



Issue Date: 25 June 2018

BALCA Case No.: 2018-TLN-00149
ETA Case No.: H-400-18092-736383

In the Matter of:

MUSTARD SEED LANDSCAPING, LLC
Employer

Appearance: Stephen G. McGowan, Esquire
Dothan, AL
For the Employer

Alejandra Dominguez
Chicago, IL
For the Certifying Officer

Before: THERESA C. TIMLIN
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Mustard Seed Landscaping’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peak-load, or intermittent basis, as defined by the United States Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, Division A, § 101 (2017).

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). See 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

H-2B Application

On April 2, 2018, Employer submitted an Application for Temporary Employment Certification (“Application”) to the Department of Labor’s Employment and Training Administration (“ETA”). (AF 5.)³ Employer, a landscaping company, sought to hire one Landscaping and Groundskeeping Worker (Landscape Foreman) originally for the period of April 2, 2018 to December 1, 2018. (AF 56). The duties of the Landscape Foreman include performing the layout and design of landscape for residential and commercial clients; operating all type of landscaping and design equipment including backhoes, diggers, and tree movers; and working in extremely hot and cold environments. (AF 58.)

First Notice of Deficiency

On April 5, 2018, the CO issued a Notice of Deficiency (“NOD”), identifying five deficiencies in Employer’s ETA-9142. First, the CO found that Employer failed to file its ETA-9142 at least seventy-five days before the date of need pursuant to 20 C.F.R. § 655.15(b) as it filed on the same date as its beginning date of need, April 2, 2018. To remedy this error, the CO directed Employer to submit an emergency request as per § 655.17 or amend Section B., Item 5 to reflect a compliant start date. (AF 49.)

Second, the CO determined that Employer did not include a job order with the requisite information for submission to the Statewide Work Agency (“SWA”) at the same time it submitted its Application and copy of the job order to the Chicago National Processing Center (“CNPC”) as required by § 655.16. The CO identified twelve bulleted items of information and another list of items numbered one to seventeen that Employer must provide in its job order, some of which overlapped. The CO then instructed Employer to submit a job order with this information or an already-amended job order that contains the required language so that the CNPC can provide this information to the SWA. (AF 50-53.)

Third, Employer did not comply with § 655.18 because it did not offer the same benefits, wages, and working conditions to U.S. workers as it did H-2B workers, according to the CO. In particular, Section E. b., Items 4 and 4(a) on Employer’s Form 9142 indicated that the job does

after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

³ References to the appeal file will be abbreviated with an “AF” followed by the page number.

not require experience, whereas the job order draft calls for twenty-four months of experience. The CO asked that the Employer correct this discrepancy. (AF 53.)

Fourth, the CO found that Employer neglected to identify and include any agreements with agents or recruiters whom it engaged or planned to engage in the recruitment of H-2B workers as per § 655.9. Employer must either identify such parties and submit their accompanying agreements or notify the Department that it will not utilize any agent or recruiter for the recruitment of H-2B workers, the CO said. (AF 53-54.)

Finally, the CO identified three errors in its Appendix B of Employer's ETA 9142: (1) Employer's attorney did not sign and date Section A., Items 6 and 7 and Employer did not sign and date Section B., Items 5 and 6; (2) Employer's attorney mistakenly completed Section J; and (3) Employer listed three worksite locations not listed on the certified ETA Form 9141 for prevailing wage purposes. (AF 54-55.)

Employer's Response to the First Notice of Deficiency

Employer resubmitted its ETA 9142 with a letter dated April 12, 2018. It reflected several changes that addressed the CO's First NOD. This version included a revised beginning date of June 20, 2018 in Section B., Item 5 and a job description section that provided much of the information required by § 655.16. Notably, the job description included a beginning date of June 1, 2018 that differed from the date provided in Section B., Item 5 of the ETA 9142. It also called for two years of experience in landscape design as a prerequisite for the position. The response advised that Employer will not utilize an agent or recruiter in its recruitment of H-2B workers. It also included a revised Appendix B including Employer's attorney signature and date at Section A., Items 6 and 7; a properly blank Section J; and a list of counties where the work will be performed in Section F., Item 7. (AF 34-45.)

Second Notice of Deficiency

On April 24, 2018, the CO issued its second NOD, this time detecting two deficiencies. Here, the CO cited three discrete errors related to § 655.16 in that the job order showed an experience requirement of two years, whereas Section F. b., Item 5 reflected an experience requirement of twenty-five years. The CO also pointed to the conflicting start dates articulated above, as well as its omission of the minimum and maximum amounts provided for daily travel subsistence. (AF 29-30.)

In addition, the CO found that Employer did not comply with § 655.20 because the twenty-five years' experience requirement for this job opportunity included in the original application was not a normal and accepted qualification imposed by non-H-2B employers in the same occupation and area of intended employment. Employer required twenty-five years of experience in "designing and maintaining the most challenging home sites and commercial landscapes" in Section F. b., Item 5, while its job order called for two years of experience in landscape design. The CO held that this requirement exceeds the standardized descriptor for this occupation in O*Net, which indicates three months of experience as a normal and accepted requirement for this position. To rectify this mistake, the CO instructed Employer to provide

documentation demonstrating that twenty-five years of designing and maintaining the most challenging home sites and commercial landscapes represents a normal and accepted requirement imposed by H-2B employers and a letter detailing its reasons why such experience is necessary for the Landscape Foreman position. (AF at 31-32.)

Employer's Response to the Second Notice of Deficiency

In correspondence dated May 2, 2018, Employer submitted a written response to amend the Application to rectify the deficiencies. As to the first deficiency, the latest submission included a start date of June 1, 2018, an experience requirement of twenty-five years, and a daily subsistence rate of at least \$12.26 per day during travel to maximum of \$51.00 per day with receipts. Regarding the second deficiency, Employer justified its experience requirement as normal and accepted based on the sites for which it has specific contracts which necessitate employee knowledge of the vagaries of water flow and potential flood issues and ability to place landscaping in certain areas to mollify flood issues. Employer argued that it needs an employee who has developed these skills and knowledge over twenty-five years to alleviate potential problems that can and do arise in order to adequately serve its clients. (AF 24-25.)

Final Determination and Appeal

On May 29, 2018, the CO denied Employer's Application in its final determination because Employer did not overcome the deficiency by submitting the statement at AF 24-25. It did not substantiate that Employer's experience requirements for the job opportunity are consistent with the normal and accepted qualifications required by non-H-2B employers in the same occupation in the area of intended employment, according to the CO. Nor did Employer specifically explain why twenty-five years of experience in designing and maintaining challenging home sites and commercial landscapes is necessary for this position, when three months' experience is considered normal and accepted for this occupation according to O*Net. (AF 6-7.)

In a letter dated June 6, 2018, Employer submitted a notice of appeal for administrative review of the final determination. In addition to its reason for requiring twenty-five years of experience in its response to the second NOD, Employer stated its selected applicant must be First Aid Certified, have strong knowledge of plants/trees, be able to follow landscape designs, be able to lift 150 pounds, and have excellent skills with landscaping/gardening tools. Employer further contended that three months of experience as described by O*Net does not come close to the minimum requirements for its contracted jobs. (AF 1.)

In correspondence dated June 13, 2018, the Certifying Officer referred this matter to the undersigned, who received the file on June 19, 2018.

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). Employer did not submit any evidence that is not part of 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).

The evidence is reviewed *de novo*, and the Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review, the Board "has fairly consistently applied an arbitrary and capricious standard" in reviewing the CO's determinations. See The Yard Experts, Inc., 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); see also Brook Ledge Inc., 2016-TLN-00033, slip op. at 5 (May 10, 2016). The decision must be affirmed if the CO considered the relevant factors and did not make a clear error of judgment. See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (describing the requirements to satisfy the "arbitrary and capricious" standard of review).

DISCUSSION

When determining whether an employer's qualifications are "normal and accepted," the Board tends to refer to the experience requirements on the O*Net database as a comparator. See Golden Construction Services, Inc., 2013-TLN-00030, slip op. at 8-9 (Feb. 26, 2013). According to the O*Net summary report for the Landscaping and Groundskeeping Worker position, "Little or no previous work-related skill, knowledge, or experience is needed for these occupations. For example, a person can become a waiter or waitress even if he/she has never worked before." <https://www.onetonline.org/link/summary/37-3011.00>. Moreover, O*Net classifies Landscaping and Groundskeeping Worker in Zone 1, meaning the position requires little to no preparation, and separately provides that employees need anywhere from a few days to a few months of training to become proficient at the job. O*Net lists the job activities for this position as disposing of trash or waste materials; operating grounds maintenance equipment; irrigating lawns, trees, or plants; driving trucks or other vehicles to or at work sites; and trimming trees or other vegetation. *Id.*

Based on this background information, it strains credibility that Employer would need to mandate a quarter century's experience to successfully perform this job. O*Net equated the experience requirement of a Landscaping and Groundskeeping Worker to that needed from a waiter or waitress; that is, little to no previous experience. Given the enormous disparity between O*Net's experience requirement and Employer's, as well as the relative simplicity of the job activities involved, it stands to reason that a twenty-five year experience requirement is excessive. Further, such a requirement would disqualify a number of applicants, some of whom have not even been alive for twenty-five years let alone possess that quantity of years of landscaping experience, who are otherwise qualified for the position. The period of time of a

few months at maximum needed to successfully train Landscaping and Groundskeeping Workers, according to O*Net, reinforces the disproportionate nature of this requirement.

Since the twenty-five year experience requirement exceeds the O*Net-provided standard of “little to no” experience, Employer has the burden of proving that its experience requirement is normal and accepted for non-H-2B employers in the same or comparable occupations. See Massey Masonry, 2012-TLN-00038, slip op. at 5 (June 22, 2012). In its most recent appeal, Employer reiterated its position that the successful applicant has a familiarity with the vagaries of water flow and potential flood issues and the ability to place landscaping in certain areas to mollify flow issues. Employer does not even attempt to explain why it believes an employee needs twenty-five years to attain such knowledge and develop such skills. This ambiguous statement alone, devoid of any underlying evidence, fails to adequately assist Employer in meeting its burden of proof.

Employer added that the successful applicant must have First Aid Certification, strong knowledge of plants and trees, the ability to follow landscape designs, the ability to lift 150 pounds, and have excellent skills with landscaping and gardening tools. Neither O*Net nor Employer’s previous appeals and application references some of these skills as prerequisites, particularly the First Aid Certification and weight lifting requirement. Even assuming the importance of such qualifications to the position, Employer fails to consider that one can easily meet this criteria in a period much shorter than twenty-five years. Employer certainly did not put forth an argument contending otherwise except to argue that three months’ experience does not come close to the minimum requirements for its multiple contracted jobs. Again, however, Employer’s lack of underlying support for this proposition precludes it from meeting its burden of proof.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey