



**Issue Date: 31 October 2016**

**BALCA Case No.: 2016-TLN-00075**

ETA Case No.: H-400-16196-428891

*In the Matter of:*

**JANE E. LIBLES,**

*Employer.*

**DECISION AND ORDER REMANDING DENIAL OF CERTIFICATION**

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act (“INA,” or “the 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.<sup>1</sup> 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, the Certifying Officer’s (“CO”) denial of temporary labor certification is remanded.

**STATEMENT OF THE CASE**

H-2B Application

On July 14, 2016, Jane E. Libles (“Employer”) filed an H- 2B Application for Temporary Employment Certification (“ETA Form 9142B”) for the job titled “Maids and Housekeeping Cleaners,” Standard Occupational Classification (“SOC”) code/occupation title 37-2012. (AF 129.)<sup>2</sup> Employer requested one housekeeper from October 1, 2016 to August 1, 2017. (*Id.*) Employer listed the nature of the temporary need as a “one-time occurrence.” (*Id.*) Employer explained that her “one-time occurrence” need is based on her mother’s worsened medical

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<sup>1</sup> On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A. See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. In the present case, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

<sup>2</sup> For purposes of this opinion, “AF” stands for “Appeal File.”

condition; due to her mother's developing medical needs, Employer will need to attend to her mother over the course of the next ten to twelve months to help her recover from her medical complications. (AF 140.) Employer's mother had been experiencing consistent back pain, which may lead to the need for spinal surgery and rehabilitation. (AF 140.) Employer requested six months' experience for this position. (AF 132.)

### Notice of Deficiency

On July 25, 2016, the CO issued a Notice of Deficiency ("NOD"), notifying Employer that her application failed to meet the acceptance criteria in light of three deficiencies. (AF 123.) The CO determined that Employer "cured" one of the three deficiencies, leaving two deficiencies at issue on appeal.

The CO found that Employer failed to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. 655.6(a)-(b). (AF 126.) The CO noted that Employer previously received H-2B certification for a housekeeper in the same area of intended employment from May 16, 2016 to December 31, 2016 based on a one-time occurrence need.<sup>3</sup> Accordingly, the CO found that the current statement of temporary need did not explain how it complied with a one-time occurrence need, which requires an employer to show that she has not employed workers to perform the services in the past and will not need workers in the future. The CO noted that Employer's current dates of need varied significantly from those listed on Employer's previous application. The previous application stated that Employer would be working part-time and would therefore no longer require a temporary worker. Consequently, the CO found that it is unclear how Employer determined its dates of need based on the prior certification and how it determined that it would no longer need a worker after August 1, 2017.

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

1. An explanation regarding why the nature of Employer's job opportunity and number of foreign workers being requested for certification reflected a temporary need, specifically addressing what event determines the end of Employer's period of need; and
2. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards for a one-time occurrence.

(AF 127.)

The CO also found that Employer failed to establish that the job's qualifications are "consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment" pursuant to 20 C.F.R. §655.20(e). (AF 127.) Specifically, the CO noted that Employer required the job applicant to have six months of experience in the job offered. The CO wrote that it was unclear what specific job experience Employer required.

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<sup>3</sup> Although Employer received H-2B certification in its previous application, Employer could not hire a housekeeper because the cap on visas had been reached already.

To remedy this deficiency, the CO directed Employer to submit evidence that the job opportunity's qualifications are normal and accepted. The CO asked that Employer's response include "a letter detailing what the offered job entails and why six months of experience in this occupation is necessary." (AF 128.)

Finally, the CO found that Employer did not submit an accurate ETA Form 9142. Specifically, the CO wrote that Employer listed its SOC code and SOC occupation title as 37-2012, Maids and Housekeeping Cleaners. However, the National Prevailing Wage Center determined in the ETA Form 9141, P-400-16153-329002, that the SOC code and SOC occupation title is 37-3011, Landscaping and Groundskeeping Workers.<sup>4</sup>

#### Employer's Response to Notice of Deficiency

On August 5, 2016, Employer responded to the CO's request, providing documentation in support of her application. (AF 92.) Employer provided the following documents: (1) statement of temporary need; (2) medical articles; (3) statement of bona fide job offer; and (4) housekeeper job ads in the area.

