

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 December 2011

BALCA Case No.: 2011-PER-00023
ETA Case No.: A-06005-71583

In the Matter of:

ATLANTIC LANDSCAPE SERVICES, INC.,
Employer

on behalf of

JAIME RENE ALVARADO,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Patrice K. Perillie, Esquire
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Krantz, Sarno, Bergstrom
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

BACKGROUND

On December 27, 2005, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Landscaping

Architects/Landscape Gardener.” (AF 112-121)¹ On April 17, 2006, the CO denied the application on unknown grounds,² Employer requested reconsideration on March 21, 2007, and on June 11, 2009 the DOL granted reconsideration and issued an Audit Notification letter requesting that Employer provide certain information in accordance with 20 C.F.R. §656.20. (AF 9, 106-111) Employer responded on July 13, 2009. (AF 14-105)

On September 15, 2009, the CO denied the application on the ground that Employer did not conduct the three additional recruitment steps required for a professional occupation, in violation of 20 C.F.R. § 656.17(e)(1)(ii). The CO noted that Employer marked “No” in item I.1 of the Form 9089, and entered a non-professional SOC code in item F.2, indicating the application was not for a professional position. However, the State Workforce Agency (SWA) issued a professional code on its prevailing wage determination (PWD), and therefore Employer should have conducted the professional steps. (AF 12-13)

Employer requested reconsideration/review on October 14, 2009, arguing that the position of Landscape Gardener is a skilled worker but not a professional position, therefore the three additional steps are not required. (AF 3-11) Employer stated that it was in a “Catch 22” position because the Department of Labor (DOL) replaced the Dictionary of Occupational Titles (DOT) with O*Net in 2003, which “downgraded the Landscape Gardener position to unskilled worker, [leaving] no room for distinction between someone who merely cuts lawns and someone who possesses the college degree of Landscape Architect.” (AF 3) Employer states that from 1930-2003, the DOL recognized the skill required to be a landscape gardener, categorizing at an SVP of 7, requiring over 2 years of previous experience. Employer attached the relevant descriptions from the DOT, showing the distinctions between the three positions of Landscape Architect, Landscape Gardener, and Landscape Laborer. It also attached the relevant O*Net descriptions of “Landscape Architect” and “Landscaping and Groundskeeping Workers.” Employer compared and contrasted these descriptions to illustrate that the position for which it filed an application actually fell between the two O*Net occupations. Employer submitted that they sought certification for the Landscape Gardener position (the title they used throughout their application), but the SWA issued a PWD for a professional landscape architect because it was forced to do so by the “Catch 22” of the O*Net designations. Employer cited to *In the Matter of David Razo Gardening Service*, 2002-INA-129 (Apr. 23, 2003) for support. Employer notes that the SWA assigned a low wage level for a professional position, and that DOL documents also confused the Landscape Architect and Landscape Laborer designations.

¹ In this decision, AF is an abbreviation for Appeal File.

² The Appeal File is missing several documents, including the original mailed-in ETA Form 9089, the first DOL denial letter, and the first request for reconsideration.

Finally, Employer notes that the application sat at the DOL for three years before the Audit documentation was requested and Employer's only option other than appeal was to submit a new application. Employer states that this option is not available to it due to the passage of time, and it is too late to request an appeal of the SWA determination or perform additional recruitment, because the PWD and recruitment periods have already expired. Employer argues that the three-year delay effectively denies it the option to correct its application and re-submit, and requests that this be considered upon review in light of fundamental fairness.

The CO forwarded the case to BALCA on October 5, 2010, stating that the request did not overcome the deficiency. Specifically, Employer conceded that it did not conduct the three additional recruitment steps, and its argument that the position at issue is not a professional position is not successful. The CO asserted that Employer could have requested a review of the SWA's PWD but did not do so. (AF 1) BALCA issued a Notice of Docketing on November 22, 2010. The Employer filed a Statement of Intent to Proceed on December 7, 2010, and reiterated its argument by brief on January 4, 2011. The CO did not file a Statement of Position brief.

