

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date issued: April 23, 2003

BALCA Case No.: 2002-INA-129
ETA Case No.: P2000-CA-09485946/NDL

In the Matter of:

DAVID RAZO GARDENING SERVICE,
Employer,

on behalf of

JESUS JOSE RAZO,
Alien.

Appearance: James T. Daly, Esquire
Santa Barbara, California
For Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and

any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On November 14, 1997, David Razo Gardening Service ("Employer") filed an application for labor certification to enable Jesus Jose Razo ("Alien") to fill the position of Landscape Gardener. (AF 41). The job duties were described as follows:

Plan and execute small scale landscaping operations and irrigation installation. Maintain grounds/landscapes of private residences. Prepare/grade terrain, locate/plant shrubs, trees, flowers. Maintain/repair of equipment such as mowers, electric hedge clippers. Trim trees and bushes of various heights.

The CO issued a Notice of Findings ("NOF") on October 12, 2001, proposing to deny certification based, *inter alia*, on Employer's failure to comply with the regulations at 20 C.F.R. §656.21(b)(2)(i)(A), 656.21(b)(2)(ii). (AF 38). The CO found the job requirements to be unduly restrictive, as they included duties which did not appear in any single Dictionary of Occupational Titles ("DOT") job description. Specifically, the DOT description of a landscape gardener does not include the duty of installation of irrigation systems; that duty is found in the DOT description for an Irrigation System Installer or other similar positions.

Employer submitted rebuttal on November 14, 2001. (AF 18). Employer stated its belief that requiring a landscape gardener to install irrigation systems was not a restrictive requirement, but rather a normal job duty. While conceding that the DOT description of the duties of a landscape gardener did not include installation of irrigation systems, Employer argued that the duties did include planning and executing small landscaping operations, and that a critical component in the planning process was the issue of the irrigation/sprinkler system. Once designed, the landscape gardener then executed the plan, which, when it called for installation of a sprinkler system, required the gardener to install same.

In support of its argument, Employer pointed to the Occupational Outlook Handbook (“OOH”) which described the positions of Landscape Contractors and Landscape Laborers, the former being required to coordinate and oversee installation of various landscaping items including sprinkler systems, while the latter physically installed and maintained landscaped areas, including employing irrigation methods to adjust the amount of water consumption. Employer argued that the duties of a Laborer were similar to the duties of a Landscape Gardener. Employer also contended that the O*Net system for classifying positions, which is now preferred by the Department of Labor, did not contain the position of Landscape Gardener, but showed the position as “Landscaping and Groundskeeping Workers.”

Employer also included letters from two landscaping companies, attesting to the fact that installing sprinkler/irrigation systems was a normal job duty for a landscape gardener. Thus, attached to Employer’s rebuttal letter was a letter from TAI Construction, Inc., Cliff Tillotson, President, and from ACACIA Landscaping & Erosion Control, Inc., Renee Tillotson, President. (AF 33, 34). Both letters asserted that landscape gardeners install and repair or maintain sprinkler systems.

The CO issued a Final Determination on January 16, 2002, denying certification. (AF 16). The CO found that Employer’s assertions and documentation did not justify the restrictive requirement. The CO pointed out that the OOH is a handbook used basically as an overview of duties which may be required of a worker in a particular occupation, and that the description of a Landscape Contractor therein was not the position being petitioned herein, where Employer was seeking a Landscape Gardener. While Employer claimed that the duties according to the O*NET job description included sprinkler installation, the CO stated that the petitioned occupation was submitted and a wage determination was issued using the Service Contract Act survey source, which did not include installation of sprinkler systems.

By letter dated February 17, 2002, Employer requested a review of the denial of labor certification by the Board of Alien Labor Certification (“BALCA” or “Board”). (AF 1). Employer’s position is that the CO placed too much weight on the DOT definition, that the O*Net, OOH and

letter from two landscape companies were not given proper weight. Employer also argued that the CO raised the issue of the Service Contract Act for the first time in the Final Determination, thus rendering Employer unable to provide rebuttal. In a statement of position filed upon docketing by the Board, Employer repeated these arguments, and argued that if it had been able to address the SCA issue, it might have been able to determine whether the SCA classification used included sprinkler systems.

DISCUSSION

Under 20 C.F.R. § 656.21(b)(2)(ii), a combination of duties is presumed to be an unduly restrictive requirement. The presumption may be overcome if the employer demonstrates that:

- (1) it normally employs workers to perform that combination of duties;
- (2) workers customarily perform that combination of duties in the area of intended employment; or
- (3) the combination of duties is based on a business necessity.

