

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 25 June 2013**

**BALCA Case No.: 2013-TLN-00051**  
ETA Case No.: H-400-13074-466669

*In the Matter of:*

**B&C CONTRACTING CO.,**

*Employer*

Certifying Officer: Chicago National Processing Center

Appearances: Timothy L. Finkenbinder, Esquire  
Overstreet, Miles, Ritch, Cumbie & Finkenbinder, P.A.  
Kissimmee, Florida  
*For the Employer*

Gary M. Buff, Associate Solicitor  
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Division of Employment and Training Legal Services  
Washington, D.C.

Before: WILLIAM S. COLWELL  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to B&C Contracting Company’s (“B&C” or “Employer”) request for administrative review of the Certifying Officer’s denial of temporary labor certification under the H–2B non-immigrant program. For the following reason, the Board affirms the CO’s denial of Employer’s application.

**BACKGROUND**

*The H-2B Program*

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service

or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008).<sup>1</sup> After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

### *Procedural History*

On March 15, 2013, the CNPC received an ETA Form 9142 from B&C for four Communication Tower Welders from March 15, 2013 to September 15, 2013. AF 95.<sup>2</sup>

The CO issued a *Request for Further Information* (“RFI”) on March 21, 2013, notifying Employer that its application did not comply with all the requirements of the H-2B program. AF 81-93. Specifically, the CO stated that Employer’s ETA Form 9142 was deficient for several reasons, including<sup>3</sup>:

1. **Pre-filing recruitment requirements** – The job order and advertisements did not indicate that applicants would have to pass a welding test and failed to adequately address the geographic scope of the travel requirements for the position. AF 83.
2. **Failure to establish that the nature of the employer’s need is temporary** – Employer failed to establish that its need for workers is temporary because it has not established that “it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” AF 85.
3. **Failure to satisfy obligations of H-2B employers** – Employer failed to include qualifications for its position that are “normal and accepted” in the “same or

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<sup>1</sup> All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance*, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

<sup>2</sup> Citations to the appeal file will be abbreviated “AF” followed by the page number.

<sup>3</sup> The CO initially listed ten reasons why Employer’s application was deficient. However, the CO withdrew seven of these deficiencies after Employer responded to the RFI with additional documentation. Three issues remain for purposes of this appeal.

comparable occupations” because Employer required a minimum of three years for its job even though O\*Net states that only two years of experience is needed for Welders, Cutters, Solderers, and Brazers. AF 87.

Employer responded to each of the CO’s alleged deficiencies in Employer’s application on March 28, 2013. AF 41-80. First, Employer stated that the welding test was not a requirement for the position. AF 42. Also, given the nature of Employer’s business and the wide geographical area where its clients are located, it was “not feasible” and “unreasonable” to list any location other than the primary worksite. *Id.* Second, Employer stated that its clients, such as AT&T and Sprint, are currently upgrading their networks from 3G to 4G and require structural reinforcements to existing communication towers. Employer expects these to be completed by the end of 2014, and it attached copies of work agreements and ongoing project orders. *Id.*; *see also* AF 46-70. Third, Employer believed that a Communication Tower Welder requires three years of experience, as opposed to the one or two years specified in the O\*Net report. AF 42-43.

The CO issued a *Final Determination* denying certification on May 15, 2013. AF 30-40. The CO cited the same three reasons listed above for denying Employer’s application. Although the CO ignored Employer’s argument that a welding test was not required as part of the job, it rejected Employer’s argument that it was not feasible and unreasonable to further specify the possible work locations. AF 34. The CO stated that Employer failed to list the locations with adequate specificity in its job advertisements and therefore Employer’s application was denied. The CO also stated that the Employer failed to show that the requested workers would be temporary, and that the Employer provided no evidence that it has not used workers to perform these services before or that it will not perform this work again in the future. AF 38. Finally, the CO found that Employer did not provide enough evidence to support its belief that the position required three years of experience, instead of the two years listed in the O\*Net report for Welders, Cutters, Solderers, and Brazers. AF 38-40.

Employer appealed the CO’s Final Determination, requested Administrative Review with the Office of Administrative Law Judges (“OALJ”), U.S. Department of Labor, and filed a supporting brief on May 24, 2013. ETA, in response, filed its brief in opposition to Employer’s appeal on June 7, 2013.

## **DISCUSSION**

Employer stated in its job advertisements that the applicant would have to “travel 4-6 weeks at a time” and that the job location was Kissimmee, Florida. AF 103-04. Also, Employer’s ETA Form 9142 stated that Employer has “contracts all over the Eastern Seaboard (from Central Florida to the Northeast Region of the United States), but the majority of work takes place in Central Florida.” AF 95. Employer stated the place of employment would be Kissimmee, Florida. AF 98.

After the ETA issued its RFI stating that the work locations were unclear, Employer responded that the advertisements were specific enough to give applicants notice of potential job sites. AF 42. Employer did not know the exact locations of any job sites, as they could be

located anywhere from the Eastern seaboard to the Southwest. Employer, however, attached several contracts and work orders indicating jobs in Arkansas, Virginia, Illinois, Georgia, South Carolina, and Texas. AF 46-51. In its brief, Employer stated that identifying all of the jobs sites would not be feasible as there are thousands of towers scattered from the Eastern Seaboard to Texas, and they do not know of a potential contract until one or two weeks prior to the commencement of the job. AF 3-4.

Employers must satisfy certain pre-filing recruitment steps before filing an ETA Form 9142. 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). Section 655.17 lists the requirements that employers must include in these advertisements. Each advertisement must include, *inter alia*, “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 services or labor.” 20 C.F.R § 655.17(b).

The job advertisements did not provide *any* notice to potential applicants where they would travel to for four to six weeks. Although the advertisements say that the job is located in Kissimmee, Florida, potential applicants were not given any hint as to where they would have to travel and reside for four to six weeks at a time. Applicants moreover are not provided with a copy of Employer’s ETA Form 9142, which stated that the workers would have to travel anywhere between the Eastern Seaboard to the Southwest. *See G.H. Daniels III & Assocs.*, 2012-TLN-37, at 5 (June 18, 2012). They, therefore, did not have any indication that the position included such a wide geographical area.

Employer also submitted several contracts and work orders in response to the RFI showing just how wide the potential geographical area for work is. But the Employer’s job advertisements do not reflect that the Employer narrowed (let alone finally defined) the geographical scope of the job opening. Employer’s job advertisements thus remain deficient. Had Employer provided more guidance to potential applicants then the Board may have viewed Employer’s job advertisements differently.

In light of the foregoing, I find that the Employer’s job advertisements failed to comply with the requirements set forth in 20 C.F.R. § 655.17. Accordingly, I affirm the CO’s denial of certification on this basis.<sup>4</sup>

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<sup>4</sup> Because the denial of certification can be upheld on this basis alone, there is no need to address the additional grounds for denial cited by the CO in the Final Determination.

**ORDER**

In light of the foregoing, the Certifying Officer's Final Determination denying certification is hereby AFFIRMED.

For the Board:

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