DISCUSSION

The CO may only certify permanent labor applications if there are not sufficient United States workers who are able, willing, qualified, and available at the time of the application. *See* 20 C.F.R. § 656.1(a)(1). In order to verify the employer's attestations and determine whether U.S. workers were apprised, the CO must determine whether the Employer conducted the mandatory, and, in the case of professional positions, additional recruitment steps designed to apprise U.S. workers of the job opportunity in the labor application. § 656.20(b)(1). The PERM regulations require that an employer filing an application for permanent alien labor certification for a professional position conduct three additional recruitment steps. In this case, Employer did not conduct the three additional recruitment steps because it did not believe it was filing an application for a professional position.

Professional or Non-Professional Position

Appendix A to the Preamble to the Code of Federal Regulations at 20 C.F.R. §656 lists the occupations considered "professional" for the purposes of the regulations.³ This document is titled "Appendix A to the Preamble – Professional Recruitment Occupations – Education and Training

³ Appendix A was not published in the Code of Federal Regulations, but is found in the Federal Register at 69 Fed. Reg. at 77377-77384.

Categories by O*Net – SOC Occupation.” It lists occupations and provides the SOC/O*NET code for each, as well as the Education and Training Category.⁴

On its ETA Form 9089 Employer indicated several times that it was seeking certification for a *non*-professional position. It marked “No” in item I.1 of the Form 9089, which asks, “Is the application for a **professional occupation**. . .? Professional occupations are those for which a bachelor’s degree (or equivalent) is normally required.” (AF 115)(emphasis in original) Employer indicated that the minimum level of education required was High School, and that while no training was required, two years’ experience was necessary. (AF 113-114) Employer affirmed that the job opportunity’s requirements were normal for the occupation at item H.12. (AF 114) Employer provided the job title of “Landscape Gardener.” (AF 113) On item F.2 of the Form 9089 Employer entered the SOC/O*NET code 37-3011, which is not a professional job code in Appendix A. (AF 113) That code corresponds to the occupation “Landscaping and Groundskeeping Workers.”

The only information on the ETA Form 9089 that suggests that Employer *is* seeking certification for a professional position is the Occupational Title provided by the SWA: “Landscaping Architects.” (AF 113)

The record includes Employer’s Prevailing Wage Request (PWR) to the SWA. (AF 32) In that request, Employer described the position as “landscape gardener,” with a rate of pay of \$10 per hour. Employer stated that no college degree or training was required, that the foreign worker would supervise no workers, and that 2 years of experience were required. Employer listed the job description as: “design and implement landscaping projects. Condition soil beds, choose plants according to soil and climate conditions. Execute landscaping designs, care and maintain gardens and grounds. In winter months prune perennials, prune and spray trees, condition soil beds, etc.” *Id.*

The SWA issued its PWD on March 8, 2005. It issued the SOC/O*NET code 17-1012, with the Occupation Title “Landscape Architects,” Skill Level 2, and prevailing wage of \$24.18 per hour. The PWD was valid from May 26, 2005 to December 31, 2005. (AF 33) Appendix A states that this code is a Category 5 occupation, meaning it requires a bachelor’s degree.

The CO asserts that because the SWA issued a professional SOC/O*NET code, Employer’s failure to conduct the three additional recruitment steps for professional occupations is a violation of §656.17(e)(1)(ii). Employer does not argue that the code and title provided by SWA are not professional;

⁴ These categories are: 1 (first professional degree), 2 (doctoral degree), 3 (master’s degree), 4 (work experience plus bachelor’s or higher degree), 5 (bachelor’s degree). 69 Fed. Reg. at 77377.

rather it asserts that the code and title provided by SWA are not reflective of the position for which it seeks certification. Employer argues that the subject position is for a “Landscape Gardener,” which is not a professional occupation, and therefore it was not required to recruit using the professional recruitment standard.

