

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: 20 June 2014

BALCA Case No.: 2014-TLN-00031
ETA Case No.: H-14120-183058

In the Matter of:

STARLIFE FOOD, LLC,

Employer.

Appearances: Simone Bertollini, Esq.
Cedar Grove, NJ
For the Employer

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

Before: **JONATHAN C. CALIANOS**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denial by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its application for H-2B temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20

C.F.R. Part 655, Subpart A.¹ For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On April 30, 2014, the Employment and Training Administration ("ETA") received an application for H-2B temporary labor certification from Starlife Food, LLC ("Employer") for two "Bakers," to be employed for from May 1, 2014 to November 30, 2014, for a one-time occurrence. (AF 22).² The Employer stated that its business opened on March 20, 2014, and none of its current employees have experience with managing the production of bread and pastries. (AF 22). The Employer explained it needs to hire 2 foreign worker bakers in order to set up operations and train the current U.S. workers. (AF 22). The Employer listed the minimum requirements for the Baker position as 24 months of experience. (AF 25).

On May 6, 2014, the CO issued a Request for Further Information ("RFI"), notifying the Employer that its application did not comply with the requirements of the H-2B program and identifying three specific deficiencies with the application. (AF 16-21). One of the deficiencies identified by the CO in the RFI was that the Employer failed to comply with the requirements found at 20 C.F.R. § 655.22(h), because the qualifications of the job opportunity were not consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations. (AF 20). Specifically, the Employer indicated in its application that it required 24 months of experience, which exceeds the standardized descriptor for the occupation in O*Net (3 months up to and including one year of experience). (AF 20).

To remedy the deficiency, the CO directed the Employer to submit: (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-2B employers in the same or comparable occupations; and (2) a letter detailing the reasons why 24 months of experience is necessary for the occupation listed on the Employer's application. (AF 20).

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in 2008 ("2008 Rule"), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the Interim Final Rule ("2013 IFR") promulgated in 2013, 78 Fed. Reg. 24047 (Apr. 24, 2013), since the Department has postponed its implementation of the Final Rules promulgated in January 2011, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 Wage Rule") and February 2012, 77 Fed. Reg. 10038 (Feb. 21, 2012) ("2012 Rule"). See 79 Fed. Reg. 11450,11453 (Mar. 5, 2014) (announcing that until such time as the Department finalizes a new wage methodology, the current wage methodology contained in 20 C.F.R. § 655.10(b), as set by the 2013 IFR, will remain unchanged and continue in effect); 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 amendment); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (ND FL Apr. 26, 2012) (enjoining DOL from implementing or enforcing the 2012 Rule), affirmed by *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013); 77 Fed. Reg. 28764 (May 16, 2012) (announcing "the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation").

² Citations to the Administrative File will be abbreviated "AF" followed by the page number.

The Employer responded to the RFI on May 13, 2014. (AF 13-15). In its response, the Employer explained:

We make a large selection of Italian pastries, pizza, bread, bread sticks. Each product is handmade. An Italian baker must have at least 2 years of experience for producing these products. An extensive knowledge on the fermentation process, use of the different kinds of yeast, the shaping and cooking processes is required.

....

While a 3-month experience may be sufficient for someone that needs to pour ingredients in a machine and press the “ON” button, it is certainly not the case for a real Baker, which is someone that can make bread, pizza, and pastries by hand starting from basic ingredients such as water, yeast, sugar.

(AF 14-15).

On May 30, 2014, the CO issued a Final Determination denying certification. (AF 9-12). The CO found that the Employer corrected 2 of the 3 deficiencies identified in the RFI, but the deficiency regarding the amount of experience required for the position remained. (AF 11). The CO found that the Employer’s response failed to provide evidence that the qualifications of the job opportunity were normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations. (AF 12). The CO stated that the Employer’s explanation of why it believes 24 months of experience is necessary alone was not sufficient to satisfy the deficiency. (AF 12). The CO explained that the Employer did not include documentation demonstrating that its qualifications were normal or accepted as required by the RFI in addition to an explanation. (AF 12).

