



Issue Date: 27 April 2010

BALCA Case No.: 2010-TLN-00058

ETA Case No.: C-10047-49358

In the Matter of:

G.H. DANIELS & ASSOCIATES,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF
CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009).

Statement of the Case

On February 16, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from G.H. Daniels III & Associates,

(“the Employer”). AF 66-79.¹ The Employer requested certification for 59 “Landscaping and Groundskeeping Workers” from April 1, 2010, until November 30, 2010. AF 66. The Employer indicated on its application that the temporary jobs were not full-time positions. *Id.* Along with its application, the Employer submitted a letter which notified the CO that the Employer had previously received certification for the same job opportunity but in a different location. The Employer then requested that the CO “either amend [the previous certification] to include [the two new locations] or certify the enclosed [application] and revoke [the previous certification] if necessary to approve the enclosed [application] because the employer only requires a total of sixty temporary H-2B workers.” AF 75.²

On February 22, 2010, the CO sent a *Request for Further Information* (“RFI”). AF 61-65. Citing to 20 C.F.R. § 655.34(c)(3), the CO noted that the Employer was requesting an amendment to a previously certified application, and stated: “The employer must provide evidence that it complied with regulations concerning amendments. The response must include but is not limited to evidence of written requests submitted for amendments.” AF 63. The CO also asserted that the Employer’s new application “does not represent a bona fide job opportunity” pursuant to 20 C.F.R. § 655.22(h). AF 64. As a result, the CO requested that the Employer provide “an explanation of how the most recent application represents a bona fide job opportunity.” AF 64.

The Employer failed to respond to the CO within the mandated timeframe. Accordingly, on March 25, 2010, the CO denied the Employer’s application. AF 56-60. Citing to 20 C.F.R. § 655.34(c)(3), the CO noted that “the amendment provision [referred to in the Employer’s February 16, 2010 letter] refers only to cases that have not yet been certified.” AF 58. Further, the CO stated that the Employer failed to respond to the RFI, and therefore, did not provide evidence that it complied with the regulations concerning amendments. AF 59. Further, the CO asserted that the Employer failed to provide evidence that the new application represented bona fide job opportunities, and as a result, the CO denied certification. The Employer’s appeal followed.

¹ References to the 79-page appeal file will be abbreviated “AF” followed by the page number.

² The Employer indicated that it attached a copy of the previously certified application to its current application, but a review of the record reveals that the Employer failed to include the previously certified application with its February 16, 2010 submission.

Discussion

Amendments of applications are guided by 20 C.F.R. § 655.34. Accordingly, § 655.34(c)(3) provides:

Other amendments to the application, including elements of the job offer and the place of work, may be requested, in writing, and will be granted if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under § 655.32.

The regulations also provide that “failure to provide the information requested [through an RFI] . . . may be grounds for the denial of the application.” 20 C.F.R. § 655.21(b).

The Employer failed to submit the required documentation to the CO within the timeframe given in the RFI. This failure alone might be sufficient to deny the Employer's application. However, even ignoring the Employer's failure to respond, its new application was correctly denied. The modification provision found at § 655.34(c)(3) allows employers to modify the place of work, but only if the modification is complete prior to certification. The language of the regulation indicates that the modification will be granted so long as it would not have a significant effect upon the CO's ability to make a labor certification. If the application has already been certified, the modification could not possibly have an effect on the CO's ability to make a labor certification because the certification would have already been completed. Therefore, based on the language of the regulation, an Employer's ability to modify the place of employment on an application is limited to pending applications, rather than certified applications.

This interpretation of the regulations is further supported by comparing § 655.32(c)(3) with the other modification provisions contained within § 655.34. Section 655.34(c)(1), for example, requires that an increase in the number of workers occur “before the CO's certification.” Reasonably, the regulations require that modifications that directly impact the domestic workforce be completed before the certification is granted. For example, the CO would have to establish, before granting a geographic location modification, whether the original recruitment conducted by the Employer was sufficient to satisfy the new area. If the application is still pending, then the Employer could simply submit a new recruitment report or, based on the geographic location, the CO might determine the previous recruitment was sufficient. However, if some time has passed, the CO can no longer determine if the

labor market is insufficient to meet the Employer's needs. Thus, under the regulations, all issues regarding the geographic location of the job opportunities should be resolved *before* certification is granted. Since the Employer's previous application was no longer pending, the Employer's new application could not stand as a modification to its former application.

Without the modification request, the Employer's application should have properly been denied pursuant to 20 C.F.R. § 655.22(h). The Employer stated in its application that it only needed "a total of sixty temporary H-2B workers," which had already been granted in its previous certification. The Employer only wanted a modification to its previous certification, not 60 additional workers. Therefore, since the Employer did not need the 60 workers listed in the application, the Employer failed to offer bona fide job opportunities as required by the regulations.

Because the Employer did not qualify for a modification and the new application failed to offer bona fide job opportunities, the CO properly denied certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge