



Issue Date: 01 April 2016

BALCA Case No.: 2016-TLN-00023  
ETA Case No.: H-400-15315-736606

*In the Matter of:*

**Bassett Construction Inc.,**  
*Employer.*

### **DECISION AND ORDER AFFIRMING 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 affirmed.

### **STATEMENT OF THE CASE**

#### **H-2B Application and Notice of Deficiency**

On November 17, 2015, Bassett Construction Inc., (“Employer”) filed an H- 2B Application for Temporary Employment Certification (“ETA Form 9142B”) for the job titled “Fiberglass Laminators and Fabricators,” Standard Occupational Classification (“SOC”) code/occupation title 51-2091. (AF 318.)<sup>2</sup> Employer requested ten Fiberglass Laminators and Fabricators from February 1, 2016 to January 31, 2019. (*Id.*) The job required applicants to have sixty months of relevant work experience. (AF 321.) Employer listed the nature of the

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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.”

temporary need as a “one-time occurrence.” (AF 318.) Employer explained that its need is a “one-time occurrence” because two companies hired Employer to construct several carbon fiber enclosures on a high-tech campus. (Id.) Employer wrote that these projects are expected to last three years. (Id.)

On November 27, 2015, the CO issued a Notice of Deficiency (“NOD”), notifying Employer that its application failed to meet the acceptance criteria in light of four deficiencies. (AF 309-317.) Employer cured two of the four deficiencies, leaving two deficiencies at issue on appeal. Employer appeals the deficiency finding that the job’s qualifications are not “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 312.) Specifically, the CO noted that Employer required all job applicants to have sixty months’ related experience, which exceeds the twenty-four months’ experience requirement for Fiberglass Laminators and Fabricators in the Occupational Information Network (“O\*Net”) database.<sup>3</sup> (Id.)

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

1. Documentation which demonstrates that the employer’s requirements for the job opportunity 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; and
2. A letter detailing the reasons why sixty months of experience in Fiber Carbon Fiber Panel Installing is necessary for the specific occupation listed on the employer’s ETA Form 9142.

(Id.)

Employer also appeals the deficiency finding that Employer failed to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. 655.6(a)-(b). (AF 313.) The CO found that Employer did not submit sufficient information to establish its requested employment period. (Id.) The CO noted that Employer requested additional workers for several new construction projects and provided a timeline for these projects as well as contracts from the two companies that hired Employer: Frener & Reifer and BNBuilders. (Id.) However, one of the contracts was unsigned and neither contract included the beginning or end dates of the contract/project. Consequently, the CO found that Employer did not adequately explain how it calculated its dates of need of February 1, 2016 through January 31, 2019.

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

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<sup>3</sup> O\*Net is a comprehensive database developed by the DOL ETA 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. Signed work contracts or other signed agreements between the employer and Frener & Reifer that contain the beginning and end dates of the project;
2. Signed work contracts or other signed agreements between the employer and BNBuilders that contain the beginning and end dates of the project;
3. Other evidence and documentation that similarly serves to justify the requested dates of need of February 1, 2016 through January 31, 2019.

(AF 314.)

### Employer's Response to Notice of Deficiency

On December 7, 2015, Employer responded to the CO's request, providing documentation in support of its application. (AF 195-307.) In response to the CO's request for documentation demonstrating that the job opportunity is consistent with the normal and accepted qualifications imposed by non-H-2B employers, Employer submitted two documents: a business necessity letter and an assembly method statement.

In the business necessity letter dated December 4, 2015, Erik Loft, Employer's Controller, explained that the Carbon Fiber Panel Installer/Finisher position is a highly specialized position that broadly falls into the O\*Net classification of Fiberglass Laminators and Fabricators. (AF 209.) Mr. Loft wrote that the O\*Net classification "is merely the closest fit," and that the Carbon Fiber Panel Installers will in fact perform work that domestic fiberglass workers have never done. (Id.) Applicants for the intended position must have "in depth knowledge of carbon fiber roof construction." (Id.) Along with the business necessity letter, Employer submitted a "Manufacturer's Assembly Method Statement" which identifies the differences between "the proposed work and typical carbon fiber laminating/fabricating." (Id.) Mr. Loft wrote that "the Manufacturer advises employing people with significant experience, five (5) years or greater." (Id.) He explained that employees must have significant experience in order to avoid "costly errors, lengthy rework, and irreversible damage." (Id.)

In response to the second deficiency, Employer explained that two contractors, BNBuilders and Frener & Reifer, hired Employer to construct carbon fiber panel roofing. (AF 197.) Employer wrote that it is under pressure to move forward with these projects and that it estimates that this temporary, one-time occurrence would start on February 1, 2016 and end on January 31, 2019. (Id.) In response to the CO's request for documentation demonstrating that the job opportunity is temporary in nature, Employer submitted: (1) BNBuilders' Offer of Contract Letter with projects' beginning and end dates; (2) Schedule acceptance from Frener & Reifer; and (3) Carbon Fiber Roof Panel photos: showing that installation has not begun but materials are in place for moving forward. (Id.)