On June 9, 2014, the Employer requested administrative review of the denial before BALCA. (AF 2-3). In its request for review, the Employer argued that its response to the RFI explained that 3 months of experience was not sufficient for the position offered because a typical position of baker in the U.S. only involves mixing ingredients into a machine whereas a real Italian Baker must have at least 2 years of experience for handling the yeast fermentation process and the creation of hand-made pastries and breads from scratch. (AF 2). The Employer also argued that the standardized descriptor on O*Net is not a conclusive indicator of the amount of experience needed for a Baker. (AF 2). The Employer referred to the Occupational Outlook Handbook of the Bureau of Labor Statistics, which states that “most bakers learn their skills through long-term on-the-job training” and that some learn “by attending a technical or culinary school.” (AF 2).

On June 12, 2014, I issued a Notice of Docketing. (AF 1-3). In the Notice of Docketing, I allowed the parties until the close of business on June 19, 2014, to file additional briefs. On June 19, 2014, the CO filed a brief requesting affirmance of the Final Determination. The Employer did not file a brief with BALCA.

DISCUSSION

An employer seeking H-2B temporary labor certification must attest that “the job opportunity is 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).

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. *Golden Construction Services, Inc.*, 2013-TLN-00030, PDF at 8-9 (Feb. 26, 2013) (*citing Evanco Environmental Technologies, Inc.*, 2012-TLN-00022, slip op. at 7 (Mar. 28, 2012); *Jourose LLC, D/B/A TongThai Cuisine*, 2011-TLN-30, slip op. at 5 (June 15, 2011); *Strathmeyer Forests, Inc.*, 1999-TLC-6, slip op. at 4 (Aug. 30, 1999). 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 and is the country’s primary source of occupational information.

The CO in the instant appeal found that according to O*Net, the standard experience required for a baker is from 3 months to one year. (AF 20); *see* O*Net Online, Summary Report for: 51-3011.00 – Bakers, <http://www.onetonline.org/link/summary/51-3011.00> (“Employees in these occupations need anywhere from a few months to one year of working with experienced employees.”)).

Because the Employer’s 24-month experience requirement exceeds the typical experience requirement of a few months to one year supported by O*Net, the Employer bears the burden of demonstrating that its experience requirement is normal and accepted for non-H-2B employers in the same or comparable occupations. *Golden Construction Services, Inc.*, 2013-TLN-00030 at 8-9 (*citing Jourose*, 2011-TLN-30; *Massey Masonry*, 2012-TLN-0038 (June 22, 2012); *S&B Construction, LLC*, 2012-TLN-0046 (Sept. 19, 2012); *A B Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013). The Employer has failed to meet this burden.

The CO required in its RFI that the Employer submit, in addition to a letter explaining why 24 months of experience was necessary, documentation demonstrating that its requirement of 24 months of experience was consistent with the normal and accepted qualifications required by non-H-2B employer in the same or comparable occupations. (AF 20).

In its response to the RFI, the Employer provided an explanation of why it believed 24 months of experience was required. (AF 14-15). However, the Employer provided no documentation establishing that its requirement of 24 months’ experience was normal and accepted for the same or comparable jobs, and as a result, the CO denied certification on May 30, 2014. *See* 20 C.F.R. § 655.23(d) (“Failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application.”). The CO correctly found that the Employer’s explanation alone was not sufficient to correct the

deficiency. (AF 7); *see A B Controls and Technology, Inc.*, 2013-TLN-00022 at 7 (“A bare assertion without supporting evidence is insufficient to carry the Employer’s burden of proof.”).

In the request for review sent to BALCA, the Employer cited to the Occupational Outlook Handbook of the Bureau of Labor Statistics which states that “most bakers learn their skills through long-term on-the-job training” and some learn “by attending a technical or culinary school.” (AF 2-3). However, this reference to the Occupational Outlook Handbook does not mention how much experience is typically required for the baker position, and additionally, it constitutes a new legal argument not presented to the CO. 20 C.F.R. § 655.33(a)(5) (requests for review may “contain only legal argument and such evidence as was actually submitted to the CO in support of the application”).

I find that the Employer failed to meet its burden of establishing that its requirement of 24 months of experience for the baker position was consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations as required by 20 C.F.R. § 655.22(h). Accordingly, I affirm the CO’s denial of certification.

ORDER

It is hereby **ORDERED** that the Certifying Officer’s denial of the Employer’s Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

For the Board:

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts