



**Issue Date: 01 December 2011**

**BALCA Case No.: 2012-TLN-00003**

ETA Case No.: C-11269-55593

*In the Matter of:*

**GULF COAST CRAWFISHING SUPPLY, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Ashley N. Foret  
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*For the Employer*

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Washington, DC  
*For the Certifying Officer*

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

**DECISION AND ORDER**  
**VACATING DENIAL OF CERTIFICATION AND**  
**REMANDING FOR FURTHER PROCESSING**

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, 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).

### **STATEMENT OF THE CASE**

On September 26, 2011, Gulf Coast Crawfishing Supply, LLC ("the Employer") filed an application for temporary labor certification for 14 "helpers – production workers." AF 174-184.<sup>1</sup> The Employer stated that it has a temporary seasonal need for the workers from November 23, 2011 to June 30, 2012. AF 177. The Employer listed the rate of pay offered on the application as "OES MEAN," but did not provide a monetary value. AF 181. The Employer stated that it began its recruitment effort on September 6, 2011 when it placed a job order with the Louisiana State Workforce Agency ("SWA"). AF 181. With the Employer's application, it submitted a copy of its newspaper advertisement and a copy of the job order placed with the SWA. AF 186-194. The newspaper advertisement provided the following information about the wage rate:

Wage \$10.79 to \$11.66 per hour (dependent on mean of OES wage data).  
The wage is dependent upon new US Department of Labor prevailing wage regulations. Wage will change for work performed on and after September 30, 2011 based on new U.S. Department of Labor prevailing wage regulations.

AF 186. The same information was also provided in the Employer's SWA job order. AF 189. The Employer also submitted evidence to show that it submitted its request for a prevailing wage determination ("PWD") to the National Prevailing Wage Center ("NPWC") on July 31, 2011, but as of September 23, 2011, had not yet received a PWD. AF 185.

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<sup>1</sup> Citations to the 209-page appeal file will be cited as "AF" followed by the page number.

On October 3, 2011, the CO issued a *Request for Further Information* (“RFI”), identifying three deficiencies with the Employer’s application, only one of which is at issue on appeal. AF 170-173. The CO stated that it had reason to believe that the Employer is offering a wage that does not equal or exceed 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. AF 172. Therefore, the CO required the Employer to submit a copy of its PWD, ETA Form 9141, in order to verify that the Employer satisfied the pre-filing requirements under 20 C.F.R. § 655.10. *Id.* The CO explained that under Section 655.10, an employer must request a PWD from the National Prevailing Wage Center (“NPWC”), obtain a PWD that is valid either on the date recruitment begins or the date of filing an application for temporary employment certification, and must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC. *Id.*

The Employer responded to the RFI on October 11, 2011. AF 143-169. The Employer stated that it submitted its PWD request to the NPWC on July 31, 2011, and that the NPWC had not complied with 20 C.F.R. § 655.10(b)(6), which provides that the NPWC will return the PWD to the employer within 30 days. AF 144. The Employer stated that its seasonal need begins in November, it has been waiting for its PWD for 71 days, and that it received an email from the NPWC notifying the Employer that “[t]he processing of Prevailing Wage Determinations, redeterminations, and Center Director Reviews has been temporarily suspended.” *Id.* The Employer sought processing of its application under the special procedures regulation at 20 C.F.R. § 655.3 in light of the NPWC’s indefinite suspension of processing PWDs. *Id.* The Employer requested an exemption of the pre-filing requirements at Section 655.10(a)(2) as a result of the NPWC’s delay and the Employer’s impending crawfish season. AF 145.

The Employer included evidence in its RFI materials showing that as of October 10, 2011, the Employer’s PWD request was still being processed. AF 159. The Employer also submitted a copy of a September 23, 2011 email to the NPWC, requesting information about the Employer’s PWD request submitted on July 31, 2011. AF 160. The Employer received a response from the NPWC stating:

The OFLC National Prevailing Wage Center is experiencing delays in processing prevailing wage determinations as it is currently working to reissue certain determinations to comply with a court order issued June 15, 2011 in the United States District Court for the Eastern District of Pennsylvania. A Notice of Proposed Rulemaking was published in the Federal Register on June 28, 2011, and a Final Rule was published on August 1. All Center resources are currently being utilized to comply with this court order. The processing of Prevailing Wage Determinations, redeterminations, and Center Director Reviews has been temporarily suspended. Processing will resume as soon as full compliance with the court order has been completed by OFLC.

*Id.* The Employer also submitted OES wage data that it used to estimate that its PWD would fall between \$10.79 to \$11.66 per hour. AF 162-169.

On October 27, 2011, the Employer submitted a copy of its PWD, which it received from the NPWC on October 17, 2011, and its corresponding amendments to the ETA Form 9142. AF 105-142. The NPWC issued two PWDs to the Employer, one for work performed prior to November 30, 2011, and one for work performed after November 30, 2011. AF 106-111. The PWD for work performed prior to November 30, 2011 is \$9.00 per hour, and the PWD for work performed after November 30, 2011 is \$13.02 per hour. AF 109, 111. The PWD states that “[f]or employers receiving these two PWDs, it must list in the Application for Temporary Employment Certification the two wages in Item G.1 as the range of wages to be offered and insert in G.3 that [Employer] will offer a wage of [the wage from this second, higher PWD] for work performed on or after November 30, 2011, unless the Department further postpones the effective date of, or is legally barred from implementing, the Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program Final Rule, 76 FR 3452 (Jan. 19, 2011).” AF 111. The Employer also submitted the required amendments to Section G of ETA Form 9142. AF 120.

On October 28, 2011, the CO denied certification on the ground that the Employer failed to comply with 20 C.F.R. § 655.10(a)(2). AF 100-104. The CO found that the Employer failed to obtain a PWD that is valid either on September 6, 2011, the date recruitment began, or on September 26, 2011, the date the Employer filed its application. AF 103-104.

The Employer requested administrative review on November 8, 2011. AF 1-97. The Employer explained that it filed its PWD request in July 2011, but had not yet received it when it began its recruitment or filed its application. The Employer stated that it advertised the position using a wage range of \$10.79-\$11.66 that it had estimated by using the OES mean wage data for the occupation, and that it had notified potential applicants about the possibility of a wage change in its advertisements. AF 3. The Employer requested that it be found to be in compliance with the pre-filing requirements in light of the NPWC's delay in issuing a PWD and the Employer's submission of the NPWC's PWD to the CO while the application was pending. AF 5-6.

BALCA received the administrative file from the CO on November 17, 2011, and the Employer filed a brief on November 22, 2011. In its brief, the Employer argues that this case warrants special procedures in the form of a variance of the pre-filing requirement that an employer receive a PWD before beginning recruitment or filing an application. The Employer asserted that it requested a PWD in July 2011 and needed to file its application 60 days before its November 23, 2011 start date of need. The CO filed a Statement of Position on November 22, 2011, contending that the NPWC's delay in issuing a PWD does not excuse the Employer's failure to comply with Section 655.10(a)(2). Additionally, the CO argues that the Employer is not entitled to special procedures processing under Section 655.3 because the Office of Foreign Labor Certification ("OFLC") Administrator has not established any special procedures to create an exemption to any of the pre-filing regulations in response to the NPWC delays.

## **DISCUSSION**

The H-2B regulations require that an employer filing an H-2B application for temporary labor certification must request a prevailing wage determination from the NPC (or NPWC). 20 C.F.R. § 655.10(a)(1). Under Section 655.10(a)(2), an employer "must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing a complete *Application for Temporary Employment Certification* with the Department."

In this case, the Employer filed its PWD request on July 31, 2011, began its recruitment on August 25, 2011, and filed its application on September 19, 2011. As

such, the Employer did not comply with Section 655.10(a)(2) because it had not yet received a valid PWD either on the date that it began recruitment or filed its application.

However, the NPWC also did not comply with the regulation imposing a time limit on the number of days that it has to process PWD requests. The applicable regulation provides:

The NPC will enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer within 30 days of receipt of the request for a prevailing wage determination. The employer must offer this wage (or higher) to both its H-2B workers and any similarly employed U.S. worker hired in response to the recruitment required as part of the application.

20 C.F.R. § 655.10(b)(6). In this case, the NPWC took 78 days to issue the Employer's PWD in violation of the time limit imposed by Section 655.10(b)(6). The Employment and Training Administration ("ETA") imposed this time limit to address concerns about the NPC's capability to provide timely PWDs and in recognition of the time-sensitive nature of employers' need for labor under the temporary labor certification program. *See* 73 Fed. Reg. 78020, 78027-29 (Dec. 19, 2008).

The NPWC's noncompliance with this regulation does not render the CO's denial of certification invalid. *See, e.g., Allagash Maple Products, Inc.*, 2012-TLN-5 and 6 (Nov. 29, 2011); *Stadium Group LLC d/b/a Stadium Club DC*, 2012-TLN-2 (Nov. 21, 2011); *Frey Produce & Frey Bros. #2 and Frey Produce & Frey Bros. #3*, 2011-TLC-403 and 404 (June 3, 2011). Nevertheless, it is clear that the Employer in this case made every effort to comply with Section 655.10(a)(2), but was simply unable to comply with the regulation and file its application in time for its season as a result of the NPWC's delay in issuing the PWD. The Employer waited more than 30 days after submitting its PWD request to file its H-2B application, and it attempted to estimate the PWD that would be issued by the NPWC based on the OES wage data. The Employer's estimate and advertised wage of \$10.79-\$11.66 per hour exceeds the PWD of \$9.00 per hour that covers labor performed up to January 1, 2012.<sup>2</sup>

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<sup>2</sup> Although the NPWC informed the Employer that the \$9.00 per hour PWD covered labor performed up to November 30, 2011, and the \$13.02 per hour PWD covers work performed after November 30, 2011, subsequent legislation has postponed the effective date of the second PWD to January 1, 2012. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 546 (2011).

Accordingly, the Employer fully complied with the requirement under Section 655.10(a)(3) that the offered and advertised wage of equal or exceed the PWD obtained from the NPWC. Additionally, the Employer advertised the wage in a method consistent with the guidance published on OFLC's website by noting that the wage will change after September 30, 2011 (now January 1, 2012) based on new DOL prevailing wage regulations. See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2b6> (last visited Nov. 30, 2011). Therefore, there is no concern that the Employer failed to conduct an adequate test of the domestic labor market or that the employment of foreign workers will adversely affect the wages of similarly employed U.S. workers.

Based on the foregoing, I find that the Employer's noncompliance with Section 655.10(a)(2) was justifiable and excusable. In light of this finding, I need not address the Employer's argument that it is entitled to processing under the special procedures regulation at Section 655.3.

Accordingly, the CO's denial of certification is vacated and remanded for further processing.

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's determination is **VACATED** and this matter is **REMANDED** for further processing consistent with this decision.

For the Board:

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

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Accordingly, the \$9.00 PWD is the correct PWD for work performed up to January 1, 2012. See 76 Fed. Reg. 73508, 73509-10 (Nov. 29, 2011).