Employer wrote a "Statement of Temporary Need" dated August 4, 2016. (AF 93-95.) Employer wrote that her mother has been suffering from back pain; her mother has bone segmentation in her back vertebrae that will require surgery. Because of her mother's age, her mother will need ten or more months to recover fully. Employer wrote that her mother "is scheduled for a lumbar fusion spinal surgery" and will then take part in a rehabilitation and exercise program." Employer listed the duration of her mother's pre-surgery preparation, surgery, and post-surgery rehabilitation. Employer wrote that she has not employed a housekeeper in the past because the United States Citizenship and Immigration Services ("USCIS") did not issue a visa in the previous application. Employer will no longer need a temporary worker once her mother recovers.

Employer submitted articles on Postoperative Care for Spinal Fusion Surgery by John E. Sherman, M.D. (AF 96-108.) The articles describe the typical lumbar fusion recover process. Employer highlighted a sentence that states "the bone continues to mature and solidify over a prolonged period, usually for 12 to 18 months after the surgery." The articles also describe each step of the recovery process and the amount of recovery time. In its "statement of bona fide job offer," Employer listed a housekeeper's specific daily responsibilities. (AF 109-110.) Finally, Employer submitted job advertisements ("job ads") for housekeeper positions in the Chicago area. (AF 111-119.) The first job ad requested a housekeeper "who is experienced." (AF 111.) The second job ad requested "previous experiences and references." (AF 114.) The third job ad requested someone with "cleaning experience," and the last ad requested "experience in cleaning a home." (AF 117-119.)

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<sup>4</sup> This is clearly a mistake made by National Prevailing Wage Center, not by Employer. Nothing in the application suggests that Employer was seeking to hire a landscaper rather than a housekeeper.

To correct the third deficiency, Employer permitted the CO to correct its ETA Form 9142 by adjusting the SOC occupation code to 37-3011.<sup>5</sup>

### Final Determination

On September 16, 2016, the CO issued a Non-Acceptance Denial (“Denial”). (AF 78-91.) The CO found that Employer failed to show that the job is temporary in nature and that the job requirements are normal and consistent. (*Id.*) The CO addressed the first deficiency, stating that in both applications, the one-time occurrence rested on the health of Employer’s mother and Employer’s need to devote full-time care to her mother. The CO found that the mother’s health “appears to be an ongoing situation with no definitive end.” The CO acknowledged that Employer based her end date on her mother’s recovery time and included articles on standard recovery times for spinal surgery. However, the CO noted that Employer did not submit any evidence substantiating the mother’s surgery date or specific medical opinion on the mother’s personal condition and predictions for recovery. (AF 84.)

The CO also found that Employer failed to show that its job requirements are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. (AF 85.) The CO wrote that although Employer provided job listings requiring housekeepers to have experience, none of these examples stated the amount of experience required. Furthermore, Employer failed to explain why specifically six months is required and did not provide supporting documentation that this requirement is normal and accepted for non-H-2B employers. Consequently, the CO denied the application because Employer failed to establish a one-time need occurrence for an experienced housekeeper from October 1, 2016 to August 1, 2017.

### Appeal

On September 29, 2016, Employer submitted a request for review before the Board of Alien Labor Certification Appeals (“BALCA”). (AF 1-77.) Employer’s request included a brief and copies of documents already in the record. (*Id.*) On September 30, 2016, BALCA docketed Employers’ appeal. The undersigned received the Appeal File on October 11, 2016. In support of its appeal, Employer argued that: 1) Employer has a definitive end date and has not hired workers in the past and; 2) the special vocational preparation (“SVP”) range for SOC code 37-3011 is below four, which permits a six months’ experience requirement.

