



Issue Date: 14 December 2015

BALCA Case No.: 2016-TLN-00013

In the Matter of:

KILLINGTON PICO SKI RESORT PARTNERS, LLC,

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.¹ 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 September 10, 2015, Killington Pico Ski Resort Partners, LLC (“Employer”) filed an H-2B Application for Temporary Employment Certification (“ETA Form 9142B”) for the job titled “Cook II”. (AF 164-183.)² Employer requested sixteen short order cooks from November 24, 2015 to April 10, 2018. (AF 164.) The job required the applicant to have one year of relevant work experience. (AF 166.)

On September 21, 2015, the CO issued a Notice of Deficiency (“NOD”), notifying the Employer that its application failed to meet the acceptance criteria in light of five deficiencies.

¹ 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.

² For purposes of this opinion, “AF” stands for “Appeal File.”

(AF 153-163.) Employer cured four of the five deficiencies, leaving only one deficiency at issue on appeal. Employer appeals the deficiency finding 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 162.) Specifically, the CO stated that Employer required all job applicants to have twelve months of "related experience", which exceeds the three months' experience requirement for short order cooks in the Occupational Information Network ("O*Net") database.³ (AF 162-163.)

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 twelve months of related experience is necessary for the specific occupation listed on the employer's ETA Form 9142B.

(AF 163.)

Employer's Response to Notice of Deficiency

On October 5, 2015, Employer responded to the CO's request, providing documentation in support of its application.⁴ (AF 118-152.) In the response, Employer provided a "Business Necessity" letter from Judith Geiger, Employer's Human Resources Director, explaining why Employer requires twelve months' experience for the "Cook II" position. (AF 151-152.) As explained in the letter, twelve months' experience is necessary because Employer has a diverse and extensive menu coupled with a large volume of patrons. (AF 151.) Employer wrote that Cook II's must operate large-volume cooking equipment and assist new staff. (AF 152.) The letter went on to state that:

As guest expectations grow within the food and beverage industry, more experience is needed and required to move from an entry-level cook/food server at Killington to a Cook II, where proficiency and experience are needed to fulfill the restaurant's expectations and volume levels... To become a Cook II, many industry restaurants require a two-or four-year degree certifying completion of a culinary program providing basic training on cooking techniques, health and safety procedures, and other various aspects of restaurant operations. Our

³ O*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).

⁴ The Denial letter states that the Chicago National Processing Center ("CNPC") received Employer's response on October 6, 2015. (AF 113.) However, Employer's response is dated October 5, 2015 and Employer sent its response via email on October 5, 2015. (AF 118.)

establishment recognizes working experience and talents of an individual in lieu of an education.

(AF 152.)

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 stated that such documentation is "outside of and in contradiction to the regulatory requirements of the H-2B program." (AF 135.) Employer went on to state that employers are required to maintain "normal and accepted qualifications required by non H-2B employers... unless they can adequately document business necessity needs for having higher requirements." (AF 136.)

Employer also argued that the DOL assigned Standard Occupational Classification ("SOC") code/occupation title 35-2015 "Cooks, Short Order" to the Cook II position because this classification yielded the highest prevailing wage as required by the regulations. (AF 136.) Employer noted that the SOC code/occupation 35-2014, "Cooks, Restaurant", classified under O*Net Job Zone Two, requires up to one year of experience. (AF 136.) Employer asserted that its Cook II position is consistent with Job Zone 2 occupations, which require between three and twelve months' experience. (AF 136.)

Final Determination and Appeal

On November 16, 2015, the CO issued a Non-Acceptance Denial ("Denial").⁵ (AF 109-114.) The CO found that Employer "did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment." (AF 113.) Thus, the CO denied the application because Employer declined to provide any documentation to remedy this deficiency. (AF 114.)

On November 30, 2015, Employer submitted a request for review before the Board of Alien Labor Certification Appeals ("BALCA"). (AF 1-108.) Employer's request included a brief and several exhibits. (AF 1-108.) On November 30, 2015, 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 December 8, 2015. In support of its appeal, Employer argued that: 1) the DOL ignored the concept of business necessity; 2) Employer provided

⁵ In its brief, Employer noted that the date on the Denial letter is incorrect. (AF 7.) The Denial is dated October 15, 2015. (AF 110.) However, on October 27, 2015, Employer sent an email to the CNPC inquiring about the application's status. (AF 116.) On the same day, the CNPC responded, stating that "as of today's date the case is still under review." (AF 116.) On November 16, 2015, Employer sent another email inquiring as to the status of its application. (AF 115.) Employer stated that it received the Denial via email on November 16, 2015. (AF 7.) Based on the record, the correct date for the Denial letter should be November 16, 2015. The Department did not contest Employer's appeal as untimely.

sufficient business necessity to prove its job requirements;⁶ and 3) the DOL used the wrong classification on the prevailing wage. (AF 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). As discussed above, Employer submitted several exhibits along with its legal brief. Most of these exhibits are copies of documents already in the Appeal File. The exhibits that are not in the Appeal File are excluded from the record. 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. Do the regulations require employers to prove both business necessity and 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

⁶ The CO did not deny Employer's application on the basis that Employer did not provide sufficient business necessity. Thus, this argument is not discussed herein.

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.