In the instant case, Employer chose to provide documentation to show that Landscape Gardeners customarily install irrigation systems, despite the absence of that duty in the DOT job description.

Initially, we observe that the DOT's "Landscape Gardener" definition does not include installation of irrigation systems as a job duty, while other DOT positions do include that duty, suggesting that irrigation systems installation is itself a specialized occupation. Thus, the CO properly raised the combination of duties issue. However, we find that Employer adequately documented that installation of irrigation systems is customary to the position of Landscape Gardener.

The Board has long held that the DOT is used as a guideline that should not simply be applied mechanically. *Promex Corp.*, 1989-INA-331 (Sept. 12, 1990). Thus, although installation of irrigation systems is not expressly listed as a job duty for a Landscape Gardener, it is not difficult to

believe that a Landscape Gardener would engage in such an activity. For instance, one of the job duties listed for a Landscape Gardener in the DOT is "dig trenches and install drain tiles," which would appear to be functionally similar to – albeit clearly not the same as – digging and installing an irrigation system.

Employer correctly notes that the Occupational Outlook Handbook entry "Landscaping, Groundskeeping, Nursery, Greenhouse, and Lawn Service Occupations," while not addressing the position of "Landscape Gardener," does describe occupations with similar duties, and that installation and maintenance of irrigation systems is a typical job duty for these occupations. The absence of a specific discussion of the occupation of Landscape Gardener in that overview does not in our view cut against such a position including irrigation related duties.

The O*Net" is a computerized database of occupational definitions, intended to replace the DOT. A "crosswalk" from the DOT "Landscape Gardener" position leads to the O*NET-SOC Code "37-3011.00 Landscaping and Groundskeeping Workers."¹ The crosswalked position includes in the description of job duties "sprinkler installation." The CO dismissed this evidence on the ground that the wage determination made in the instant case was based on a SCA occupational code, which did not include installation of sprinkler systems in its definition. The SCA Service Contract Act Directory of Occupations for "11090 GARDENER" is similar to the DOT definition.² The fact that the SCA occupational definition was used for establishing the wage, however, does not negate the fact that O*Net suggests that sprinkler installation is a duty common to landscaping occupations.

O*Net has now been on-line for several years. According to ETA's web site "O*NET

¹ See the O*Net Online page at "http://online.onetcenter.org/gen_crosswalk_page."

² Employer's counsel stated that he had not been able to access the SCA database on-line, attaching a page from the Department of Commerce's NTIS FebWorld Service Contract Wage Determination Database to illustrate his difficulty in this respect. The SCA Directory of Occupations, however, is available on-line on ETA's web site at <http://www.dol.gov/esa/regs/compliance/whd/wage/p11090.htm>.

replaces the *Dictionary of Occupational Titles*"³ and is intended to improve upon the DOT for today's work environment.⁴ The regulations governing permanent labor certification at 20 C.F.R. Part 656 still reference the DOT. The Department has pending proposed regulations, however, at 67 Fed. Reg. 30465 (May 6, 2002), which, if finalized, would use O*Net rather than the DOT for position descriptions. We find that, although the present application is being processed under regulations that use the DOT as the standard for assessing job descriptions, an O*Net job description does have some documentary value when assessing job classification issues, even though it has not yet been formally adopted for use in permanent labor certification applications. The 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. For present purposes, however, we find that the O*Net's consolidation of the DOT Landscape Gardener position with similar landscaping positions in fact supports Employer's argument that landscaping positions - such as the one it is offering - generally include duties relating to irrigation.

Finally, the Employer's rebuttal included letters from two other landscaping companies to support its argument that irrigation-related duties are customary for Landscape Gardeners. The Final Determination mentions the letters but does not state why they were found inadequate. We find no substantial reason to question their credibility.⁵ Based on the foregoing, we find that Employer successfully rebutted the NOF on the combination of duties issue.⁶

³ See <http://www.doleta.gov/programs/onet/glance.asp>.

⁴ See generally "Replace with a database: O* NET replaces the Dictionary of Occupational Titles" at <http://www.doleta.gov/programs/onet/onet2txt.asp>.

⁵ We observe that the two companies that provided these letters have nearly the same street address and that the surnames of the Presidents of the two companies are the same. These circumstances, however, do not permit us to draw any conclusion about the credibility or lack thereof of the letters.

⁶ The NOF also raised an unlawful rejection of U.S. applicants issued; however, this issue was found in the Final Determination to be successfully rebutted. (AF 17).

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and this matter is remanded for the issuance of a labor certification.

For the panel:

JOHN M. VITTON
Chief Administrative Law Judge

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 of Alien Labor Certification Appeals. 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

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