



Issue Date: 16 September 2013

BALCA Case Nos.: 2013-PWD-00062
2013-PWD-00063
2013-PWD-00064
ETA Case Nos.: P-400-13058-002313
P-400-13059-694534
P-400-13042-521868

In the Matter of:

PROGRESSIVE SOLUTIONS, LLC,
Employer.

ORDER OF REMAND

These matters arise from an Application for Prevailing Wage Determination (ETA Form 9141) that Progressive Solutions, LLC (Employer) filed with the Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC) on February 11, 2013. The Application requested a single prevailing wage determination (PWD) for the job title “Brush Clearer and Precommercial Thinner,” with the suggested SOC (O’NET/OES) code of 45-4011 and occupation title of “Forest and Conservation Workers.”

On March 22, 2013, the OFLC issued three separate PWDs under the occupational classification for “Landscaping and Groundskeeping Workers,” SOC code 37-1012.¹ The OFLC informed the employer that should it disagree with the determinations, it may either:

1. Submit a redetermination request within 30 days of the letter in accordance with the Department’s regulations. The process for seeking redetermination of wages involving H-2B certifications is set out at 20 CFR § 655.10(g), and the process for seeking a redetermination of wages involving PERM certifications is found at 20 CFR § 656.40(h); or
2. Submit a new ETA Form 9141, Application for Prevailing Wage Determination

The Employer did not elect to pursue either of the above options; rather, by letter dated March 22, 2013, the Employer asked the Director of the National Processing Center (NPC) to review the PWDs pursuant to 20 C.F.R. § 655.11. The Employer did not receive a response to this request until August 8, 2013. The response, which was sent via email, was signed by the “Office

¹ All three prevailing wage determinations arise from a single *Application for Prevailing Wage Determination* (ETA Form 9141). Accordingly, these matters have been consolidated for review.

of Foreign Labor Certification.” It begins by stating, “[w]e have affirmed the Prevailing Wage issued on March 12, 2013 after reviewing your Redetermination Request submitted on Jun [sic] 14, 2013,”² and concludes by informing the Employer that should it desire to seek review, it “must submit a request for review by the center director within 10 days of the date of this letter in accordance with DOL’s regulations at 20 CFR § 655.11.”

On August 16, 2013, the Employer requested review before BALCA. On August 29, 2013, the Associate Solicitor for Employment and Training Legal Services (Associate Solicitor) filed a Motion asking the Board to remand these matters on the ground that they are not ripe for review. The Employer filed a motion opposing this request on September 10, 2013. As discussed below, we grant the Associate Solicitor’s Motion and remand these matters to the NPC for a final decision by the Certifying Officer in accordance with 20 C.F.R. § 655. 11.

DISCUSSION

Employers who seek a prevailing wage determination for purposes of the H-2B nonimmigrant program must file a complete *Application for Temporary Employment Certification* with the NPC. 20 C.F.R. § 655.10(a)(2). The NPC enters its wage determination on the Application, indicates the source, and returns the form to the petitioning employer with its endorsement. 20 C.F.R. § 655.10(b)(6). If an employer disagrees with the wage level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there is another legitimate basis for such a review, the employer may submit supplemental information to the NPC. 20 C.F.R. § 655.10(g)(1). The NPC refers to this submission of supplemental information as a “request for redetermination.” If the NPC does not accept the employer’s survey after considering the supplemental information, or affirms its determination concerning the skill level, the NPC must inform the employer, in writing, of the reasons for its decision. 20 C.F.R. § 655.10(g)(1).

Section 655.11 goes on to describe Certifying Officer review of prevailing wage determinations. In pertinent part, this section provides:

(a) *Request for review of prevailing wage determinations.* Any employer desiring review of a PWD must make a written request for such review within 10 days of the date from when the final PWD was issued. The request for review must be sent to the NPC postmarked no later than 10 days after the determination; clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include all materials submitted to the NPC for purposes of securing the PWD.

(b) *NPC Review.* Upon the receipt of a written request for review, the NPC shall review the employer’s request and accompanying documentation, including any supplementary material submitted by the employer.

(c) *Designations.* The Director of the NPC will determine which CO will review the employer’s request for review.

² The Employer maintains that it requested review in a timely manner on March 22, 2013. The OFLC has not addressed this discrepancy.

(d) *Review on the record.* The CO shall review the PWD solely on the basis upon which the PWD was made and after review may:

- (1) Affirm the PWD issued by the NPC; or
- (2) Modify the PWD.

20 C.F.R. § 655.11. An employer desiring review of a Certifying Officer's decision must make a written request for review of the determination by BALCA within 30 calendar days of the date of the decision of the CO. 20 C.F.R. § 655.11(e).

BALCA's review of prevailing wage determinations is in the nature of an appellate proceeding. The Associate Solicitor argues that this matter should be remanded to the NPC because the Employer has not completed the review process described in 20 C.F.R. § 655.11. He reports that the NPC treated the Employer's March 22, 2013 request for review as a request for redetermination because 20 C.F.R. § 655.10(g)(3) requires an employer to request a redetermination prior to requesting review by the Director of the NPC. The Employer disagrees that it was required to request a redetermination before seeking review before the Director of the NPC.³

According to the Employer, the Board may exercise jurisdiction over the above-captioned PWDs because the Employer specifically requested review before the Director of the NPC and the Department responded to this request. But in making this argument, the Employer overlooks the fact that the regulations only authorize BALCA to review a PWD after a Certifying Officer has issued a final determination. *See* 20 C.F.R. § 655.11(e). While I am fully cognizant of and sympathetic to the length of time that has passed since the Employer first appealed the prevailing wage determination, no such final determination by a Certifying Officer exists.⁴

³ Specifically, the Employer argues:

The title and content of paragraph (g) gives no indication that it should be read as a description of a mandatory first step in a two-step interim process for challenging a PWD before the employer can request review of a PWD by BALCA. Instead, paragraph (g) explains the *optional* Process for an employer to follow if it wishes to submit supplemental information to the Department before seeking review, as described in 655.11.

There is no indication in this paragraph that an employer must produce supplemental information and submit it to the Department, then wait for a response, then decide whether to seek review by the Certifying Officer. Again, although the Department in its Request for Remand apparently refers to this as a "redetermination" process, there is no mention in section 655.10(g) of the term "redetermination." In fact, nowhere in the H-2B regulations is there any reference to a "redetermination" process.

⁴ The Employer argues that BALCA has often excused an employer's failure to strictly comply with the regulatory procedures in the H-2B program when such compliance would prejudice the employer's interests as a result of the Department's failure to timely issue a decision; however, none of the cases to which the Employer cites involve a question of the Board's jurisdiction.

Without a final determination by a Certifying Officer, we cannot exercise jurisdiction over the Employer's appeal.⁵ Accordingly, it is hereby ORDERED that the above-captioned matters are REMANDED to the NPC. I expect that the Director of the NPC will immediately assign these matters to a Certifying Officer for review and that a final decision will be issued in an expeditious manner.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

⁵ We do not get to the question of whether the NPC erred in treating the Employer's request for review by the Director of the NPC as a request for a redetermination because even if the NPC erred, we cannot exercise jurisdiction without a final determination by a Certifying Officer.