Employer asserts that “business necessity trumps the need to demonstrate the employer’s requirements as consistent and normal to the occupation in the area of intended employment, and the need for the employer to also show such consistency in the requirements of non-H-2B employers is a superfluous prerequisite not intended by the H-2B program.” (AF 10.) In support of its position, Employer cited to the permanent labor certification (“PERM”) regulations, which state:

(h) Job duties and requirements. (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones. To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.

20 C.F.R. 656.17(h)(1). However, the H-2B regulations are separate and distinct from the PERM regulations. The H-2B regulations do not have the same “business necessity” language as the PERM regulations. The H-2B regulations state:

(e) Job qualifications and requirements. Each job qualification and requirement must be listed in the job order and 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...The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement specified in the job order.

20 C.F.R. §655.20(e). The regulations’ plain text mandates that all H-2B job qualifications must be consistent with the normal and accepted qualifications imposed by non-H-2B employers. There is nothing in the regulations’ language to suggest that an employer can overcome the “normal and accepted” requirement by showing business necessity. BALCA has consistently required employers to show that its experience requirement is normal and accepted for non-H-2B employers in the same or comparable occupations. See, e.g., Starlife Food, LLC, 2014-TLN-00031; Golden Construction Services, Inc., 2013-TLN-00030; A B Controls & Technology, Inc., 2013-TLN-00022; Evanco Environmental Technologies, Inc., 2012-TLN-00022; Jourose LLC, 2011-TLN-00030; Quality Controlled Manufacturing, Inc., 2014-TLN-00034, slip op. at 9 (July 29, 2014); Persona, Inc., 2015-TLN-00036 (April 7, 2015).

Employer cited to In Matter of Destin Fire Control District, for the proposition that if an employer can establish that its job requirements arose out of business necessity, it does not need

to establish that the requirements are normal to the industry. 2013-TLN-00040 (March 20, 2013). In Destin, the employer submitted a letter explaining why it needed twenty-four months' experience for lifeguards. Id. Employer also submitted a USA Today article discussing the rip-current conditions in the Destin area. Id. BALCA found that this evidence satisfied the employer's burden in showing that its experience requirement is consistent with the "same or comparable occupations in the area of intended employment." Id. at 5. Notably, BALCA did not eradicate the "normal and accepted" requirement in Destin but rather found that the employer's letter and USA Today article satisfied the employer's burden. Id.

In the present case, Employer submitted a business necessity letter from its Human Resources Director explaining why it requires twelve months' experience for the Cook II position. The letter explained that Cook II's have to prepare a diverse menu, handle high volume production, assist new staff, and operate large machinery. The letter stated that "many industry restaurants require a two-or four-year degree certifying completion of a culinary program." (AF 152.) While the letter supports Employer's need for twelve months' experience, it does not support Employer's burden that twelve months' experience is normal and accepted in the industry. Although Employer asserted that many restaurants require a two or four year degree, a bare assertion without supporting evidence is insufficient for an employer to meet its burden of proof. See John Gosney, 2012-TLC-00009 (Dec. 30, 2011) (citing Carlos Uy III, 1997-INA-00304 (Mar. 3, 1999) (en banc)). Employer did not proffer any other evidence to show that its experience requirement is consistent with the normal and accepted requirements imposed by non-H-2B employers for the same occupation.

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 does not meet Employer's burden in showing that twelve months' experience is consistent with the normal and accepted requirements for short order cooks.

2. Did the DOL assign the correct SOC classification to the Cook II position?

The job opportunity for Cook II was classified under O*Net Code 35-2015.00 - Cooks, Short Order.⁷ The CO found that for this SOC code, O*Net permits up to three months of experience. (AF 162-163.) Employer argued that the Cook II position should have been classified under O*Net Code 35-2014- Cooks, Restaurant, which requires up to one year of experience.⁸ (AF 13-14.) Employer explained that the Cooks, Restaurant job is more congruent with the Cook II position than with the Cooks, Short Order job.⁹ (AF 13.)

⁷ See <http://www.onetonline.org/link/summary/35-2015.00>.

⁸ See <http://www.onetonline.org/link/summary/35-2014.00>.

⁹ Employer also noted that in last year's application, the Cook II position was classified under code 35-2014. As Employer did not raise this argument before the CO, it is not discussed herein.

Pursuant to 20 C.F.R. §655.10(c), an employer must request and obtain a prevailing wage determination (“PWD”) from the National Prevailing Wage Center (“NPWC”) prior to filing its ETA Form 9142B. The PWD is based on the BLS Occupational Employment Statistics Survey (“OES”). Id. If an employer disagrees with the PWD, it must make a written request to the NPWC Director within seven business days of the PWD’s issuance. §655.13(a). The NPWC Director will then either affirm the PWD or modify the PWD. §655.13(b). An employer can appeal the NPWC Director’s decision to BALCA by making a written request within ten business days of the decision. §655.13(c).

Employer filed a prevailing wage request on July 14, 2015 and received a PWD on September 8, 2015. (AF 13.) The PWD classified the Cook II position under SOC Code 35-2015. (AF 13.) Employer asserted that it had “no time to fight the classification considering [Employer’s] start date on the petition was a mere 2 months away.” (AF 13.) If Employer disagreed with the job’s classification, it should have appealed the NPWC’s determination within seven business days of the PWD’s issuance. Employer’s assertion that it did not have time to fight the classification is without merit. Employer cannot circumvent the appeal process and contest the job’s classification at a later date based on its job’s start date. Consequently, as NPWC classified the Cook II position under SOC Code 35-2015, and as Employer failed to contest the classification when made, it is the proper job classification for the position.

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