

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 February 2013

BALCA Case No.: 2013-TLN-00030
ETA Case No.: H-400-12353-445826

In the Matter of:

GOLDEN CONSTRUCTION SERVICES, INC.,

Employer

Certifying Officer: Chicago National Processing Center

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

Gary M. Buff, Associate Solicitor
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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

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) pursuant to Employer Golden Construction Service, Inc.’s request for administrative review of the Certifying Officer’s denial of temporary labor certification under the H-2B non-immigrant program. For the reasons set forth below, the Certifying Officer’s denial in this matter is AFFIRMED.

BACKGROUND

The H-2B Program

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service

or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (ETA Form 9142) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008).¹ After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer, who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Procedural History

Golden Construction Service, Inc. (“Employer” or “Golden Construction”) operates a commercial landscaping/sprinkler system installation business in Collin County, Texas. AF 116.² On January 17, 2012, Golden Construction filed an *Application for Temporary Employment Certification* with ETA’s CNPC, seeking H-2B certification for four “Landscape Crewman” (O*NET code: 37-3011; O*NET occupation title: “Landscape and Groundskeeping Workers”) from February 4, 2013, to December 1, 2013. AF 116-128. The job duties the Landscape Crewman were to perform included:

Sod laying, planting plants and trees, mowing, trimming, watering, digging, spread dirt, raking, pruning, mulching, sprinkler installation, installation of mortarless segmental concrete masonry wall units, and loading and unloading materials. Lifting required up to 50 lbs.

AF 118. In order to qualify for this position, Golden Construction required a minimum of six months experience in landscaping, groundskeeping, and sprinkler system installation. AF 119.

On January 2, 2013, the CO issued a *Request for Further Information* (“RFI”), informing Golden Construction that its six-month experience requirement did not appear to be normal and accepted among non-H-2B employers in the same or comparable occupations, as required by 20 C.F.R. § 655.22(h). AF 111-115. Specifically, the CO noted that Golden Construction’s six-month experience requirement exceeds the typical 0-3 month job training requirement for “Landscape and Groundskeeping Workers” listed in the Occupational Information Network (“O*NET”). AF 113. Citing this finding, the CO found reason to believe that Golden Construction’s six-month experience requirement exceeded the normal and accepted job requirements for non-H-2B employers in the same or comparable occupations, in violation of 20

¹ All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance*, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

² Citations to the Appeal File will be abbreviated “AF” followed by the page number.

C.F.R. 655.22(h). *Id.* Accordingly, the CO instructed Golden Construction to “provide evidence that its job opportunity is a bona fide, full-time temporary position with required qualifications that are normal and accepted qualifications required by non-H-28 employers in the same or comparable occupations,” including but not limited to the following:

1. Evidence which supports the employer's belief that its requirements for the job opportunity are consistent with the normal and accepted qualifications required by non-H-28 employers in the same or comparable occupations in the area of intended employment; and
2. A letter detailing the reasons why six months of experience is necessary for the specific occupation listed on the employer's ETA Form 9142.

AF 113 (emphasis in original).

Golden Construction responded to the RFI via e-mail on January 7, 2013, submitting a notarized business necessity letter signed by Jennifer Golden (President of Golden Construction). In the business necessity letter, Ms. Golden explained:

Over the past several years we had routinely advertised for individuals with little to no experience in the landscape field. Response was consistently poor. At the time, our crews were larger, experience wasn't as important as quantity of labor and another job was just around the corner. This has changed. Crews are much smaller, experience is critical and there isn't necessarily another job if you aren't able to do a quality job, in budget and on time. While in the beginning there were very few applicants with any experience available, this is not true any longer.

However, what has also changed in the landscape industry is the ability to be competitive. While many of my competitors continue to utilize undocumented workers and beat us at the bidding process as a direct result of this cheap labor, we have managed to keep our regular workers employed while increasing our available temporary positions by having a better trained temporary team when they arrive. We have reduced and even eliminated a lot of the costly mistakes made by untrained workers, improved job completion time and reduced job waste and warranty trips due to a more experienced crew.