### Final Determination and Appeal

On February 25, 2016, the CO issued a Non-Acceptance Denial ("Denial"). (AF 175-181.) The CO found that Employer had two deficiencies: 1) Employer failed to show that its job requirements are normal and consistent and 2) Employer failed to show that its job is of a temporary nature. The CO noted Employer's statement that "no previous U.S. workers have

been employed in this position because the technology is new and only available overseas.” (AF 179.) Accordingly, the CO found that Employer’s position is not a bona fide job opportunity for U.S. workers and Employer’s own statement suggests that the U.S. workers’ requirements are less favorable than the H-2B workers’ requirements. (Id.) The CO found that Employer did not provide any documentation showing that the job opportunities’ 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. (AF 179-180.) Because Employer acknowledged that its requirements for the position exceed O\*Net standards, the Chicago National Processing Center could not compare the Employer’s job requirements against any similar occupations in the area of intended employment. (AF 180.) Thus, the CO denied the application because Employer failed to remedy this deficiency. (Id.)

The CO also found that Employer failed to show that its job opportunity is temporary in nature. (Id.) The CO wrote that although Employer submitted contracts for its anticipated projects, these contracts do not contain information on the beginning and end dates of “the contract or the project referred to in the contracts.” (AF 180-181.) The CO also noted that the BNBuilders contract is not signed or dated by either party. (AF 181.) The CO acknowledged that Employer provided detailed information on the tasks associated with the project, a letter from BNBuilders describing the anticipated time for the project and a Project Schedule showing tasks and timelines. (Id.) However, the CO found that Employer did not provide any signed contracts or formal plans to justify the dates of need requested. (Id.) Consequently, the CO denied the application because Employer failed to establish a one-time need occurrence for ten Fiberglass Laminators and Fabricators from February 1, 2016 to January 31, 2019. (Id.)

On March 7, 2016, Employer submitted a request for review before the Board of Alien Labor Certification Appeals (“BALCA”). (AF 1-173.) Employer’s request included a brief and several exhibits. (Id.) On March 7, 2016, BALCA docketed Employer’s appeal of the CO’s decision to reject Employer’s application for temporary workers. The undersigned received the Appeal File on March 18, 2016. In support of its appeal, Employer argued that: 1) its position constitutes a bona fide job opportunity that requires experience not found in U.S. workers and 2) that it provided sufficient evidence to show that it has a one-time need for temporary workers. (AF 10-13.) The undersigned received the CO’s brief on March 29, 2016.

### **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). As discussed above, Employer submitted several exhibits along with its legal brief. All of these exhibits are copies of documents already in the Appeal File. 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 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). It is appropriate to take official notice of the O\*Net descriptions. See 29 C.F.R. § 18.201; The Cherokee Group, 1991-INA-280 (Nov. 4, 1992). Additionally, as the CO specifically relied on this information in making his determination, it does not undermine the Board’s limited scope of review to take official notice of the O\*Net database.

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, 2011-TLN-00030; 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.

Under O\*Net Code 51-2091, Fiberglass Laminators and Fabricators have a Specific Vocational Preparation (“SVP”) range from four up to six, which equals up to twenty-four months of experience.<sup>4</sup> Employer seeks applicants with at least sixty months of experience, which significantly exceeds the O\*Net classification requirements. In defense of its requirement for sixty months experience, Employer asserted that the Carbon Fiber Panel Installers will be performing work that is more specialized than the O\*Net position and will be using innovative technology not used in the United States. (AF 10.) Employer wrote that the position never existed “before the employer’s use of this new technology.” (Id.) Employer centers its argument on showing that its job opportunity is a bona fide job opportunity for United States workers despite the unavailability of United States workers with these skills. In its brief, Employer wrote that “it still needs to test the U.S. market to determine for certain that there are no available U.S. workers.” (Id.)

Employer’s arguments fail to establish that its job requirements are consistent with the normal and accepted requirements of non-H-2B employers. Employer’s evidence does not

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<sup>4</sup> See <http://www.onetonline.org/link/summary/51-2091.00>; <http://www.onetonline.org/help/online/svp>

establish that another employer would impose similar requirements for a comparable position. Employer's Controller wrote that "the Manufacturer advises employing people with significant experience, five (5) years or greater." (AF 209.) However, Employer did not provide the source for this statement. The Manufacturer's Assembly Method Statement does not contain any information on the experience that employees must have to perform the installation work. The statement merely describes the assembly process and contrary to Employer's assertions, does not explain how this process differs from regular installation methods. While Employer's business necessity letter may support Employer's need for extensive experience, it is insufficient to show that other employers would require a similar amount of experience for a comparable position. An employer's own preference is insufficient under section 655.20. See S&B Construction, LLC, 2012-TLN-00046; see also MS Drywall and Paint Co., 2015-TLN-00018, slip. op. at 6 (Feb. 10, 2015) (citing Massey Masonry, 2012-TLN-00038 (June 22, 2012)) ("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.'"). Consequently, Employer does not offer any evidence to show that other employers would require an additional three years of experience to perform this type of installation work.

