



Issue Date: 27 February 2019

BALCA Case No: 2019-TLN-00044
ETA Case No: H-400-18334-925627

In the Matter of:

GUNDERSON, LLC,
Employer.

Certifying Officer: Charlene G. Giles
Director, Chicago National Processing Center

Appearances: Melany Savitt, Esq.
Tonkon Torp
Portland, Oregon
For the Employer

Before: Paul R. Almanza
Associate Chief Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Gunderson, LLC’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, peakload, 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 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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

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 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.

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 “Board”). 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

H2-B APPLICATION

Employer is a manufacturing company that produces railcars in Portland, Oregon. AF 140.³ On January 7, 2019, the Employer filed a Form 9142 with the CO. AF 25. Employer requested certification for 40 Machine Operators from April 1, 2019 to September 30, 2019, based on alleged peakload temporary need during that period.

Notice of Deficiency

On January 17, 2019, the CO issued a Notice of Deficiency (“NOD”). AF 130-39. The CO listed four deficiencies: (1) failure to establish the temporary nature of the job opportunity under 20 C.F.R. § 655.6(a-b); (2) failure to establish temporary need for the number of workers requested, in accordance with 20 C.F.R. § 655.11(e)(3-4); (3) failure to satisfy the obligations of H-2B employers under 20 C.F.R. § 655.20(e); and (4) failure to submit an acceptable job order, in accordance with 20 C.F.R. §§ 655.16 and 655.18. AF 134-38.

On the first deficiency, the CO stated that Employer’s application did not “sufficiently demonstrate the requested standard” of peakload need, and failed to explain “why there is an increase in job orders beginning in April nor why the number of job orders received decrease after September.” AF 134. The CO requested further documentation and an explanation as to why the nature of the job opportunity reflected peakload temporary need. AF 134-35.

On the second deficiency, the CO stated that the Employer “did not indicate how it determined that it needs 40 machine operators during the requested period of need.” AF 135. The CO requested that Employer submit additional evidence showing why it required that many temporary workers for that period of time, summarized monthly payroll reports for the previous two calendar years, and additional documentary evidence to establish that the requested number of workers was needed for that period. AF 135.

On the third deficiency, the CO explained that 20 C.F.R. § 655.11(e) requires that each job qualification and requirement must be listed in the job order and must be 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 137. The CO stated that by requiring applicants to have 24 months of experience as a Machine Operator, the Employer exceeded the “standardized descriptor” for the position of Machine Operator in O*Net. AF 137. The CO noted that O*Net indicates that 3 months to 1 year of experience is normal and accepted for the occupation, and therefore the Employer “did not include qualifications for its job opportunity

³ Citations to the Appeal File are abbreviated as “AF.” For purposes of clarity, the “P” prefix on each page number of the Appeal File has been omitted (*i.e.*, “P60” is instead cited as “60”).

that are normal and accepted qualifications . . . imposed by non-H-2B employers.” AF 137. The CO requested documentation demonstrating that the Employer’s 24 month experience requirement is: (1) consistent with the normal and accepted requirements imposed by non-H-2B employers in the same occupation and area of intended employment, and (2) necessary for the specific occupation listed on its Form 9142. AF 137.

On the fourth deficiency, the CO stated that the Employer’s job order did not contain various informational requirements including Employer’s name and contact information. AF 138. The CO requested that the Employer submit an amended job order containing this information. AF 139.

Employer Response

On January 24, 2019, the Employer responded to the NOD with various documents and exhibits. AF 34.

In response to the first deficiency, Employer explained that it has a significant new contract for 1,500 stack car units that has spurred its temporary peakload need. AF 34. Employer submitted a production schedule for 2017-2019 in support of its alleged temporary peakload need. AF 34-35.

In response to the second deficiency, Employer explained that in order to fill its short-term demand, it needs 40 additional Machine Operators to supplement its permanent staff of 39 Machine Operators. AF 37-38. Employer submitted monthly payroll information from 2017 and 2018, in addition to copies of its 2019 sales orders, in support of its position. AF 38.

In response to the third deficiency, Employer explained that the position of Machine Operator falls within O*Net’s occupation of Multiple Machine Tool Setters, Operators, and Tenders, Metal and Plastic, SOC Code 51-4081. AF 38. Employer noted that the occupation is broad, and includes more “rudimentary types of Machine Operator positions.” AF 39. Given the “size and complexity of [Employer’s] railcar products,” Employer noted that its Machine Operator position is “necessarily complex.” AF 39. Employer submitted a sample job posting indicating a similar Machine Operator position requiring 24 months of experience. AF 39. Moreover, Employer submitted a letter from its HR Director explaining that 24 months of experience as a Machine Operator is necessary for this position. AF 39.

In response to the fourth deficiency, Employer submitted an amended job order containing the requested information. AF 39-40.