With commercial installation jobs, each job is a different job. So an understanding of this difference is imperative, this is learned only by experience and doing. While small jobs are installed one way, larger jobs are completely different. What we have learned is that time is of the essence if we are to remain competitive in both cost and efficiency in today's environment. Beginning with completely novice workers every year prohibits us from maximizing our limited time on these projects, and puts us at risk to lose to our competitors who do use day labor with no experience.

In Commercial Installations, tasks are more diverse compared to the more routine maintenance type jobs. While all of our jobs have a supervisor, due to the limited

size of our crew we depend on each individual to be able to multi task, to know the sequence of events, to understand how to plant without having to be instructed on each job, to know the right and wrong way to do a landscape installation. With these tools, we can get our job done and stay in business, in spite of cheap labor used by our competitors.

AF 99. To support her belief that the six-month experience requirement was consistent with other employers in its industry, Ms. Golden pointed to two job orders for Landscaping and Groundskeeping Workers placed by other employers in the area.

The first, Job Order #2677974, order sought “landscape workers”—specifically, “Irrigation Technicians” with 2-3 years of experience in irrigation system maintenance, troubleshooting and electrical repairs. AF 101-103. Although this position was classified in the same occupation as the Golden Construction’s Landscape Crewman—Landscaping and Groundskeeping Workers—its minimum requirements exceeded those listed in the Golden Construction’s ETA Form 9142. For instance, in addition to two to three years of experience, the Irrigation Technician position required: a valid Texas irrigation license or Texas irrigation technician license; a valid driver’s license and ability to pass DOT exam; strong communication, time management and people skills; and familiarity with the start-up and shut-down process. AF 102.

The second, Job Order #6842298, advertised a “Goundskeeper” position at Baylor University. AF 104-106. The Groundskeeper was to work under the supervision of the Assistant Grounds Manager and perform tasks related to maintaining “exceptional quality landscaping” on Baylor’s campus, including: mowing, edging, string trimming, weeding of beds, pruning of shrubs, and collection of trash and debris across the campus; and the operation and maintenance of various types of equipment, including reel and rotary type mower, edger, and various other powered lawn equipment. AF 105. The job order included the following “required qualifications”: ability to use grounds maintenance tools and equipment as required; ability to communicate effectively with supervisor, vendors, clients, and fellow employees; ability to follow and apply all safety rules and regulations for job assignments and equipment used; valid driver’s license; eighteen (18) years of age or older; and one (1) year commercial experience preferred. *Id.*

On January 23, 2013, the CO issued a *Final Determination* denying certification. AF 85-92. The CO based the denial on Golden Construction’s failure to establish that its six-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations, as required by 20 C.F.R. § 655.22(h) (2008). AF 85-92. The CO was not persuaded by Ms. Golden’s letter. Specifically, the CO explained:

The RFI response letter clearly outlines the reasons why the employer has a *preference* for Landscaping and Groundskeeping Workers with a minimum of six months of experience. However, the employer did not adequately explain how or why six months of experience is a normal and accepted minimum amount of experience necessary to perform the duties described. The letter specifically states that the employer has hired workers with less experience in the past and goes on to discuss why it would be preferable and more efficient to hire workers with

more experience in order to be more competitive against other companies. The employer provided adequate explanation to substantiate its reasoning for desiring to hire Landscaping and Groundskeeping Workers with six months experience, but this explanation does not serve to demonstrate how a six month experience requirement is consistent with the normal and accepted qualifications required by non-H-28 employers in the same or comparable occupations.

AF 89 (emphasis in original). Nor was the CO persuaded by the job orders that Golden Construction submitted to support its position that a six-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations:

The first, Job Order #2677974, indicates multiple job titles under its job requirements section, indicating a preference for experience in one or more of the occupations listed. Although one of the occupations in which that employer has indicated they will accept experience is Landscaping and Groundskeeping Workers, a closer examination of the job order reveals that the job opportunity being advertised is not, in fact, for a Landscaping and Groundskeeping job opportunity, but rather for an Irrigation Technician, with job duties that, while related to Landscaping and Groundskeeping work, significantly differ from the job duties and requirements identified in the employer's current application. Therefore, Job Order #2677974 does not serve as evidence that the employer's six month experience requirement is normal and accepted by non-H-28 employers in the area of intended employment because it is not advertising a job opportunity with the same or similar duties and requirements.