Employer's argument that its position is more specialized than the O\*NET classification and does not exist in the United States does not overcome Employer's H-2B obligations to provide normal and accepted job requirements. If one were to accept Employer's premise, then H-2B employers would be able to circumvent the "normal and accepted" requirement by asserting that their job opportunities are more specialized than the ones offered in the United States. Employers could then impose more stringent requirements and preclude U.S. workers from applying to these positions, thus undermining the purpose of § 655.20.<sup>5</sup> An employer cannot defend that its job requirements are "normal and accepted" by comparing the specialized skills of foreign workers to United States workers. See e.g., Starlife Food, LLC, 2014-TLN-00031 (affirming denial where employer argued that Italian Bakers are required to have at least two years of experience as compared to United States bakers who are required to have three months' experience).

Instead of offering evidence to show that its job opportunity's requirements are normal and accepted, Employer offered evidence that its job opportunity "is beyond the scope of the generic O\*Net occupational classification." (AF 11.) Employer therefore appears to concede that its job opportunity's requirements are not normal and accepted by non-H-2B employers.

In sum, the regulations at 20 C.F.R. Part 655, Subpart A require employers to show that its job requirements 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. Employer's business necessity letter and Manufacturer's Assembly Method Statement does not meet Employer's burden in showing that sixty months' experience is consistent with the normal and accepted requirements for Fiberglass Laminators and Fabricators or a similar position. The CO properly found that Employer did not cure this deficiency.

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<sup>5</sup> See 80 Fed. Reg. 24042, 24062 (April 29, 2015) ("[u]nder DOL's longstanding policy, job qualifications and requirements must be customary; *i.e.*, they may not be used to discourage applicants from applying for the job opportunity. Including requirements that do not meet this standard would undermine a true test of the labor market.")

2. 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). A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. AB Controls & Technology, Inc., 2013-TLN-00022 (Jan. 17, 2013). In evaluating whether a job opportunity is temporary, “[i]t is not the nature or the duties of the position which must be examined to determine the temporary need,” rather, “[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position.” Matter of Artee Corp., 18 I. & N. Dec. 366 (1982), 1982 WL 190706 (BIA Nov. 24, 1982).

Here, Employer requests temporary workers 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: (1) a Statement of Temporary Need including the projects’ outline from February 1, 2016 until January 31, 2009 (2) an unsigned contract between Employer and BNBuilders; (3) a signed contract between Frener & Reifer and Employer; (4) Frener & Reifer’s schedule for its project; and (5) Letter from Jeff Faulkner, BNBuilder’s Site Manager.

The CO found that Employer did not meet its burden of establishing temporary need because Employer did not provide “any signed contracts or formal plans that justify the dates of need requested.” (AF 181.) The CO also noted that Frener & Reifer’s project schedule “shows some dates in 2016 but provides no specific tasks, timelines, or milestones that justify the employer’s dates of need and that there will no longer be a need after January 31, 2019.” (Id.) The CO properly found that Employer failed to establish a temporary need under the one-time occurrence category. However, the CO’s finding that Employer’s documentation is deficient because it lacks “specific tasks, timelines, or milestones” does not merit a denial. The regulations do not require an Employer to submit documentation establishing specific details, “the documentation need only support the petitioner’s theory as set forth in the statement of temporary need.” Tampa Ship, LLC, 2009-TLN-00044 slip. op. at 6.

Employer provided contracts with Frener & Reifer and BNBuilders. These contracts establish that Employer has a one-time occurrence need for temporary workers. Although the BNBuilders contract is unsigned, the record includes a letter of offer stating that BNBuilders intends to hire Employer for several carbon fiber projects. (AF 251.) The letter states that BNBuilders is in the process of negotiating the agreement and requests Employer to ensure that it is “adequately staffed to handle the anticipated workload during this period.” (Id.) BNBuilder’s Site Manager estimated that the project’s timeline will last from June 2017 through January 2019. (Id.)

While Employer is able to show a one-time occurrence need for temporary workers, Employer has not provided evidence that justify its dates of need. As the CO correctly noted, there is nothing in the documents that show that Employer will need employees from February 1, 2016 through January 31, 2019. Neither of the contracts establish how long the project will last. As the CO emphasized, Frener & Reifer’s schedule for its project includes dates from 2015 through the beginning of 2016. (AF 181.) The only evidence supporting Employer’s requested dates of need, apart from its own timeline, is BNBuilder’s offer letter in which Jeff Faulkner writes that the project will last from June 2017 until January 2019. (AF 251.) Mr. Faulkner’s estimated project timeline is one year and four months shorter than Employer’s requested period of need. Employer has not provided any evidence showing why the anticipated projects will require three years.

Consequently, Employer has failed to establish that it has a need for ten temporary workers under a one-time occurrence need from February 1, 2016 through January 31, 2019. Thus, the CO properly denied the application on this basis.

**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 AFFIRMED.

For the Board:

THERESA C. TIMLIN  
Administrative Law Judge

Cherry Hill, New Jersey