

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 18 June 2012**

**BALCA Case No.: 2012-TLN-00037**

ETA Case No.: C-12102-58984

*In the Matter of:*

**G.H. DANIELS III & ASSOCIATES, INC.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Chris Pooley, Esquire  
Law Office of Chris Pooley  
Avon, Colorado  
*For the Employer*

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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 matter arises under the H-2B temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A. These provisions, referred to as the

“H-2B program,” permit U.S. employers to temporarily bring foreign nationals to the United States to fill temporary nonagricultural jobs. 20 C.F.R. § 655.6(b).

Prior to petitioning U.S. Citizenship and Immigration Services (“USCIS”) for an H-2B visa classification, an employer must apply for and receive a temporary labor certification from the U.S. Department of Labor (“the Department”). To apply for temporary labor certification under the H-2B program, an employer must file an ETA Form 9142, *Application for Temporary Employment Certification*, with the Department’s Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. After ETA accepts an employer’s application for processing, a Certifying Officer (“CO”) in ETA’s Office of Foreign Labor Certification (“OFLC”) will review the application and make a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies labor certification, in whole or in part, then the employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

### **STATEMENT OF THE CASE**

On April 11, 2012, ETA received an *Application for Temporary Employment Certification* from G.H. Daniels III & Associates, Inc. (“the Employer”) for twenty five (25) “Landscaping and Groundskeeping Workers.” AF 117-222.<sup>1</sup> Under “Place of Employment Information” on the attached ETA Form 9142, the Employer stated that these positions would be “primarily in Eagle, Garfield, Mesa, Pitkin, San Miguel and Summit counties, but may include work sites located anywhere in the state of Colorado.” AF 120. The Employer used this same geographic description in the job order it placed with Colorado’s State Workforce Agency (“SWA”) and the newspaper advertisements it ran in the *Denver Post*. AF 126-127, 132.

On May 17, 2012, the CO issued a *Request for Further Information* (“RFI”), identifying five deficiencies in the Employer’s application. AF 110-116. Only two of these deficiencies are relevant to the instant appeal. The first concerns the work sites that the Employer included under “Place of Employment Information” on its ETA Form 9142. AF 113-114. In particular, the CO found that the Employer included work sites in different Metropolitan Statistical Areas. AF 113. Because the regulations preclude an employer from submitting a single application for multiple worksites in different areas of intended employment, the CO directed the Employer to

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<sup>1</sup> Citations to the appeal file will be abbreviated “AF” followed by the page number.

submit an amended ETA Form 9142 complying with the regulatory requirement that all H-2B workers perform the same services or labor in the same area of intended employment. AF 114. In addition, the CO took issue with the Employer's statement the positions "may include work sites located anywhere in the state of Colorado." AF 113. After instructing the Employer that the entire state of Colorado is not within the same area of intended employment, the CO directed the Employer to specify the cities and counties where the work is to be performed. *Id.*

The second relevant deficiency concerns the Employer's job order and newspaper advertisements. AF 115. Because these postings advertised a position that "may include work sites located anywhere in the state of Colorado," the CO found that the Employer "did not specify 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." *Id.* In order to remedy this deficiency, the CO directed the Employer to provide evidence of its compliance with the regulatory pre-filing recruitment requirements at 20 C.F.R. Part 655.15(e)(2) and (f)(3). AF115-116.

The Employer responded to the RFI on April 23, 2012. AF 50-107. In particular, the Employer submitted an amended ETA Form 9142, in which it removed the job site locations in Pitkin and San Miguel counties, as well as the phrase "may include work sites located anywhere in the state of Colorado." AF 71.

On May 17, 2012, the CO issued a *Final Determination* denying the Employer's application. AF 44-49. In particular, the CO observed that the Employer's job order and newspaper advertisements were inconsistent with the job site locations listed on its amended ETA Form 9142. AF 49. Because of this inconsistency, the CO found that the Employer's pre-filing recruitment advertising did not apprise U.S. applicants of the correct geographic area of employment, as required by 20 C.F.R. Part 655.17. AF 47-49. As a result, the CO denied the Employer's application for failure to comply with the pre-filing recruitment requirements at 20 C.F.R. Part 655.15(e)(2) and (f)(3). *Id.*

## DISCUSSION

### *Scope of Review*

BALCA's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the Employer's request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer's application. 20 C.F.R. § 655.33(a), (e).<sup>2</sup>

### *Pre-Filing Recruitment Requirements*

The Department's regulations require an employer to satisfy certain pre-filing recruitment steps before filing an *Application for Temporary Employment Certification*. 20 C.F.R. § 655.15. These steps include, *inter alia*, placing a job order with the State Workforce Agency ("SWA") in the area of intended employment, as well as two print advertisements in a newspaper of general circulation. 20 C.F.R. § 655.15(e), (f). Both the job order and newspaper advertisements must meet all of the requirements listed in Section 655.17. 20 C.F.R. § 655.15(e)(2), (f)(3). Section 655.17 prohibits pre-filing recruitment advertising from containing terms and conditions of employment that are less favorable than those offered to H-2B workers. Among other things, this section requires an employer's pre-filing recruitment advertising to describe "[t]he 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." 20 C.F.R. § 655.17(b).

Here, the Employer's SWA job order and newspaper advertisements described a much larger geographic area of employment than the job site locations listed in the Employer's amended ETA Form 9142. The former listed work sites in Pitkin and San Miguel counties, and then added that work sites may be located "anywhere in the state of Colorado," whereas the latter limited the geographic area of employment to worksites in Eagle, Garfield, Mesa, and Summit counties. In the *Final Determination*, the CO found that Eagle, Garfield, Mesa, and

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<sup>2</sup> The Employer argues that the regulation at Section 655.33(a)(5) unlawfully violates its due process right to be meaningfully heard. AF 1. However, as an Article I court, BALCA lacks the inherent authority to rule on the validity of a regulation [or] express authority to invalidate the regulations as written." See *Dearborn Public Schools*, 1991-INA-222, USDOL/OALJ Reporter at 7 (Dec. 7, 1993) (en banc).

Summit counties were all within a single area of intended employment. AF 49.<sup>3</sup> In the RFI, however, the CO noted that San Miguel County is 225 miles—or a four hour and seventeen minute drive—from the Employer’s headquarters in Gypsum, Colorado, and that Baca County, the furthest county in Colorado from the Employer’s headquarters, is 395 miles away—or a seven hour and five minute drive—from Gypsum, Colorado. AF at 113.<sup>4</sup> Considering the vast distances between the job site locations described in the Employer’s pre-filing recruitment advertising, in comparison with the job sites listed on the Employer’s amended ETA Form 9142, all of which are located within a single area of intended employment, I find that the terms and conditions of employment in the Employer’s pre-filing recruitment advertising are less favorable than those listed in the Employer’s amended ETA Form 9142. Based on this inconsistency, I affirm the CO’s finding that the Employer’s pre-filing recruitment advertising “did not apprise U.S. applicants of the correct geographic area of employment for this job opportunity,” as required by 20 C.F.R. § 655.17(b).

The Employer argues its reference to job sites “anywhere in the State of Colorado” in its advertising must be construed in conjunction with the job schedule that it listed in the amended ETA Form 9142. According to the Employer, such an interpretation confirms that its reference to job sites “anywhere in the State of Colorado” is limited to those sites in Colorado that are listed in the amended ETA Form 9142. However, as Counsel for the CO points out, applicants reviewing the Employer’s advertising did not have access to the schedule of work sites listed in the Employer’s amended ETA Form 9142, and thus did not have notice of the correct geographic area of employment. As a result, I find that the work schedule listed in the Employer’s amended ETA Form 9142 does not correct the deficiency identified by the CO in the Employer’s pre-filing recruitment advertising.

The Employer additionally contends that the CO’s denial is an irrational departure from past precedent, because ETA previously granted the Employer temporary labor certification for positions located anywhere in the State of Colorado. AF 1. However, the fact that ETA may have let deficiencies slip through in the past should not estop the CO denying certification on a legally sufficient basis. Accordingly, because the Employer did not comply with the

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<sup>3</sup> The Employer has not challenged this finding.

<sup>4</sup> The Employer has not challenged these assertions.

advertisement content requirements provided at 20 C.F.R. Part 655.17, I find that 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