a roving vehicle. They may be responsible for up to 10,000 patrons in that vicinity. We have had several lifeguards make in excess of 20 rescues in an eight-hour period. We can not prevent near drownings with such limited coverage, so physical ability and experience makes up for it. We cannot have lifeguards with little to no experience patrolling such vast areas with such great responsibility.

AF 91. The *USA Today* article also established the danger posed by rip-currents in the Destin area, including the death of eight swimmers in the Florida Panhandle in a single weekend in 2003. AF 94-95.

On February 20, 2013, the CO denied the Employer's application. AF 80-83. The CO found that the Employer failed to provide sufficient documentation establishing that two years' 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 83. Additionally, the CO noted that the O*Net classification for lifeguards indicates that up to one year's experience is typical for this occupation. *Id.*

On February 28, 2013, the Employer submitted a request for BALCA review, arguing that it is not reasonable to analyze experience requirements for the position at issue using the O*Net classification because it is "too vague and generic," that the CO erred in not considering business necessity for the 24 month experience requirement, that

positions with increased responsibility merit higher requirements, and prior certifications establish the business necessity for the 24 month experience requirement. AF 1-79. Among other documents, the Employer submitted certifications for the same position over several years where the CO certified the same lifeguard position including the same 24 month or two year experience requirement denied in this case, as well as the same or similar swim/run/paddle board requirements. AF 52-78 (certifications from December 2007, January 2009, January 2010 (reflecting same OES code as this case), and January 2011 (reflecting same OES code as this case)).

The Board received the request for review on March 1, 2013, and the appeal file on March 7, 2013. On March 14, 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 24 month experience requirement 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 with its request for BALCA review – specifically, prior certifications from 2001, 2009, 2010, and 2011 – that it did not provide to the CO with its application or with its response to the RFI. AF 52-78. The regulation is clear that a request for review “[m]ay contain only legal argument and such evidence as was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a)(5). Moreover, the Board has held that it will not take official notice of any evidence which would undermine the regulation's 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 neither a part of the record upon which the CO based his denial nor an appropriate subject of official notice, I cannot consider it on appeal.

The Employer's application, however, referred to prior certifications in stating “[p]lease also note that this year we are only seeking 4 lifeguards rather than 5 in past seasons. Due to the national economic downturn, we have had to make a cut in lifeguards. This is why we are only seeking 4 for the 2013 season.” AF 105. Accordingly, while I cannot consider the prior certifications submitted at AF 52-78, I can consider the application's reference to prior certifications.

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.

Twenty Four 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.”

In the CO's brief, he cites *Carlos Uy III*, 1997-INA-304, slip op. at 8-9 (Mar. 3, 1999) (*en banc*) for the proposition that an Employer's “bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof” that labor certification should be granted. In this case, the Employer provided a detailed letter from Mr. D'Agostino, Employer's Beach Safety Division Chief, explaining precisely why 24 months' experience is necessary for the job opportunity at issue. The “supporting reasoning” in his letter more than adequately meets the Employer's burden to show that 24 months' experience 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 was requested in the RFI. AF 98. Moreover, the USA Today article substantiating the extreme risk posed by rip currents in the area of intended employment further buttresses Employer's assessment that 24 months of experience is necessary for the job opportunity at issue.

I note that the Employer did not provide job postings or other evidence from other employers seeking to employ beach lifeguards in similarly high-risk areas to show that 24 months' experience is “normal and accepted . . . in the same or comparable occupations.” 20 C.F.R. § 655.22(h). Such evidence may often be helpful in meeting an employer's burden. In this case, however, the Employer has provided sufficient supporting reasoning and other evidence to meet its burden without job postings or other evidence from other employers.

While of course it is appropriate to take official notice of O*Net descriptions of what experience is typical for a given occupation, *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), the Employer provided ample evidence, as discussed above, that the job opportunity at issue is one where the “same or comparable occupations in the area of intended employment” would require more than the up to one year's experience typical for the occupation of lifeguard reported in O*Net. Accordingly, while I have considered the O*Net information, I find the information provided by the Employer more probative concerning the job opportunity at issue.

Prior Certifications

As I have found that the Employer submitted sufficient information, including supporting reasoning and substantiating evidence, to meet its burden that labor certification should be granted, I need not reach the issue of whether the CO's prior granting of certifications has any bearing on the CO's denial of certification in this case.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **VACATED** and **REMANDED** to the Certifying Officer with instructions to **GRANT** Destin Fire Control District's application.

For the Board:

PAUL R. ALMANZA
Administrative Law Judge