The employer's second submission, Job Order #6842298, lists a job opportunity for a university campus-based Groundskeeper position which requires applicants to have a driver's license, communicate effectively with vendors and clients and indicates a *preference* for one year of commercial experience. Taken as a whole, the description of the job opportunity advertised in Job Order #6842298 also indicates a significantly more autonomous work environment with more responsibility than the one described by the employer's application and advertisements and, significantly, does not actually require one year of experience but indicates it as a preference. Absent further supporting evidence, Job Order #6842298 does not serve as adequate evidence that the employer's six month experience requirement is normal and accepted by non-H-2B employers in the area of intended employment.

AF 89-90 (emphasis in original). According to the CO, “the employer’s assertion that a six month experience requirement is necessary to perform the job duties described, absent sufficient supporting documentation or evidence, is not adequate to establish that the employer's requirements are, in fact, 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 90. As a result, the CO concluded that Golden Construction failed to adequately respond to the RFI and failed to provide sufficient documentation to overcome the deficiency listed above

[Failure to satisfy obligations of H-2B employers, 20 CFR 655.22(h)], and thus denied Golden Construction's application.³

Golden Construction requested administrative review of the CO's denial on February 4, 2013. AF 1-84. Golden Construction argues that the CO's denial is incorrect as a matter of law and fact because (1) last year, the Department certified Golden Construction's application for the same job, at the same location, with the same six-month experience requirement; and (2) Golden Construction proved, both this year and last year, that its six-month experience requirement is normal and accepted. AF 2. In support of its appeal, Golden Construction submitted: the *Application for Temporary Employment Certification* it filed in 2012; the RFI that the Department issued in connection with this application; its response to the 2012 RFI (including the job postings and advertisements for landscape workers it had provided the CO in 2012); and the *Final Determination* issued in connection with this application (dated February 3, 2012), in which the Department certified all but one of the Landscape Laborer positions that Golden Construction requested in this application.⁴

The undersigned issued a Notice of Docketing on February 5, 2013, notifying the parties that BALCA docketed the appeal and providing the parties an opportunity to submit briefs on an expedited basis. BALCA received the Appeal File (AF) from the CNPC on February 8, 2013; a statement of position from the CO on February 21, 2013 (this document was dated February 16, 2013); and a reply to the CO's statement of position from Golden Construction on February 15, 2013.

Counsel for the CO maintains that the Department's certification of Golden Construction's application last year is not determinative, since the CO must deny all applications that do not meet the requirements specified in the regulations, regardless of whether the Department granted certification for the same positions in the past. (CO's Brief at 3). In the instant case, Counsel for the CO argues, Golden Construction's application did not meet the requirements of the regulations because Golden Construction failed to establish that its six-month experience requirement is, in fact, 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. Specifically, Counsel for the CO states that BALCA generally looks to the experience requirements listed in O*Net when determining which requirements are "normal and accepted" for a particular occupation, and when an employer's requirements exceed those listed in O*NET, BALCA places the burden on the employer to prove that its requirements are "consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations." (CO's Brief at 2, citing *Jourose LLC, D/B/A Tong Thai Cuisine*, 2011-TLC-30 (ALJ June 15, 2011)).

³ The CO additionally found that the Employer's pre-filing recruitment advertising—which listed the atypical six-month experience requirement—violated 20 C.F.R. 655.17, since subsection (e) requires an employer's advertisements to list the minimum level of experience required. AF 90-93. Because I will uphold the CO's denial based on the Employer's failure to justify its requirement for six months' experience, I need not discuss this second ground for denial.

