

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 February 2015

BALCA Case No.: 2015-TLN-00018
ETA Case No.: H-400-14342-055774

In the Matter of:

MS DRYWALL AND PAINT CO.,
Employer

Certifying Office: Chicago National Processing Center

Appearances:

Daniel J. Sullivan, Esq.
Farmingville, N.Y.
For the Employer

Jonathan R. Hammer
Washington, D.C.
For the Office of Foreign Labor Certification

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the H-2B temporary labor certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A.¹ These

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in December 2008 (the “2008 Rule”), and published in the Code of Federal Regulations in 2009. *See* 73 Fed. Reg. 78020 (Dec. 18, 2008); 20 C.F.R. Part 655, Subpart A (2009). The Department of Labor (“DOL”) indefinitely delayed implementation and enforcement of the regulations it promulgated in February 2012 (“2012 Rule”), 77 Fed. Reg. 10038 (Feb.21, 2012), after a Federal court order enjoined DOL from implementing or enforcing the 2012 Rule. *See* 77 Fed. Reg. 28764 (May 16, 2012) (announcing the continuing effectiveness of the 2008 Rule “until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation”); *Bayou Lawn & Landscape*

provisions, referred to as the “H-2B program,” permit employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient domestic workers who are able, willing, qualified, and available to perform such services or labor. *See* 8 C.F.R. § 214(2)(h)(1)(ii)(D).

Prior to applying for a visa under the H-2B program, employers must file an *Application for Temporary Employment Certification* (ETA Form 9142) with the U.S. Department of Labor (“DOL” or “the Department”), Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. Employers’ applications are reviewed by a Certifying Officer (“CO”), who makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, an employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

Background

On November 14, 2014, MS Drywall and Paint, Inc. (“Employer”) filed an application with ETA requesting temporary labor certification under the H-2B program for one (1) Dry Wall and Ceiling Tile Installer, O*NET Code 47-2081, for the period February 15, 2015 to December 15, 2015.² (AF 114-144).³ The application listed a rate of pay for this position of \$31.39 and indicated that employment experience was not required. (AF 118-119). However, the Application for Prevailing Wage Determination, State Workforce Agency Job Order, and newspaper advertisements listed a minimum experience requirement of 24-months or two years. (AF 128-129; 134; 136-137).

On December 15, 2014, the CO issued a *Request for Further Information* (“RFI”) identifying six deficiencies and requested that the Employer submit additional information establishing that its need for nonagricultural services or labor is temporary in nature; that the number of work positions being requested for certification is justified and represents any and all bona fide job opportunities; and that the Employer satisfied all of the requirements of the H-2B program. (AF 105-113). On the later deficiency, the CO requested a letter detailing the reasons why two years of experience is necessary for the specific occupation listed on the ETA Form 9142.

Employer did timely respond to the RFI and submitted additional documentation on December 19, 2014. (AF 54-55). Employer clarified that the position required a minimum of two years’ experience and offered the following explanation: “MS Drywall and Paint Inc. handles almost exclusively high end home improvement work. [The president] is looking for

Services v. Solis, Case 3:12-cv-00183, Order at 8 (N.D. Fla. Apr. 26, 2012) (issuing order temporarily enjoining DOL from implementing or enforcing the 2012 Rule), *affirmed by* 713 F.3d 1080 (11th Cir. 2013); *see also Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183 (N.D. Fla. Dec. 18, 2014) (vacating the 2012 Rule and permanently enjoining DOL from enforcing it).

² The temporary worker was needed to perform “drywall, spackling, taping, painting at various locations in [the] Nassau and Suffolk County Long Island, New York area.” (AF 115).

