

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 14 April 2014**

**BALCA Case No.: 2014-TLN-00022  
2014-TLN-00023**

ETA Case No.: H-400-14036-567760  
H-400-14036-682775

*In the Matter of:*

**STONE OAK LAND DESIGN LLC,**

*Employer*

Certifying Officer: Chicago National Processing Center

Appearances: Shalee Rookstool  
Stone Oak Land Design LLC  
Austin, Texas  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Stephen R. Jones, Attorney  
Office of the Solicitor of Labor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **LINDA S. CHAPMAN**  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) pursuant to Employer Stone Oak Land Design’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).<sup>1</sup> 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*

Stone Oak Land Design LLC (Stone Oak) operates a commercial landscaping and design business in Austin, Texas. AF1 30.<sup>2</sup> On February 5, 2014, Stone Oak filed an *Application for Temporary Employment Certification* with ETA’s CNPC, seeking H-2B certification for fifteen “Landscape Laborers” (O\*NET code: 37-3011; O\*NET occupation title: “Landscape and Groundskeeping Workers”) from March 1, 2014, to November 30, 2014. AF130. On the same date, Stone Oak filed an identical application seeking H-2B certification for eight “Landscape Laborers.”<sup>3</sup> AF2 31. The job duties the Landscape Laborers were to perform included:

[u]se hand/power tools/equip, lay sod, mow, trim, plant, water, fertilize, dig, rake.

AF1 32; AF2 33. In order to qualify for this position, Stone Oak required a minimum of twelve months of commercial landscape laborer experience, “and must be able to work efficiently and produce above average work.” AF1 33; AF2 34.

On February 12, 2014, the CO issued a *Request for Further Information* (“RFI”), informing Stone Oak that its twelve-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). AF1 28; AF2 26. Specifically, the CO noted that Stone Oak’s twelve-month experience requirement exceeds the typical 0-3 month job training requirement for

---

<sup>1</sup> 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).

<sup>2</sup> Citations to the Appeal File will be abbreviated “AF1” (application for 15 positions) and “AF2” (application for 8 positions) followed by the page number.

<sup>3</sup> Except for the job advertisements and recruitment reports, the two applications are identical.

“Landscape and Groundskeeping Workers” listed in the Occupational Information Network (“O\*NET”). AF1 28; AF2 26. Given the basic duties listed by Stone Oak in its applications, the CO stated that more information was needed to justify the twelve-month experience requirement. *Id.* Accordingly, the CO instructed Stone Oak 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-2B employers in the same or comparable occupations,” including but not limited to the following:

1. Documentation 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; and
2. An explanation on how the submitted documentation supports the requirement.

AF1 29-30; AF2 29-30.

Stone Oak responded to the RFI via e-mail on February 19, 2014, submitting a letter signed by Shalee Rookstool, Director of Operations for Stone Oak. In the letter, Ms. Rookstool explained:

We are hiring experienced labors [*sic*] to temporarily work for our “first class operation” style of landscape and design company. We service high end commercial properties and deliver exceptional work for our clients.

Although the skills needed to perform this job are the standard landscaping duties, we require a higher level of expertise when executing these daily which is why we indicated 12 months of experience is needed and must be able to work efficiently and produce above average work.

Many other companies service residential and/or commercial and have a range of upper and lower scale properties that don’t require previous knowledge and experience.

We operate at a high level, service only upper scale commercial properties and need employees that have specific experience with high end commercial service for at least 12 months. We are not looking for an entry level position.

We were also approved for a Level III prevailing wage which is not an entry level position.

AF1 14; AF2 15. To support her belief that the twelve-month experience requirement was consistent with other employers in its industry, Ms. Rookstool submitted a posting by the University of Texas at Austin for a Groundskeeper position, which required one year of experience in landscape maintenance in a university setting. AF1 18; AF2 19. The “essential functions” of the position were:

Maintains landscape to university standards (to include all turf, shrubs, and hardscapes) and reports trouble conditions on campus that might be a safety hazard to the university community. Safely operates landscaping equipment to include power mowers, cultivators, edgers, small sweepers, and other equipment used in gardening work. Picks up litter, empty trash receptacles, and keeps University property neat and orderly. Irrigates the landscape, abides by water restrictions, and performs minor repairs on irrigation systems. Readily accepts and follows written and oral instructions, maintains work schedule set by the supervisor, and completes routine paperwork (to include weekly electronic time reports, daily labor reports, vehicle usage log, and other UT related electronic forms). Wears appropriate personal protective equipment (PPE) for the task, follow safety rules, and maintain safe working conditions.

AF1 18; AF2 19.

On March 7, 2014, the CO issued a *Final Determination* denying certification. AF1 8-12; AF2 8-13. The CO based the denial on Stone Oak's failure to establish that its twelve-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). AF1 8-12; AF2 9-13. The CO was not persuaded by Ms. Rookstool's letter. Specifically, the CO explained:

In response to the RFI, the employer provided one job posting for a Groundskeeper to support its 12 month experience requirement. The job posting submitted was for a Groundskeeper position that similarly required 12 months experience. However, that position also required a high school diploma or GED and basic computer skills and included duties that differentiated it significantly from the employer's position. Specifically, that job included duties of completing reports and other paperwork such as weekly electronic time reports, daily labor reports, vehicle usage log, and other electronic forms. The posting also required a class C operator's driver's license. The job posting submitted is notably different from the employer's position in the scope and sophistication of duties. This, as well as the fact that the employer was only able to present one job listing for a Groundskeeper that required at least 12 months experience, serve to demonstrate that a 12 month experience requirement is not a normal and accepted requirement.