All the information on the ETA Form 9089 indicated that the Employer was seeking to fill a non-professional position, except for the data generated by the SWA. The SOC/O*NET code entered by Employer on the ETA Form 9089 is not listed in Appendix A, and the education and experience requirements all support the inference that the Employer’s application was for a non-professional occupation. This is further supported by Employer’s PWR to the SWA, where Employer clearly requested a prevailing wage for a position that required no bachelor’s degree or training, would involve no management, and would pay less than half the rate of the professional position the SWA cited.

Further supporting Employer’s claim that it sought certification for a non-professional occupation is the fact that the information on the PWR corresponds closely to the information provided by Employer on the ETA Form 9089. Both give the job title of “landscape gardener,” require no more than a high school education, require no training, require 2 years of experience, and provide identical, verbatim, job duty descriptions. (AF 32, 114)

DOT and O*NET titles

Employer goes to great length to illustrate that there is no SOC/O*NET code that properly reflects the subject position. Employer wished to hire a “Landscape Gardener,” as defined in the DOT. However, in 2003 the DOL replaced the DOT with O*NET, and when that changed occurred, O*NET removed the title of Landscape Gardener. The DOT offered three titles: Landscape Architect, Landscape Gardener, and Landscape Laborer. (AF 4-5) The Architect title was a professional occupation, involved planning and designing land area such as parks, airports, highways, parkways, hospitals, schools, etc., and had a Specific Vocational Preparation (SVP) Level⁵ of 8 (four to 10 years). The Gardener title was not professional, involved planning and executing small scale landscaping operations, and maintaining grounds and landscape, and had a SVP Level of 7 (two to four years). The Laborer title was not professional, involved moving soil, equipment and materials, digging holes, and performing duties related to assisting the Landscape Gardener, and had a SVP Level of 2 (anything beyond a short demonstration up to and including one month). (AF 4-5) The Gardener and Laborer titles both fell under the Industry

⁵ The PERM regulations define Specific Vocational Preparation (“SVP”) as “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 worker situation.” 20 C.F.R. § 656.3.

Designation of “Agriculture and Agricultural Service,” while the Architect fell under “Professional and Kindred Occupations.”

O*NET, on the other hand, offered only two titles: Landscape Architect and Landscaping and Groundskeeping Workers. The latter falls into Job Zone 1, meaning little or no preparation is needed, and a high school diploma may be required. Its SVP range is below 4. The job description is strictly manual tasks and included none of the design, planning, or discretionary elements included in Employer’s job description as provided in the PWR and ETA Form 9089. The Architect title falls into Job Zone 4, meaning considerable preparation is needed and most require a four-year bachelor’s degree. Its SVP range is 7.0 to 8.0. Its job description aligns closely with the description it had in the DOT: designing and planning land areas for large projects like parks, airports, hospitals, etc. (AF 6)

Employer argued that this change in title codes put both itself and the SWA in a “Catch 22” position because it “downgraded the Landscape Gardener position to unskilled worker, [leaving] no room for distinction between someone who merely cuts lawns and someone who possesses the college degree of Landscape Architect.” (AF 3) Employer argues that the SWA was forced to assign the code of a professional occupation because the level of experience and job duties exceeded those of Landscaping and Groundskeeping Workers, and there was no other Landscaping code available to the analyst to properly reflect the experience, education level, and job duties of a Landscape Gardener.

Employer goes on to state that if it had designated the position as Landscaping and Groundskeeping Worker, it would have “been forced to accept all applicants with no experience and his customers would not have been satisfied with their job performance.” Employer notes that the business is located in an area where homeowners “invest hundreds of thousands of dollars in their landscaping,” and expresses a concern regarding the potential cost to homeowners and its business if it had to hire unskilled landscape laborers with no experience.

We find all of this data, taken together with the consistencies between the ETA Form 9089, the PWR, and Employer’s argument, convincing evidence that Employer did not intend to request a prevailing wage for, or seek certification for, a professional position.