⁴ The Employer application was only partially certified because the Employer had successfully recruited and hired one U.S. worker.

According to Counsel for the CO, Golden Construction's response "falls far short of providing enough evidence to rebut the O*Net finding and show that six months is normal and accepted in the field." *Id.* In particular, Counsel for the CO observes that in her letter, Ms. Golden acknowledged that Golden Construction's competitors do not have an experience requirement, and "instead of explaining why [Golden Construction's] requirement is normal and accepted despite this fact, [Ms. Golden] explained why [Golden Construction] preferred workers with six months experience." (CO's Brief at 2). According to Counsel for the CO, such a mistake is significant because the standard at 20 C.F.R. § 655.22(h) is not "based on an employer's specific needs or preferences," but rather, "what is normal and accepted for the occupation." *Id.* Counsel for the CO additionally notes that the job orders to which Ms. Golden cites do not demonstrate that Golden Construction's six-month experience requirement is normal and accepted. Specifically, Counsel for the CO explains:

First, two advertisements is not sufficient to show that the experience requirement is normal and accepted in the field. Second, while both of the advertisements are for jobs that are landscaping related, both have significantly greater job responsibilities than the job duties listed on the employer's form 9142. AF 101-106. The CO explained that the first job opportunity is for an irrigation technician, not a landscaper, and the job duties are very different than the employer's duties. AF 9. The CO points out that the second job description also includes very different job requirements, including requirements for a driver's license and the ability to communicate effectively with vendors and clients. AF 9-10. Most importantly though, the CO notes that the second advertisement merely prefers one year of experience, it does not require it.

Id.

Counsel for the Employer argues that "there is no statute, regulation or case (BALCA or federal court) mandating the application of O*Net standards in H-2B labor certification cases. (Employer's Brief at 1). Counsel for the Employer additionally poses the following question:

If Golden's experience requirement is outside the norm, why did OFLC (the same office that issued the [*Final Determination*] issue a prevailing wage, Level IV, of \$12.22 per hour, with the experience requirement clearly indicated? One would think that DOL would nip a "bad" case in the bud by contesting the experience requirement at the 9141 stage rather than allowing the employer to engage in expensive and time-consuming recruitment efforts, only to deny the case on an issue clearly disclosed from the outset. There is a serious procedural disconnect here if OFLC is permitted to issue a prevailing wage determination without giving any warning that a key component of the 9141 will be deemed faulty after the fact.

Id. Finally, Counsel for the Employer states that denying Golden Construction's application in this matter "will have a negative ripple effect in the supply chain of Golden's clients, suppliers and other employees." (Employer's Brief at 2).

DISCUSSION

Scope of Review

The H-2B regulations limit the scope of the Board's review 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).

Golden Construction submitted additional evidence with its request for BALCA review that was not previously submitted to the CO. While I may take administrative notice of the fact that the Department certified Golden Construction's *Application for Temporary Employment Certification* last year, *see* 29 C.F.R. § 18.201(b), I may not consider the advertisements that Golden Construction submitted in connection with this application. Golden Construction first submitted these advertisements in its request for review, and they were not a part of the record upon which the CO based his denial. Section 655.33(a)(5) clearly limits an employer's request for review to the evidence that "was actually submitted to the CO in support of the application." Despite this clear limitation, Golden Construction cites these advertisements to establish a substantive adjudicative fact, *i.e.*, that its six-month experience requirement is consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations. It is not appropriate to take official notice of such evidence, as the Board has held that it will not take official notice of any evidence that 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). Accordingly, I do not consider these advertisements on appeal.

It is, however, appropriate to take administrative notice of O*Net descriptions. *See* 29 C.F.R. § 18.201; *The Cherokee Group*, 1991-INA-280 (Nov. 4, 1992); *A B Controls & Technology, Inc.*, 2013-TLN-00022 (ALJ Jan. 17, 2013). The CO specifically relied on this information in making his determination, and it does not undermine the Board's limited scope of review to take official notice of the O*Net database.