AF1 11; AF2 13. The CO concluded that Stone Oak failed to adequately respond to the RFI, and failed to provide sufficient documentation to overcome the deficiency listed in the RFI (failure to satisfy obligations of H-2B employers, 20 CFR 655.22(h)), and thus denied Stone Oak's application.

Stone Oak requested administrative review of the CO's denial on March 24, 2014. AF1 1-7; AF2 1-9. Stone Oak argues that the CO's denial is incorrect because "there are other US employers seeking US workers in our areas that have the same 1 year of experience requirement. In support of its appeal, Stone Oak submitted "ads from other similar employers who are hiring

labors [*sic*] in the area with the same 1 year of experience or higher that we are requiring.” AF1 1; AF2 1.

The undersigned issued a Notice of Docketing on March 28, 2014, 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 March 28, 2014; a statement of position from the CO on April 4, 2014; Stone Oak did not submit a statement of position.

Counsel for the CO maintains that the CO correctly denied Stone Oak’s application, based on Stone Oak’s failure to justify its twelve-month experience requirement. Counsel for the CO noted that the RFI provided clear notice of this deficiency and the required corrective action, but Stone Oak’s responses were inaccurate. The single example submitted with the RFI responses was off-point.

Counsel for the CO argued that the additional examples submitted by Stone Oak on appeal should be excluded from consideration.<sup>4</sup>

Counsel for the CO argued that Stone Oak has the burden to establish compliance with the provisions of the H-2B program, and based on the information in the record, the CO properly determined that Stone Oak did not justify its requirement for at least one year of experience. According to counsel for the CO, such a requirement could reasonably be expected to discourage U.S. workers who had the customary three months’ experience from applying for the job opportunity. As evidenced by the recruitment reports submitted for the applications, it also served as an illegitimate basis for rejecting U.S. worker applicants who might have otherwise been qualified for the job opportunity. That would undermine the CO’s efforts to determine if U.S. workers are available for the job opportunity, and whether the requested certifications would impact the interests of U.S. workers.

## **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).

Stone Oak submitted additional evidence with its request for BALCA review that was not previously submitted to the CO. However, I may not consider the three job postings that Stone Oak submitted in connection with this application. Stone Oak first submitted these three job postings 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

---

<sup>4</sup> In connection with its application for certification for 8 positions, Stone Oak submitted three “ads from other similar employers who are hiring labors [*sic*] in the area with the same 1 year of experience or higher that we are requiring.” AF 6-8

evidence that “was actually submitted to the CO in support of the application.” Despite this clear limitation, Stone Oak cites to these advertisements to establish a substantive adjudicative fact, *i.e.*, that its twelve-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 job postings 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.

### *Twelve-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, Stone Oak requires twelve months of experience as a commercial landscape laborer to qualify for the requested Landscape Laborer positions. The sole issue on appeal is thus whether this twelve-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).<sup>5</sup> 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.

---

<sup>5</sup> 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.

<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 twelve-month experience requirement exceeds the typical experience requirement of zero-to-three months supported by O\*Net, Stone Oak 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). Stone Oak has failed to meet this burden.

In the letter that Stone Oak submitted in response to the RFI, the company’s Director of Operations, Ms. Rookstool, did not address why Stone Oak’s twelve-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations. In fact, Ms. Rookstool conceded that “the skills needed to perform this job are the standard landscaping duties,” and that “[m]any other companies service residential and/or commercial and have a range of upper and lower scale properties that don’t require previous knowledge and experience.” AF1 14; AF2 15. She explained that Stone Oak requires a “higher level of expertise,” and services “only upper scale commercial properties.” In other words, Ms. Rookstool explained why Stone Oak prefers to hire workers with experience. But 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.”

Moreover, the lone job order in Stone Oak’s RFI response does not establish that a twelve-month experience requirement is normal and accepted by non-H-2B employers in the landscaping industry. Although the Groundskeeper position advertised in the University of Texas Job Posting is classified under the same “Landscape and Groundskeeping Worker” occupation as the Landscape Laborer positions for which Stone Oak seeks certification, it clearly requires more expertise—and licensing—than Stone Oak’s Landscape Laborer positions or the “Landscape and Groundskeeping Worker” position described in O\*Net. Considering the nature of the Groundskeeper position in the University of Texas job posting, the one year experience requirement does not assist Stone Oak in establishing that its twelve-month experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations.<sup>6</sup>

In sum, Stone Oak has not put forth sufficient probative evidence demonstrating that its twelve-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.

---

<sup>6</sup> Moreover, even if this job posting were sufficiently comparable to the Landscape Laborer positions for which Stone Oak seeks certification, I find that one such job posting is not sufficient to establish that the twelve-month experience is normal and accepted by non-H-2B employers in the same or comparable occupations.

**ORDER**

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

For the Board:

**LINDA S. CHAPMAN**  
Associate Chief Administrative Law Judge