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Issue Date: 20 January 2015

BALCA Case No.: 2015-TLN-00009
ETA Case No.: H-400-14323-022855

In the Matter of:

JAMES RIVER GROUNDS MANAGEMENT,
Employer,

Before: Drew A. Swank
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(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). For the reasons set forth below, I affirm the Certifying Officer’s (“CO”) denial of temporary labor certification.

STATEMENT OF THE CASE

H-2B Application

On November 17, 2014, James River Grounds Management (“Employer”) filed an H-2B Application for Temporary Employment Certification for the job title of “landscape laborer.” AF 54.¹ Employer requested 65 workers from February 15, 2015 to December 1, 2015 to perform “landscape work.” AF 54-56. Employer indicated that the job was a “peakload need.” AF 54. The basic hourly rate for the 35-hour week was \$11.32 per hour; correspondingly, the overtime rate was \$16.98 per hour. AF 56, 58. The minimum experience required for the occupation of “landscape laborer” was six months performing “landscape work,” such as planting, pruning, and lawn maintenance. AF 57. The job also required the applicant to have “past certification for herbicide and fertilizer application” and the ability to work in extreme weather conditions. AF 57.

¹For purposes of this opinion, “AF” stands for “Appeal File.”

Employer filed a job order with the applicable state workforce agency (“SWA”) and published advertisements for the work in a local newspaper on October 24, 2014 and October 26, 2014. AF 81-84. In an attached recruitment report, the company identified 21 U.S. individuals who applied for the position but were not hired because they failed to meet experience and certification requirements or did not attend their interview. AF 65-69.

Request for Further Information

On November 25, 2014, the CO issued a Request for Further Information (“RFI”), notifying Employer that the CO was unable to render a final determination on its application because Employer did not comply with all application requirements. AF 50-53. In order to ensure compliance, the CO identified two deficiencies. AF 52-53. Most notably, the CO concluded that Employer did not include qualifications for the job opportunity that are normal and accepted by non H-2B employers in the same or comparable occupations, as required by 20 C.F.R. 655.22(h). AF 52. Specifically, the CO stated that Employer required all job applicants to have six months’ experience, which exceeds the three month experience requirement for landscaping workers in the O*Net database.² AF 52.

To remedy the deficiency, the CO directed Employer to submit the following items:

1. Documentation supporting Employer’s contention 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 how the submitted documentation demonstrates that the six month experience requirement is consistent with the normal and accepted qualifications required by non H-2B employers in the same or comparable occupations.

AF 52.

Employer’s Response

On November 25, 2014, in response to the CO’s request, Employer provided a letter from company president Maria Candler explaining why Employer requires six months’ experience for landscape laborers. AF 17-18. As Ms. Candler explained in her letter, six months’ experience is necessary for the following reasons:

²O*Net is a comprehensive database developed by the U.S. Department of Labor, Employment and Training Administration and contains information on hundreds of standardized and occupation-specific descriptors. It is the nation’s primary source of occupational information. See <http://www.onetonline.org/>; *Starlife Food, LLC*, 2014-TLN-00031, at 4 (June 20, 2014).

1. The DOL approved Employer's Prevailing Wage Determination on October 16, 2014, and the Prevailing Wage Determination stated that six months' experience was required for the position. AF 17.
2. Employer's internal safety guidelines are more stringent than DOL safety guidelines, thus requiring Employer to hire more experienced employees who can comply with the Employer's safety protocols. AF 17-18.

Employer also included a copy of its "JRGM Production Path" and "Safety Training Manual" to demonstrate that an employee with only three months' experience would not have the necessary training or experience to comply with its safety guidelines. AF 21-23. Specifically, the "JRGM Production Path" provided brief job descriptions for various landscape positions at the company, including skill and experience requirements for each available job. AF 21-22. Employer's "Safety Training Manual" detailed the proper safety protocols that company employees should follow when performing a variety of job-related tasks, such as tree-planting, forklift operation, and hedge trimming. AF 23-49.

Final Determination

On December 17, 2014, the CO issued a final determination and denied Employer's application for alien labor certification on the basis that Employer failed to establish:

- (a) that there are not sufficient numbers of qualified U.S. workers who are available for the job opportunity for which temporary labor certification is sought, and/or
- (b) the employment of the H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

AF 7.

More precisely, the CO found that three months' experience is typical for landscaping and groundskeeping workers. AF 9. Thus, Employer's application was denied because Employer failed to provide sufficient proof that its six month experience requirement was a "normal and accepted" qualification required by non H-2B employers for similar occupations. AF 10. The CO acknowledged that Employer obtained a Prevailing Wage Determination with the six month requirement included but stated that the issuance of a Prevailing Wage Determination does not demonstrate that the job requirements are "normal and accepted" among non H-2B employers for comparable occupations. AF 10. Similarly, the CO noted that Employer provided copies of its human resources manual and safety booklet but stated that these documents do not demonstrate that six months of experience is a "normal and accepted" qualification by non H-2B employers for similar occupations. AF 10.

Appeal

Employer submitted a request for review before the Board of Alien Labor Certification Appeals (“BALCA”) on December 23, 2014. In support of its appeal, Employer argued that six months’ experience for a landscape laborer is “normal and accepted” among non H-2B employers in comparable occupations. AF 1. On December 24, 2014, BALCA docketed Employer’s appeal of the CO’s decision to reject Employer’s application for temporary workers. I was assigned this case on January 5, 2015 and received the Appeal File on January 9, 2015. On January 9, 2015, I provided the parties an opportunity to file briefs in support of their positions by fax or mail no later than the close of business on January 16, 2015. As of 12:00 PM eastern standard time on January 20, 2015, I had not received briefs from either party. On January 20, 2015, I received a “Notice Regarding Status of Proceeding” from Employer’s counsel. In this filing, Employer stated that it had decided to withdraw a request for a hearing at the outset of this case. The DOL, however, was now unlawfully delaying Employer’s application for temporary workers by issuing a new RFI related to state-mandated employee licenses. Employer thus requested that its original withdrawal of a hearing request be considered contingent upon the DOL withdrawing or processing this latest RFI.³

SCOPE OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO’s denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

ISSUE

In this case, I must determine whether six months’ experience is “normal and accepted” by non H-2B employers for “landscape laborers” or comparable occupations. If six months’ experience is “normal and accepted” by non H-2B employers for “landscape laborers” or comparable occupations, then Employer’s application for temporary labor certification must be

³Employer’s “Notice Regarding Status of Proceeding” cannot be considered in deciding this case and is noted solely to present an accurate procedural history of the case. BALCA’s scope of review in H-2B cases is limited to the Appeal File, the request for review, and any legal briefs submitted by the parties. 20 C.F.R. § 655.33(e). Given that Employer’s “Notice Regarding Status of Proceeding” does not fit into any of these categories, it cannot be considered in deciding this case. Even if Employer’s “Notice Regarding Status of Proceeding” is somehow considered a “legal brief,” it was received after the January 16th deadline and would thus be untimely. Consequently, Employer’s “Notice Regarding Status of Proceeding” is noted for the record but cannot be considered in deciding this case.

approved. If six months' experience is not "normal and accepted" by non H-2B employers for "landscape laborers" or comparable occupations, then the Employer's application for temporary labor certification must be denied.

DISCUSSION

According to federal regulations, the job opportunity that is the subject of the H-2B labor certification application 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," BALCA generally defers to the experience requirements listed in the O*Net database. *See e.g., Golden Construction Services, Inc.*, 2013-TLN-30 (Feb. 26, 2013); *A B Controls & Technology, Inc.*, 2013-TLN-22 (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). 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 (June 22, 2012); *S&B Construction, LLC*, 2012-TLN-00046 (Sept. 19, 2012); *A B Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

In the present case, the CO found O*Net requires three months' experience for a landscape laborer. AF 52; *see* O*Net Online, Summary Report for 37.3011.00—Landscaping and Groundskeeping Workers, <http://www.onetonline.org/link/summary/37-3011.00#Knowledge> ("Little or no previous work-related skill, knowledge, or experience is needed for these occupations...employees in these occupations need anywhere from a few days to a few months training."). Given that Employer's experience requirements exceeds the typical experience requirements as provided 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. *See e.g., Jourose LLC, D/B/A Tong Thai Cuisine*, 2011-TLN-30 (June 15, 2011); *Massey Masonry*, 2012-TLN-00038 (June 22, 2012); *S&B Construction, LLC*, 2012-TLN-00046 (Sept. 19, 2012); *A B Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

Employer has failed to meet its burden in this case because it has not provided adequate documentation demonstrating that its job requirements are consistent with the "normal and accepted" qualifications of non H-2B employers in the same or comparable occupations. First, in response to the CO's RFI, Employer provided its "JRGM Production Path" and "Safety Training Manual" to demonstrate that an employee with only three months' experience would not have the necessary training or experience to comply with Employer's safety guidelines. AF 21-23. These documents, however, do not provide any evidence that *other non H-2B employers in the same or comparable occupations* require six months' experience. Instead, the "JRGM

Production Path” merely describes job opportunities with Employer, while the “Safety Training Manual” explains proper safety protocols for company employees. *See* AF 21-49. Neither document sheds any light on the experience requirements of other non H-2B employers in the same or similar occupations. Consequently, the “JRGM Production Path” and “Safety Training Manual” do not sufficiently demonstrate that Employer’s job requirements are “normal and accepted” for non H-2B employers in the same or similar occupations.

Further, in response to the CO’s RFI, Employer submitted a letter from company president Maria Candler to explain why Employer requires six months’ experience for landscape laborer positions. AF 17-18. Specifically, Employer’s letter contends that the DOL approved Employer’s Prevailing Wage Determination, which disclosed that six months’ experience was required for the position. AF 17. The letter also asserts that Employer’s internal safety guidelines are more stringent than DOL safety standards, thus requiring Employer to hire more experienced employees who can comply with its strict safety protocols. AF 17-18. These arguments, however, do not address the fundamental question in this case: whether non H-2B employers require six months’ experience for “landscape laborers” or comparable occupations. The fact that the DOL approved Employer’s Prevailing Wage Determination does not provide any evidence that non H-2B employers require six months’ experience for landscape laborers or similar occupations. Similarly, the fact that Employer’s safety protocols are more stringent than DOL safety standards may show that Employer places a high priority on safety; it does not, however, demonstrate that non H-2B employers require six months’ experience for landscape laborers or similar occupations.

CONCLUSION

Employer has failed to present sufficient evidence demonstrating that six months’ experience is “normal and accepted” by non H-2B employers for “landscape laborer” positions or comparable occupations. Accordingly, I affirm the CO’s denial of temporary labor certification.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's Decision is **AFFIRMED**.

DREW A. SWANK
Administrative Law Judge