³ Citations to the Appeal File will be abbreviated “AF” followed by the page number.

someone with enough experience in order that he always produces an excellent result from his work ... two years of experience is necessary to find that quality of employee.” (AF 54-55).⁴

The CO issued a *Final Determination* denying certification on January 7, 2015, specifically citing three deficiencies in the Employer’s application, among them that “employer has not adequately demonstrated that its two year requirement for this position is normal and accepted by non H-2B employers.” (AF 47-53).⁵ The Employer’s BALCA appeal followed on January 15, 2015. (AF 1-46). The Board issued a Notice of Docketing on January 21, 2015, setting out an expedited briefing schedule. The CO filed a brief on February 4, 2015 and Employer filed an additional statement of position on February 6, 2015.

Scope of Review

BALCA’s scope of review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the Employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer’s application. 20 C.F.R. § 655.33(a), (e).

MS Drywall submitted additional evidence with its request for BALCA review that was not previously submitted to the CO, including residential and commercial property listings and a document reflecting upcoming jobs in 2015. However, I may not consider these documents submitted in connection with my review of this application. MS Drywall first submitted these documents 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, MS Drywall cites to these property listings and job opportunities to establish a substantive adjudicative fact, *i.e.*, that its two-year 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 documents on appeal.

⁴ Employer provided a written statement from its attorney dated December 19, 2014; a copy of the issued RFI; employer’s written statement regarding its two year experience requirement; a written statement from employer authorizing corrections to its application; a copy of the employer’s contractor license; copies of paid invoices; a written statement from the employer’s accountant dated December 19, 2014; copies of the employer’s payroll reports for its two employees; a copy of the employer’s amended ETA Form 9142; a revised recruitment report; a copy of the employer’s job order; and a copy of the employer’s newspaper advertisements.

⁵ The CO determined Employer cured three of the six deficiencies. The remaining deficiencies were: failure to provide adequate documentation to establish temporary need for number of workers requested; failure to satisfy obligations of H-2B employers; and non-compliance with pre-filing recruitment requirements. Although the evidence certainly seems to militate against it, I need not decide whether Employer has demonstrated a bona need for a temporary worker in 2015. I find Employer has not adequately demonstrated that its two year experience requirement for the position is normal and accepted by non-H2B employers, and affirm the denial of certification on this basis alone.

It is appropriate, however, 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.

Issue

Is two years' experience "normal and accepted" by non H-2B employers for "drywall installers" or comparable occupations?

Discussion

The Department may only certify applications under the H-2B program if, at the time the application is filed, there are not sufficient able and qualified U.S. workers to fill the requested position(s), and employment of the requested foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. § 214.2(h)(6)(iv).

The job opportunity for which an employer seeks 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). 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., Golden Construction Services, Inc.*, 2013-TLN-30 (ALJ Feb. 26, 2013); *A B Controls & Technology, Inc.*, 2013-TLN-22 (ALJ Jan. 17, 2013); *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).⁶ When an employer's experience requirement exceeds the typical experience requirement for the occupation in 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. *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). Additionally, an employer may not require workers to have additional experience for reasons of increased efficiency or profitability, as such a requirement is contrary to the INA. *See Earthworks, Inc.*, 2012-TLN-17 (Feb. 21, 2012).

⁶ 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.

As noted above, O*Net job classifications are probative evidence regarding whether an occupational requirement is normal and accepted. See *A Abby Group, Inc. d/b/a A Abby Lawn Care*, 2012-TLN-24; *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). *Stone Oak Land Design LLC*, 2014-TLN-22 and 23 (ALJ Apr. 14, 2014); *Golden Construction Services, Inc.*, 2013-TLN-30 (ALJ Feb. 26, 2013) (landscaping and grounds keeping workers); *American Pool Enterprises, Inc.*, 2014-TLN-21 (ALJ Apr. 7, 2014); *Earthworks, Inc.*, 2012-TLN-17 (Feb. 21, 2012).

Two-Year Experience Requirement

In the instant case, Employer requires two years of experience as a drywall installer to qualify for the requested Drywall and Ceiling Tile Installer position. The issue on appeal is whether this two year experience requirement is “normal and accepted . . . by non-H-2B employers in the same or comparable occupations.”

O*Net provides the following job description for “Drywall and Ceiling Tile Installers”:

Apply plasterboard or other wallboard to ceilings or interior walls of buildings. Apply or mount acoustical tiles or blocks, strips, or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound. Materials may be of decorative quality. Includes lathers who fasten wooden, metal, or rockboard lath to walls, ceilings or partitions of buildings to provide support base for plaster, fire-proofing, or acoustical material. Sample of reported job titles: Drywall Finisher, Drywall Hanger, Drywall Mechanic, Ceiling Installer, Dry Wall Installer, Exterior Interior Specialist, Metal Frammer, Metal Stud Frammer, Sheetrock Hanger, Sheetrock Installer

<http://www.onetonline.org/link/summary/47-2081.00>. O*Net further classifies this occupation as Job Zone Two, meaning that some previous work-related skill, knowledge, or experience is usually needed, and lists an SVP range of 4 – less than 6, indicating experience requirements ranging from Level 1 (“short demonstration only”) to Level 5 (“Over 6 months up to and including 1 year”). *Id.* O*Net further specifies that “[e]mployees in these occupations need anywhere from a few months to one year of working with experienced employees. A recognized apprenticeship program may be associated with these occupations.” *Id.*

Because the two year experience requirement exceeds the typical experience requirement of six months to one year supported by O*Net, 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. Assertions, without facts, do not satisfy this burden. *Lodoen Cattle Company*, 2011-TLC-109 (Jan. 7, 2011), citing *Carlos UvIII*, 1997-INA-304 (Mar. 3, 1999)(en banc). See also *Jourose LLC, D/B/A Tong Thai Cuisine*, 2011-TLN-30 (June 15, 2011); *S&B*

Construction, LLC, 2012-TLN-00046 (ALJ Sept. 19, 2012); *A B Controls & Technology, Inc.*, 2013-TLN-00022 (ALJ Jan. 17, 2013). Employer has failed to meet this burden.

In the letter that MS Drywall submitted in response to the RFI, the company's attorney, Daniel J. Sullivan, did not address why MS Drywall and Paint Inc.'s two-year experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations. He explained simply that MS Drywall and Paint, Inc. "handles almost exclusively high end home improvement work...and is looking for someone with enough experience in order that he always produces an excellent result from the work...[and] definitely believes at least two years experience is necessary to find that quality of employee." AF 55. In its position statement of February 6, 2015, Employer's counsel again asserts:

[Employer] presented proof the area where his company works is an exclusive neighborhood and that the work must be of the highest quality or his reputation and business would be severely tarnished. My client presented documents describing the real estate areas of the company's construction sites and invoices showing the types of construction. It is "normal and accepted" to expect a highly qualified employee with at least 2 years of experience to work in this exclusive area of real estate.

In other words, Mr. Sullivan indicates why MS Drywall and Paint, Inc. prefers to hire workers with experience. Given the high dollar value of the properties at issue, the preference for experienced drywallers is not unreasonable. However, the standard is not "based on an employer's specific needs or preferences," but rather, what is "normal and accepted by non-H-2B employers in the same or comparable occupations." *See* 20 CFR § 655.22(h); *Massey Masonry*, 2012-TLN-00038 (ALJ June 22, 2012).

Moreover, the job orders and real estate listings in MS Drywall's RFI response do not establish that a two-year experience requirement is normal and accepted by non-H-2B employers in the drywall industry. They simply demonstrate that Employer appears to work in an exclusive area of Long Island and operates at the higher end of residential real estate. It does not assist Employer in establishing that its two-year experience requirement is normal and accepted by non-H-2B employers in the same or comparable occupations.

In sum, Employer has not put forth sufficient probative evidence demonstrating that its two-year 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.

SO ORDERED:

STEPHEN R. HENLEY
Administrative Law Judge