



Issue Date: 29 November 2011

BALCA Case No.: 2012-PWD-00001

ETA Case No.: P-400-10252-229653

In the Matter of:

CURBY'S LAWN AND GARDEN,
Employer

Appearances: Wendel V. Hall, Esquire
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For the Employer

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For the Certifying Officer

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

ORDER OF DISMISSAL

This matter arises from a request for review of a National Processing Center H-2B prevailing wage determination pursuant to 20 C.F.R. § 655.11(e).

BACKGROUND

The Employer in this case received a prevailing wage determination ("PWD") from the National Prevailing Wage Center ("NPWC") on September 27, 2010 for the occupation of "landscape and groundskeeping workers." Subsequently, the Employer

filed an application for temporary labor certification under the H-2B program and received certification for 14 landscaping and groundskeeping workers from February 14, 2011 to December 13, 2011. AF 56.¹

CATA Litigation and DOL's Subsequent Rulemaking

On August 30, 2010, in *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), the U.S. District Court in the Eastern District of Pennsylvania ordered the Department of Labor to promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act (“APA”) within 120 days.² Subsequently, the court extended the deadline to January 18, 2011. *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (Oct. 27, 2010).

In response to the *CATA* decision, on October 5, 2010, the Employment and Training Administration (“ETA”) issued a Notice of Proposed Rulemaking (“NPRM”) that revised the methodology by which prevailing wages are determined. 75 Fed. Reg. 61578 (Oct. 5, 2010). On January 19, 2011, ETA issued a final rule establishing a new prevailing wage methodology. 76 Fed. Reg. 3452 (Jan. 18, 2011). The methodology set forth in the rule was to apply to wages paid for work performed on or after January 1, 2012.

On January 24, 2011, the plaintiffs in *CATA* filed a motion with the district court to order the DOL to comply with the court’s August 30, 2010 order. On June 16, 2011, the court issued a ruling invalidating the Rule’s January 1, 2012 effective date and ordered the DOL to announce a new effective date within 45 days. *CATA v. Solis*, Dkt. No. 119, 2011 WL 2414555 at *4 (E.D. Pa. June 16, 2011). The district court found that the one-year delay in the effective date was not logical and therefore violated the APA,

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

² The district court in *CATA* determined that the DOL had violated the APA by not adequately explaining its reasoning for using skill levels as part of its methodology for making prevailing wage determinations, and that it had failed to consider comments relating to the choice of appropriate data sets in deciding to rely on data from the Bureau of Labor Statistics’ Occupational Employment Survey (“OES”) rather than wage rates established by the Davis-Bacon Act (“DBA”) and McNamara O’Hara Service Contract Act (“SCA”) in setting the prevailing wage rates.

and violated the Immigration and Nationality Act (“INA”) inasmuch as the DOL considered the hardship on employers when deciding to delay the effective date. *Id.*

In response to the June 16, 2011 *CATA* order, ETA issued a NPRM on June 28, 2011, proposing that the wage rule take effect on or about October 1, 2011, rather than January 1, 2012. 76 Fed. Reg. 37686 (June 28, 2011). On August 1, 2011, ETA issued the final rule amending the effective date to September 30, 2011. 76 Fed. Reg. 45667 (Aug. 1, 2011). The final rule notified employers that ETA would issue supplemental PWDs to all employers with H-2B workers who would be performing work on or after September 30, 2011.

2011 Wage Rule and the Appeal Sub Judice

On September 13, 2011, the NPWC issued a Supplemental PWD to the Employer, notifying the Employer that it must pay the new wages calculated pursuant to the 2011 Wage Rule for all work performed on or after September 30, 2011. AF 52-55. On September 20, 2011, the Employer filed a request for review of the Supplemental PWD with the Center Director under 20 C.F.R. § 655.11(a). AF 42-51.

Due to district court litigation challenging the new effective date of the 2011 Wage Rule, ETA published a notice in the Federal Register notifying employers that the new wage rate would be postponed to November 30, 2011. 76 Fed. Reg. 60720 (Sept. 30, 2011). On September 30, 2011, the NPWC issued a letter to the Employer, notifying it that the effective date of the wage rate had been postponed to November 30, 2011. AF 41. The letter made no mention of the Employer’s request for review and made no mention of appeal rights to the Board of Alien Labor Certification Appeals (“BALCA”). *Id.*

On October 28, 2011, the Employer requested BALCA review of the Supplemental PWD. AF 1-39. Counsel for the Certifying Officer (“CO”) filed a Motion to Dismiss on November 8, 2011, contending that the CO had not yet issued a final determination regarding the Supplemental PWD, and therefore, this matter is not ripe for review by the Board. On November 9, 2011, I held a telephone conference call with the parties and granted the Employer five business days after receipt of the appeal file to respond to the CO’s Motion to Dismiss.

BALCA received the appeal file on November 10, 2011, and the Employer filed its brief on November 17, 2011. In its brief, the Employer argues that the Board has jurisdiction to review the appeal because the NPWC's September 30, 2011 letter notifying the Employer that the effective date of the new wage rate had been postponed was a denial of the Employer's request for review. In the alternative, the Employer argues that the CO's decision to delay issuing a written decision on the Employer's request for review is tantamount to a denial. The Employer also argues that the CO's delay has a prejudicial effect on the Employer, and the Board should exercise jurisdiction in the interest of administrative efficiency.

Postponement of New Wage Rule until 2012

On November 18, 2011, the President signed the Consolidated and Further Continuing Appropriations Act, 2012. Section 546 of the Act provides:

None of the funds made available by this or any other Act for fiscal year 2012 may be used to implement, administer, or enforce, prior to January 1, 2012, the rule entitled "Wage Methodology for the Temporary Non-agricultural Employment H-2B Program" published by the Department of Labor in the Federal Register on January 19, 2011 (76 Fed. Reg. 3452 et seq.).

Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 546, *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2112enr/pdf/BILLS-112hr2112enr.pdf> (2011) (*hereinafter* "the Continuing Resolution" or "Section 546").

The legislative history provides:

Section 546 prohibits any funds from being used to implement, administer, or enforce the "Wage Methodology for the Temporary Non-agricultural Employment H-2B Program" prior to January 1, 2012, to allow time for Congress to address this rulemaking. In making prevailing wage determinations for the H-2B nonimmigrant visa program for employment prior to January 1, 2012, the conferees direct the Secretary of Labor to continue to apply the rule entitled "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" published by the Department of Labor on December 19, 2008 (73 Fed. Reg. 78020 et seq.).

H.R. REP. NO. 112-284, at 197 (2011); 157 CONG. REC. H7528 (daily ed. Nov. 14, 2011).

In light of the Continuing Resolution's prohibition of the use of any funds to implement, administer, or enforce the 2011 Wage Rule, I held a telephone conference call with the parties on November 21, 2011 to discuss the disposition of this case. While the CO argued that Section 546 renders this appeal moot, the Employer disagreed and urged that I find that the CO lacked the regulatory authority to issue a supplemental PWD in the first place.

DISCUSSION

I find that this matter is moot. The Supplemental PWD instructed the Employer to pay a higher wage from November 30, 2011 to December 13, 2011 pursuant to the 2011 Wage Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011). Section 546 clearly prevents the implementation, administration, and enforcement of the 2011 Wage Rule prior to January 1, 2012. As the Supplemental PWD issued in this matter only covers labor from November 30, 2011 to December 13, 2011, the Supplemental PWD is no longer valid. Additionally, during the November 21, 2011 conference call, counsel for the CO indicated that the Employer would be receiving notification from the NPWC to this effect.

Based on the foregoing, the appeal of the Supplemental PWD is moot, and this matter is **DISMISSED**.³

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

³ I note that the Employer's attorney has filed approximately 300 other PWD appeals. Because it appeared that final determinations had not yet been issued by the CO in any of these cases, BALCA did not docket these cases. BALCA will not docket any of these appeals unless the employers demonstrate: 1) that the CO has issued a final PWD determination, and 2) that the underlying H-2B application involves labor that is to be performed on or after January 1, 2012.