Six-Month Experience Requirement

The job opportunity for which an employer seeks H-2B temporary labor certification must 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." 20 C.F.R. § 655.22(h) (2008). In the instant case, Golden Construction requires six months of experience in landscaping, groundskeeping, and sprinkler system installation to qualify for the requested Landscape Crewman positions. The sole issue on appeal is thus whether this six-month experience requirement is "normal and accepted . . . by non-H-2B employers in the same or comparable occupations."

In determining whether an employer's qualifications are "normal and accepted," the Board generally defers to the experience requirements listed in the O*Net database. *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).⁵ O*Net provides the following job description for “Landscape and Groundskeeping Workers”:

Landscape or maintain grounds of property using hand or power tools or equipment. Workers typically perform a variety of tasks, which may include any combination of the following: sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation, and installation of mortarless segmental concrete masonry wall units.

<http://www.onetonline.org/link/details/37-3011.00>. O*Net classifies this occupation as a Job Zone One, meaning that little or no previous work-related skill, knowledge, or experience is required, and lists an SVP of 4.0, indicating experience requirements ranging from Level 1 (“short demonstration only”) to Level 3 (“over 1 month up to and including 3 months”). *Id.* O*Net further specifies that “[e]mployees in these occupations need anywhere from a few days to a few months of training. Usually, an experienced worker could show you how to do the job.” *Id.*

Because the six-month experience requirement exceeds the typical experience requirement of zero-to-three months supported by O*Net, Golden Construction bears the burden of demonstrating that its experience requirement is “normal and accepted” for non-H-2B employers in the same or comparable occupations. *See e.g., Jourose LLC, D/B/A Tong Thai Cuisine*, 2011-TLN-30 (June 15, 2011); *Massey Masonry*, 2012-TLN-00038 (ALJ June 22, 2012); *S&B Construction, LLC*, 2012-TLN-00046 (ALJ Sept. 19, 2012); *A B Controls & Technology, Inc.*, 2013-TLN-00022 (ALJ Jan. 17, 2013). Golden Construction has failed to meet this burden.

In the letter the letter Golden Construction submitted in response to the RFI, the company’s president, Ms. Golden, did not address why Golden Construction’s six-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations. In fact, Ms. Golden conceded that Golden Construction’s competitors use “day labor with no experience.” *See* AF 99 (“Beginning with completely novice workers every year prohibits us from maximizing our limited time on these projects, and puts us at risk to lose to our competitors who do use day labor with no experience.”). Instead, Ms. Golden explained why Golden Construction prefers to hire workers with experience. But, as noted by Counsel for the CO, the standard at 20 C.F.R. § 655.22(h) is not “based on an employer’s specific needs or preferences,” but rather, “what is normal and accepted for the occupation.”

⁵ O*Net is the nation’s primary source of occupational information. *See* <http://www.onetcenter.org/overview.html>. 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.

Moreover, the job orders in Golden Construction’s RFI response do not establish that a six-month experience requirement is normal and accepted by non-H-2B employers in the landscaping industry. Although the Irrigation Technician position advertised in Job Order #2677974 is classified under the same “Landscape and Groundskeeping Worker” occupation as the Landscape Crewman positions for which Golden Construction seeks certification, it clearly requires more technical expertise—and licensing—than Golden Construction’s Landscape Crewman positions or the “Landscape and Groundskeeping Worker” described in O*Net. Considering the atypical nature of this Irrigation Technician position, the two to three year experience requirement listed in Job Order #2677974 does not assist Golden Construction in establishing that its six-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations. The “Goundskeeper” position advertised in Job Order #6842298 does appear similar to the Golden Construction’s Landscape Crewman positions. Although it states that one year of commercial experience is preferred, this job order, in of itself, is not sufficient to establish that Golden Construction’s six-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations.

In sum, Golden Construction has not put forth sufficient probative evidence demonstrating that its six-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations. Accordingly, I find that the CO properly denied certification.

ORDER

In light of the foregoing, the Certifying Officer’s *Final Determination* denying certification is hereby AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge