



MAY 12 1992

In the Matter of:

VIRGINIA AGRICULTURAL  
GROWERS' ASSOCIATION, Inc.,  
Petitioner,

Case No. 92-TLC-10

v.

U.S. DEPARTMENT OF LABOR, :  
Respondent.

Ann Margaret Pointer, Esq.  
for the Petitioner

Annaliese Impink, Esq.  
for the Respondent

Before: Glenn Robert Lawrence  
Administrative Law Judge

### DECISION AND ORDER

This case arises under the Immigration and Nationality Act, 8 U.S.C. §1101 et seq., as amended by the Immigration and Control Act of 1986, and the regulations at 20 C.F.R. Part 653 and 20 C.F.R. §§655.90 through 655.113. Petitioner, Virginia Agricultural Growers' Association, Inc. (VAGA), is seeking expedited review of a denial by the Employment and Training Administration, U.S. Department of Labor (DOL) of three H-2A applications. Pursuant to 20 C.F.R. §655.112(a), oral arguments were conducted by telephonic conference on May 6, 1992. Based on the record, I have made the following findings of fact and conclusions of law.

#### Findings of Fact and Conclusions of Law

On March 18, 1992, the Virginia Employment Commission (Commission) transmitted its Domestic Agricultural In-Season Wage Reports for the 1991 wage survey in Virginia to the DOL. As a result of its survey of wages offered for the vegetable crop activity in the South Hill wage reporting area, the Commission determined that the prevailing rates for in-state workers were both \$4.50 and \$5.00 per hour. The Commission further determined that both the all worker rate and the interstate rate for the area of intended employment was \$4.33.

On April 24, 1992, VAGA filed three applications for temporary alien agricultural labor certification with the DOL Region III office on behalf of three employers seeking to employ

1,227 aliens to perform farmworker duties on farms located in the Virginia South Hill wage reporting area. At the time the applications were filed, the adverse effect wage rate set by the DOL was \$4.97 per hour. As such, VAGA, in its applications, listed the rate of pay at \$4.97 per hour.

Based on the information submitted by the Commission, on April 16, 1992, the DOL National Office transmitted its prevailing wage rate determinations applicable to the 1992 clearance orders to the DOL Region III office. The National Office set the prevailing wage rate for the vegetable harvesting in the South Hill wage reporting area at \$5.00 per hour.

On May 1, 1992, the Regional Administrator informed VAGA that he could not accept its applications for consideration because they had failed to offer the \$5.00 prevailing wage rate set by the DOL. By telegram dated May 2, 1992, VAGA appealed the DOL's refusal to accept its applications. The parties requested a telephonic hearing in this matter which was held on May 6, 1992. At the hearing, counsel for the Petitioner stated its promise to adhere to the outcome of this Decision. (TR-26).

The Act requires that before a temporary certification can be issued to employers seeking to employ foreign workers for temporary or seasonal agricultural work, the Secretary of Labor must certify that there are not sufficient workers who are able, willing, and qualified to perform the labor or services involved in the petition, and the employment of the alien will not adversely affect the wages and working conditions of domestic workers similarly employed. 8 U.S.C. §1188(a)(1).

As part of the process to determine whether domestic workers are available, the DOL requires employers seeking foreign workers to submit an "Application for Alien Employment Certification" and an "Agricultural and Food Processing Clearance Order", commonly referred to as a Job Order. 20 C.F.R. §§655.101 and 655.102. The Job Order must comply with a variety of requirements, including minimum benefits, wage, and working conditions provisions. If workers are to be paid by the hour, the rate stated must be at least the highest of the following three wage rates:

- (a) the adverse effect wage rate in the state;
- (b) the prevailing hourly wage rate as established by a State Employment Service Agency (SESA) prevailing wage survey; or
- (c) the legal federal or state minimum wage rate.

20 C.F.R. 655.102(b)(g)(i). The DOL has instructed the SESA to follow the guidelines set forth in ETA Handbook No. 385 when determining the prevailing hourly wage rate and for determining in which of the rates, adverse effect wage rate, prevailing wage rate, and federal or state minimum wage rate, should be offered to alien and domestic workers in the area of intended employment.

To determine the prevailing hourly wage rate, three categories of workers are analyzed: all workers; instate workers; and interstate workers. Section C (3) of the Handbook at page I-116 sets forth the procedures to be followed in setting the prevailing wage rate for a crop activity in the area of intended employment.