CO’s Final Determination

On January 29, 2019, the CO Issued a Non Acceptance Denial of Employer’s Application. AF 25. The CO determined that Employer did not overcome three of the four deficiencies cited in the NOD. *See* AF 25-33.⁴

⁴ The CO no longer cited Employer’s fourth deficiency, the failure to submit an acceptable job order.

On the first deficiency, the CO found that based on Employer's previous customer demand in 2017 and 2018, there is not a consistent production peak. AF 29. Moreover, the CO explained that "a general increase in demand from one-year to the next, as also displayed in the employer's increase in orders from 2017 to 2018, does not represent a peakload need but a general increase in business." AF 30.

On the second deficiency, the CO found that Employer "did not provide any documentation to support" the estimated production numbers for April 2019 through September 2019. AF 31. Moreover, the CO noted that "[t]he Employer's original submitted documentation included an article regarding a shortage of manufacturing workers; however, a general shortage cannot be used as the basis for calculating a need for a specific number of workers as it contains no details specific to the Employer." AF 31.

On the third deficiency, the CO noted that the sample job order submitted by Employer in its response to the NOD was for the position of Machinist/CNC Machine Operator,⁵ and the SOC Code for that position is 51-4012, Computer Numerically Controlled Machine Tool Programmers, Metal and Plastic. AF 33. The CO found that this was "inconsistent with the SOC Code 51-4081 requested for this application." AF 33. Moreover, the CO noted that only 3 months to 1 year of experience is necessary for SOC Code 51-4081. AF 33. The CO found that that the HR Director's letter did not sufficiently justify the Employer's 24 month experience requirement. AF 33.⁶

PROCEDURAL HISTORY

On February 12, 2019, BALCA received Employer's request for administrative review of the CO's final determination. AF 1. Along with its request for administrative review, Employer included its brief setting forth the grounds for its appeal request. *See* AF 11-20. On February 14, 2019, I was assigned this matter. On February 19, 2019, I issued a Notice of Assignment and Expedited Briefing Schedule, granting the parties "no later than the close of business . . . on the seventh business day after they receive the appeal file" to file briefs. I received the Appeal File on February 21, 2019. The CO has informed me that it will not be filing a brief. As Employer has already submitted its brief, this matter is ripe for decision.

SCOPE OF REVIEW

BALCA's standard of review is limited in H-2B cases. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

⁵ CNC stands for "Computer Numerically Controlled." *See* AF 33.

⁶ Because I affirm the CO's final determination based on the Employer's failure to justify its requirement for 24 months of experience, I will not further discuss the first two deficiencies in this decision.

DISCUSSION

The job opportunity for which an employer seeks certification 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,” the Board generally defers to the experience requirements listed in the O*Net database. See e.g., *Golden Construction Services, Inc.*, 2013-TLN-00030 (ALJ Feb. 26, 2013); *A B Controls & Technology, Inc.*, 2013-TLN-00022 (ALJ Jan. 17, 2013); *Evanco Environmental Technologies, Inc.*, 2012-TLN-00022, slip op. at 7 (ALJ March 28, 2012); *Jourose LLC, d/b/a Tong Thai Cuisine*, 2011-TLN-00030, slip op. at 5 (ALJ June 15, 2011).⁷ 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; Massey Masonry*, 2012-TLN-00038 (ALJ June 22, 2012); *S&B Construction, LLC*, 2012-TLN-00046 (ALJ Sept. 19, 2012); and *A B Controls & Technology, Inc.* Additionally, an employer may not require workers to have additional experience for reasons of increased efficiency or profitability, as such a requirement is contrary to the Immigration and Nationality Act. See *Earthworks, Inc.*, 2012-TLN-00017 (ALJ Feb. 21, 2012).

As noted above, O*Net job classifications are probative evidence regarding whether an occupational requirement is “normal and accepted.” See *A Abby Group, Inc. d/b/a A Abby Lawn Care*, 2012-TLN-00024 (ALJ March 30, 2012); *Strathmeyer Forests, Inc.*, 1999-TLC-00006, slip op. at 4 (ALJ Aug. 30, 1999); *Tougas Farm*, 1998-TLC-00010, USDOL/OALJ Reporter at 6 (ALJ May 8, 1998); *Stone Oak Land Design LLC*, 2014-TLN-00022 and 00023 (ALJ Apr. 14, 2014); *Golden Construction Services, Inc.; American Pool Enterprises, Inc.*, 2014-TLN-00021 (ALJ Apr. 7, 2014); and *Earthworks, Inc.*