First, Employer argued that contrary to the CO’s position, Employer proposed a definitive end, August 1, 2017, based on Employer’s mother’s treatment plan. (AF 1). Employer also wrote that she has not hired workers in the past to perform the requested job duties. USCIS did not accept the previously approved labor certification because visa numbers were unavailable. Since USCIS did not accept the application, Employer did not hire a temporary worker.

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<sup>5</sup> The undersigned notes again, that the CO “permitted” Employer to change the code from the correct code (housekeeping) to an incorrect code (landscapers), rather than acknowledging that the National Prevailing Wage Center made the mistake, not the Employer.

Second, Employer wrote that under SOC code 37-3011, the SVP range is below four and the six month requirement falls within the allotted experience, which provides that employees need anywhere “from a few days to a few months of training.”

### The CO’s Brief

The Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a brief on October 21, 2016. The Solicitor argued that Employer failed to establish temporary need. (Solicitor’s Brief at 4.) The Solicitor wrote that Employer has not given any information about the end date and has not submitted any documentation to set a definite end date. (Id. at 6.) The Solicitor noted that the submitted medical data only provides general information and does not provide any specific information regarding Employer’s mother’s health and diagnosis. (Id. at 7.)

The Solicitor also argued that Employer did not demonstrate that the experience requirements are normal and accepted qualifications required by non-H-2B employers. (Id. at 8.) The Solicitor noted that none of the submitted job ads required six months experience. (Id. at 9.) Employer failed to explain why its job requirement is normal and accepted. The Solicitor found that Employer included additional documents in its appeal that were not before the CO, specifically, Employer referenced the SVP range for the position, which is a new legal argument. (Id. at 11.)

### **SCOPE OF REVIEW**

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file, the parties’ legal briefs, 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 the 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).

### **DISCUSSION**

#### 1. Did Employer establish that its job opportunity is temporary in nature?

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the DHS. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The DHS regulations provide that employment “is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish

that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. (*Id.*) The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); see also Tampa Ship, 2009-TLN-44, slip op. at 5 (May 8, 2009).

Here, Employer requests a temporary worker for a “one-time occurrence.” In order to establish a one-time occurrence:

The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

8 C.F.R. § 214.2(h)(6)(ii)(B)(1). Since the regulations provide no guidance as to precisely what documentation an employer should submit, ETA has published a list of Frequently Asked Questions (“FAQs”) to help guide applicants. Regarding the documentation required for establishing a one-time temporary need, the FAQs state, “[e]vidence that has been used in cases of one-time need includes contracts showing the need for the onetime services, letters of intent from clients, news reports, event announcements, and similar documentation.” See ETA, H-2B FAQs – Round II at 3, [http://www.foreignlaborcert.doleta.gov/pdf/h2b\\_faqs\\_round2.pdf](http://www.foreignlaborcert.doleta.gov/pdf/h2b_faqs_round2.pdf).

In response to the CO’s document production request, Employer presented an explanation letter and medical articles describing the recovery process for spinal fusion surgery. The medical articles suggested that the standard recovery process is twelve to eighteen months after the surgery. In the explanation letter, Employer described her mother’s medical condition and listed the amount of time needed for each step of the recovery process. Employer also explained why she has not employed workers in this position in the past; stating that she never received a visa for the previous application.

The CO found that Employer did not meet her burden of establishing temporary need because Employer did not provide evidence to substantiate her arguments. The CO found that the mother’s health “appears to be an ongoing situation with no definitive end.” (AF 84.) However, Employer’s evidence does establish an end date; Employer’s statement of need and supporting medical literature demonstrates that the mother’s health is not an ongoing situation. Employer meticulously set out the surgery and recovery process and demonstrated why she will no longer need a temporary worker at the end of ten months. The medical articles support Employer’s statement of need, showing that the typical recovery process is twelve to eighteen months.