Prevailing Wage Rate Findings. The State agency shall make the prevailing wage rate findings based upon the collected wage rate information and in conformity with the following:

- a. 40 percent rule. A single rate or schedule which accounts for the wages paid to 40 percent or more of the domestic seasonal workers in a single crop activity is the prevailing rate. If there are two such rates or schedules, the one accounting for the greater number of domestic seasonal workers becomes the prevailing rate. If two rates or schedules are being paid to the-same number of workers and each rate accounts for at least 40 percent of the workers, then both rates or schedules are prevailing.

ETA Handbook No. 385, Section IC3a, p. I-116 (emphasis added).

Once the prevailing wage rate is set, section C (5) at page I-118 provides instructions regarding the applicability of the prevailing wage rate to the employer's orders.

- A. The wage rate offered on intrastate clearance orders should not be less than the "in-state rate".

The wage rate offered on orders placed in interstate clearance for domestic agricultural workers should not be less than the "all workers rate," the "in-state rate," or the "interstate rate," whichever is highest, for the crop activity in the area of intended employment. . . .

ETA Handbook No. 385, Section IC5a, p. I-118 (emphasis added).

Both parties agree that in this instance, the all worker rate is \$4.33, the interstate worker rate is \$4.33, and the in-state worker rates are both \$4.50 and \$5.00, the last sentence of the 40 percent rule controlling. The petitioner argues that the plain meaning of the 40 percent rule results in a finding of two prevailing wage rates, \$4.50 and \$5.00 per hour, these two rates being the highest of the three worker categories. Therefore, VAGA argues, that its offer of \$4.97 per hour, the adverse effect wage rate, is an offer higher than the acceptable prevailing wage rate of \$4.50, and is higher than state or federal minimum wage. VAGA maintains that this offer is acceptable within the DOL's guidelines, and the DOL's rejection of this offer because it does not offer \$5.00 per hour is inconsistent with its own procedures.

VAGA contends that if the DOL had wanted the employer to pay the higher of the two prevailing wage rates, it could have provided in the 40 percent rule that the final step in the process is that the higher of the two rates will be considered the prevailing rate. It did not. VAGA

also argues that by failing to acknowledge both of the two rates as acceptable prevailing wage rates, the DOL's interpretation fails to give the last sentence in the 40 percent rule any effect. (TR-16 and closing brief) .<sup>1</sup>

This argument, on its face, appears plausible. However, if taken to its logical conclusion, the argument becomes untenable. During argument of this case, VAGA could not suggest a sufficient rationale for chasing one of the two prevailing rates. (TR-45). The determination of which of the two prevailing wage rates shall be chosen then becomes arbitrary. As is the case here, the employer will invariably choose the lower of the two rates. I believe this interpretation not only thwarts the intent of the Act, but violates the regulatory language of 20 C.F.R. §655.102(b)(9) as well. The regulation states that:

If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.

20 C.F.R. §655.102(b)(9)(i) (emphasis added). To give any effect to the language quoted above, as well as the language at section C (5) of the Handbook, the rate offered to the workers should be the prevailing wage rate of \$5.00 per hour, the highest rate for the crop activity in the area of intended employment.

Additionally, as counsel for the Administrator points out (TR-34), Congress' intent in enacting the Immigration and Nationality Act and its regulations was to protect the wages and working conditions of the U.S. worker. This is evidenced by section 655.102(b) of the regulations, which states, "in order to protect similarly employed U.S. workers for adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H-2A application always shall include . . . the following . . . wage . . . provisions." To protect the U.S. worker, the DOL must ensure that the wage rate offered to alien workers is the highest wage rate available, given the guidelines and the regulations. Accordingly, the highest rate in this case is \$5.00 per hour. Therefore, the Administrator's determination that the employers' job orders must specify the rate as \$5.00 per hour is affirmed.

#### ORDER

The petition requesting that the DOL be ordered to accept and process the applications without delay is granted in part; the applications should be approved, but at the rate of \$5.00 per hour. The petition is otherwise denied.

GLENN ROBERT LAWRENCE  
Administrative Law Judge

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<sup>1</sup> For purposes of this Decision and Order, TR = transcript of the hearing.