



**Issue Date: 25 May 2011**

**BALCA Case Nos.: 2011-TLN-00025**

ETA Case No.: C-11087-54594

*In the Matter of:*

**MICHAEL E. MARCH**  
**D/B/A**  
**MIKE'S STONE SUPPLY,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Denise March  
Mike's Stone Supply  
Boise, Idaho  
*For the Employer*

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

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, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

### **STATEMENT OF THE CASE**

On March 24, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Michael E. March d/b/a Mike's Stone Supply ("the Employer") for four rock splitters from May 1, 2011 to December 1, 2011. AF 41-48.<sup>1</sup> The Employer indicated that the primary worksite was in Boise, Idaho, but that the work will also be performed at quarries in Marsing, Shoshone, Mackay, and Oakley, Idaho. AF 44.

On March 31, 2011, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that it was unable to render a final determination for the Employer's application because the Employer did not satisfy all of the requirements of the H-2B program. AF 35-40. Among the three deficiencies identified, the CO informed the Employer that although the Employer indicated in its application, ETA Form 9142, that there were five worksites, the Employer's prevailing wage determination, ETA Form 9141, did not include determinations for worksites in Mackay and Oakley, Idaho. AF 37-38. Therefore, the CO requested the Employer to submit copies of its newspaper advertisements and job order in order to verify that the Employer advertised the job at the correct wage rate. AF 38-39.

On April 4, 2011, the Employer responded to the RFI and submitted the requested documentation. AF 14-33. The Employer indicated that the worksites in Mackay and

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<sup>1</sup> Citations to the 57-page appeal file will be abbreviated "AF" followed by the page number.

Oakley, Idaho were no longer accessible and therefore should not have been listed as worksites on the ETA Form 9142. AF 14. Additionally, the Employer submitted copies of its newspaper advertisements and job order. AF 31-33. The job order that the Employer submitted with the State Workforce Agency (“SWA”) provided the location of the job opportunity as “various locations around the State.” AF 33.

The CO denied the Employer’s application on April 28, 2011, determining that the Employer’s job order did not comply with 20 C.F.R. §§ 655.15(e)(2) and 655.17 because it did not provide the geographic area of employment with enough specificity to apprise applications of any travel requirements and where applicants will likely have to reside to perform the services or labor. AF 9-13. The Employer’s appeal followed.

## **DISCUSSION**

The CO may only grant an employer’s petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the U.S. if there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time the employer files its petition. 20 C.F.R. § 655.5(a)(1). Accordingly, the CO must determine whether an employer conducted the recruitment steps required by the H-2B regulations that are designed to apprise U.S. workers of the job opportunity that is the subject of the labor application. The H-2B regulations require an employer to conduct several recruitment steps prior to filing an application for temporary labor certification, including placing a job order with the SWA serving the area of intended employment. 20 C.F.R. § 655.15(d)(2). The job order must satisfy the advertisement content requirements contained at Section 655.17. 20 C.F.R. § 655.15(e)(2).

Under 20 C.F.R § 655.17, advertisements must contain terms and conditions of employment which are not less favorable than those offered to H-2B workers, and must contain the following information:

- (a) The employer’s name and appropriate contact information for applicants to send resumes directly to the employer;
- (b) The geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

- (c) If transportation to the worksite(s) will be provided by the employer, the advertising must say so;
- (d) A description of the job opportunity (including the job duties) for which labor certification is sought with sufficient detail to apprise applicants of services or labor to be performed and the duration of the job opportunity;
- (e) The job opportunity's minimum education and experience requirements and whether or not on-the-job training will be available;
- (f) The work hours and days, expected start and end dates of employment, and whether or not overtime will be available;
- (g) The wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers, each of which must not be less than the highest of the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified H-2B employment; and
- (h) That the position is temporary and the total number of job openings the employer intends to fill.

The Employer's job order stated that the area of employment is "various locations" around the state of Idaho. Absent unusual circumstances, it will be necessary for an employer to include the cities or towns where work will be performed in order to adequately apprise potential applicants of any travel requirements or where they will likely have to reside to perform the services or labor. Here, although the Employer stated that "lodging is provided outside of the Treasure Valley area quarries," this is insufficient to meet the requirements of Section 655.17(b), as it does not inform potential applicants of the locations of the worksites. The Employment and Training Administration ("ETA") carefully considered the newspaper advertisement requirement, and determined that the information listed in Section 655.17 is necessary to adequately apprise U.S. applicants of the position. See Final Rule, *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. 78020, 78034 (Dec. 19, 2008). Furthermore, BALCA has strictly enforced the H-2B newspaper advertisement content requirements in order to protect domestic workers. See *Freemont Forest Systems, Inc.*, 2010-TLN-38, slip op. at 3 (March 11, 2010); *BPS Industries, Inc.*, 2010-TLN-14 and 15, slip op. at 2-3 (Nov. 24, 2009); *Quality Construction & Production LLC*, 2009-TLN-77 (Aug. 31, 2009).

As the Employer did not provide the cities or towns in Idaho where the work would be performed, potential applicants were not apprised of travel requirements and where they would have to reside to perform the work. Accordingly, I find that the CO properly denied certification because the job order that the Employer placed with the SWA did not comply with 20 C.F.R. § 655.17(b).

**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