Employer based her temporary need on her mother’s health. Contrary to the CO’s position, Employer explained that she based the job’s end date on a particular event: her mother’s surgery. Employer’s evidence supports her position that she will no longer need a worker once her mother recovers; the medical articles provide general information on recovery times and Employer’s statement of need provides projected recovery times consistent with the

medical articles. Despite this evidence, the CO found that “the employer did not submit any documentation substantiating the Mother’s surgery date or specific medical opinion on the mother’s personal condition and predictions for recovery.”<sup>6</sup> (*Id.*) The CO’s finding that Employer’s documentation is deficient because it lacks a specific surgery date or medical opinion requires reversal. The regulations do not require a definitive end date in order to establish temporary need based on a one-time occurrence. The regulations require only that Employer show that she will not need workers to perform the service in the future. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). Employer established that she will not need workers to perform the service in the future by showing that her need will end once her mother recovers from surgery. Thus, the undersigned cannot sustain the CO’s denial on this basis.

2. Did Employer establish that her job requirements are consistent with the normal and accepted requirements imposed by non-H-2B employers?

According to federal regulations, an H-2B job opportunity “must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.” 20 C.F.R. §655.20(e). 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-00030 (Feb. 26, 2013); *A B Controls & Technology, Inc.*, 2013-TLN-00022 (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-00030, slip op. at 5 (June 15, 2011). While the CO in this case did not rely on the O\*Net database in making his determination, the CO did use the incorrect SOC code in processing this matter.

In its appeal letter, Employer argued that under the SOC code specified by the CO, 37-3011, Landscaping and Groundskeeping Workers, the specific vocational preparation (“SVP”) range is below four, which requires over three months up to and including six months of experience.<sup>7</sup> In its brief, the Solicitor argued that Employer cited the wrong code and that the correct code should be SOC code 37-2012, Maids and Housekeepers. Contrary to the Solicitor’s argument, Employer originally used SOC code 37-2012. The NOD informed Employer that the National Prevailing Wage Center determined that the code should be 37-3011 and directed Employer to change the code. Employer complied with this instruction and changed the SOC code to 37-3011 even though this code is for Landscaping and Groundskeeping Workers. Thus, it was not Employer’s mistake in using this code. Under SOC code 37-2012, the SVP range is four to six, which requires over six months up to and including one year of experience.<sup>8</sup>

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<sup>6</sup> The undersigned notes that the CO’s requirement for more specific information regarding Employer’s mother’s medical status and surgical date could run afoul of the privacy rules protecting patient information set forth in the Health Insurance Portability and Accountability Act of 1996, (“HIPAA”) [Pub.L. 104–191](#), 110 [Stat. 1936](#), enacted August 21, 1996

<sup>7</sup> [See http://www.onetonline.org/link/summary/37-3011.00](http://www.onetonline.org/link/summary/37-3011.00);  
<https://www.onetonline.org/help/online/svp>.

<sup>8</sup> [See http://www.onetonline.org/link/summary/37-2012.00](http://www.onetonline.org/link/summary/37-2012.00).

The CO denied Employer's application because Employer failed to show that six months of work experience is normal and accepted for a household maid. In support of her six months' experience requirement, Employer presented a "statement of bona fide job offer" and six job advertisements for housekeepers in the Chicago area. The "statement of bona fide job offer" listed a housekeeper's job duties. Under "justification of experience requirement," Employer wrote that the housekeeper "will need to perform extensive job duties without the supervision of [Employer]." (AF 110.) The submitted job ads all requested work experience of unspecified duration. The CO found that Employer "failed to explain why specifically six months is required and did not provide supporting documentation that this requirement is normal and accepted for non H-2B employers." (AF 85.)

The CO's insistence on processing this appeal under the wrong SOC code, and failure to use the O\*Net in determining whether a six-month experience is appropriate for a housekeeper position makes it impossible to determine whether the CO's denial should be affirmed or reversed. Thus, the undersigned is remanding the matter to the CO. On remand, the CO should use the correct SOC code and consider whether Employer's evidence establishes a need for six months experience, given that O\*Net provides that for the proper SOC code, 37-2012, the SVP range is four to six, which requires over six months up to and including one year of experience.

### **ORDER**

In light of the foregoing, it is hereby ORDERED that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification is reversed and REMANDED for proceedings in accordance with this Decision.

For the Board

**THERESA C. TIMLIN**  
Administrative Law Judge