SWA Request for Review

The CO asserted that Employer could have requested a review of the SWA’s PWD but did not do so. (AF 1) The regulations give employers notice that they are responsible for ensuring the accuracy of the PWD. *See In the Matter of J & R Technical Services*, 2010-PER-00074 (July 20, 2010). In this

case, Employer was aware that the PWD did not accurately reflect the subject position. The PWD at issue is from a SWA and issued in 2005, therefore the regulations at 20 C.F.R. § 656.40(c) (2008) “governs the Employer’s application, and any application where an employer is relying on a PWD from a SWA.” *In re Karl Storz Endoscopy*, 2011-PER-40, (Dec. 1, 2011)(en banc).

The 2008 regulations provide means for an Employer to provide supplemental information to the SWA:

If the employer disagrees with the skill level assigned to its job opportunity, or if the SWA informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the SWA.

§ 656.40(h)(1) (2008). Further, the regulations provide

The SWA must consider one supplemental submission about the employer’s survey or the skill level the SWA assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the SWA does not accept the employer’s survey after considering the supplemental information, or affirms its determination concerning the skill level, it must inform the employer of the reasons for its decision. (3) The employer may then apply for a new wage determination or appeal under § 656.41.

§ 656.40(h)(2)-(3). Therefore, Employer could have submitted supplemental information to the SWA when it disagreed with the PWD and skill level assigned. If that supplemental information did not produce the desired results, it could have applied for a new wage determination or appealed. The review must have been requested within 30 days of the date from when the PWD was issued by the SWA. § 656.41(a). Employer submitted no such supplemental information, nor did it request such a review.

Employer asserts that the problem was not that the SWA was providing inaccurate information; it was that O*NET provided no accurate option for the SWA to choose. Employer feels that there was no action it could have taken to remedy the inaccuracy and points out that the only alternate code it could have requested from the SWA (Landscaping and Groundskeeping Worker), was also inaccurate.

However, if Employer had requested a review from the SWA of the PWD, and the SWA changed the code to Landscaping and Groundskeeping Worker, the professional/nonprofessional problem would have been eliminated. At that point, Employer would have been faced with the problem of its stated minimum requirements (namely the two years’ experience) exceeding the SVP level assigned by the SWA. However, Employer would have then had the opportunity to document its requirements as arising from business necessity, under § 656.17(h). *See generally J&R Technical Services*, 2010-PER-74 (affirming denial when the PWD listed in Employer's application was for a different job category than the job listed in the labor application).

Employer cites to *David Razo*, 2002-INA-129 (Apr. 23, 2003), where the Board stated that “O*Net has compressed many occupations that have been separately identified in the DOT, and such compression indicates that the O*Net is less precise about particular occupations than is the DOT.” In this case it seems that the compression of occupations has perhaps made Employer’s application process more complicated, but it has not actually resulted in the kind of “Catch-22” described by the Employer. There was a different way Employer could have approached its application to avoid this problem, which would have been to request review from the SWA back in 2005.

Conclusion

While we find Employer’s position that it did not intend to seek certification for a professional position convincing, we do not accept its argument that it was caught in a “Catch 22” with no way to submit an application that complied with the regulations, because it could have appealed to the SWA for review, and/or proven its requirements through business necessity.

The fact remains that Employer submitted a PWD from the SWA that did not support its attestations on the Form 9089. That PWD indicated a professional position listed on Appendix A. Where a position is listed on Appendix A, it is considered a professional occupation, and the regulations require an employer to recruit using the professional recruitment standard. Failure to recruit using the professional recruitment standard for a professional occupation will result in the denial of labor certification. *See Federal Medical Group, Inc.*, 2008-PER-00012 (Apr. 28, 2008). Employer did not conduct the three additional recruitment steps required for a professional occupation, in violation of 20 C.F.R. § 656.17(e)(1)(ii). Accordingly, the labor certification must be denied.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

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KENNETH A. KRANTZ
Administrative Law Judge

KAK/lec/mrc
Newport News, Virginia

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.