In this case, the Employer classified the “Machine Operator” position that it requested under O*Net SOC Code 51-408, “Multiple Machine Tool Setters, Operators, and Tenders, Metal and Plastic.” AF 140. O*Net classifies this occupation as a Job Zone 2, meaning that “some previous work-related skill, knowledge, or experience is usually preferred,” and lists an SVP of “4.0 to < 6.0,” indicating experience requirements ranging from Level 4 (“over 3 months up to and including 6 months”) to Level 5 (“over 6 months up to and including 1 year”).⁸ The Employer’s 24 month minimum experience requirement thus exceeds the 3 months to 1 year range listed in O*Net. Because Employer’s experience requirement exceeds the typical experience requirement for the occupation in O*Net, Employer bears the burden of

⁷ O*Net is the nation’s primary source of occupational information. See <http://www.onetcenter.org/overview.html>. O*Net job descriptions contain several standard elements, one of which is a “Job Zone.” An O*Net Job Zone “is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work.” The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation. Each Job Zone level specifies the applicable specific vocational preparation (“SVP”), which is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

⁸ See <https://www.onetonline.org/link/summary/51-4081.00>; <https://www.onetonline.org/help/online/svp>.

demonstrating that its experience requirement is “normal and accepted” for non-H-2B employers in the same or comparable occupations.

In response to the NOD, Employer submitted a letter from its HR Director in support of its 24 month experience requirement. *See* AF 123-24. He explained that Employer has 10 “steps” that Machine Operators climb throughout their careers, with each step representing a different level of work experience (*i.e.*, Step 1 has one year of experience, Step 2 has one year and six months of experience, Step 3 has two years of experience, etc.). *See* AF 123. He noted productivity preferences partially motivated Employer’s experience requirement, noting “approximately 70% of [Employer’s] current Machine Operators are Step 3 or higher . . . [and] [n]ew employees with at least 24 months of prior experience will be able to be more productive soon after hire.” AF 124.

Furthermore, Employer’s HR Director highlighted Employer’s tight production schedule as another significant factor motivating its 24 month experience requirement:

Given the tight timeline of the production schedule we do not have time to train a Machine Operator with only 3 months to one year of experience. We require a Step 3 Machine Operator with 24 months of experience in manufacturing to fill our temporary need due to the immediacy of our need and the need for these Machine Operators to produce parts at a fast pace. As outlined in the corresponding letter responding to the Department of Labor’s Notice of Deficiency, [Employer] committed to a production schedule for 2019 that is 77% greater than usual production output for the peakload period in the H-2B application. Without experienced Machine Operators we run the risk of not meeting our committed production targets and falling behind within our committed schedule for deliveries. Without additional experienced Machine Operators we will operate less efficiently and with excessive overtime to offset the need to deliver on schedule.

AF 124.

Moreover, Employer reasserts in its brief that productivity and a tight production schedule are motivating factors for its 24 month experience requirement:

Again, the basis for the difference in [Employer’s] Machine Operator requirements and DOL’s occupational requirement is based on the following factors and considerations: (1) tight production schedule; (2) speed and accuracy of an experienced worker versus entry-level or low-level worker in producing [Employer’s] large sophisticated railcar product; and (3) sufficient familiarity with machines such as operating shears, punches

AF 19.

However, as noted above, increased efficiency is an impermissible justification for experience requirements that exceed those outlined in O*Net. *See Earthworks, Inc.*

Accordingly, the letter from Employer's HR Director not only fails to help Employer meet its burden, but also ensures that Employer's application must fail.

Assuming *arguendo* that Employer had relied on a permissible justification, the only other evidence submitted to show that a 24 month experience requirement is "normal and accepted" for non-H-2B employers in the same or comparable occupations is a sample job order from "Worksource Oregon," for the position of "Machinist/CNC Machine Operator Mori." AF 120. However, as the CO explained in its final determination, although the job order does show that a minimum of 2 to 4 years of "CNC machining" experience is required, the appropriate SOC classification for this position is more likely 51-4012, Computer Numerically Controlled Machine Tool Programmers, Metal and Plastic. *See* AF 33. Because Employer requested the position of Multiple Machine Tool Setters, Operators, and Tenders, Metal and Plastic, SOC Code 51-4081, and not SOC Code 51-4012, the sample job order is not a proper comparator.

Moreover, even if I were to find that the sample job order was a proper comparator for Employer's position, Employer has not provided, and I cannot find, authority for the proposition that submitting one sample job order is enough for an Employer to meet its burden of demonstrating that its experience requirement is "normal and accepted" for non-H-2B employers in the same or comparable occupations.

Therefore, I find that Employer has failed to demonstrate that its 24 month experience requirement is "normal and accepted" among non-H-2B employers in the same or comparable occupations as required by 20 C.F.R. § 655.22(h). Accordingly, I find that the CO properly denied certification in this matter.

ORDER

Based on the foregoing, the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

I am requesting that this decision and order be served by fax in addition to by regular mail.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge