



Issue Date: 19 March 2009

OALJ Case No.: 2009-TLC-00034
ETA Case No.: C-09041-17797

In the Matter of

FORKLAND SPRINGS FARM, LLC,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

On February 26, 2009, Forkland Springs Farm, LLC, (the Employer) filed a request for review of the Certifying Officer's (the CO) February 13, 2009, decision not to accept the Employer's application for temporary alien labor certification. During a February 26, 2009, telephone call, the Employer requested expedited administrative review of the CO's decision. *See* 20 C.F.R. § 655.115 (describing the two types of review offered by this Office).¹ On the evening of March 11, 2009, this Office received the Administrative File from the CO. In expedited administrative review cases, the administrative law judge has five working days after receiving the file to review the record for legal sufficiency and issue a decision. 20 C.F.R. § 655.115(a)(2). The administrative law judge may not remand the case or receive additional evidence. § 655.115(a)(1).

Statement of the Case

On February 10, 2009, the Department of Labor's Employment and Training Administration (ETA) received the Employer's application for temporary labor certification for one aquaculture worker. *See* AF 30-47.² On February 13, 2009, the CO informed the Employer that its application was "not being accepted for consideration on the grounds that the availability of U.S. workers cannot be tested because the benefits, wages rates, and/or working conditions do not meet the criteria of the regulations." AF 14-16. The CO requested that the Employer increase the position's hourly wage from \$9.50 to \$13.19. AF 16. Citing 20 C.F.R. § 655.105(g), the CO explained that the Employer must offer the highest wage among the adverse effect wage rate ("AEWR"), the prevailing hourly wage or piece rate, or the federal or state minimum wage rate. AF 16. The CO determined that the AEWR in Tuscaloosa, Alabama—the

¹ On December 18, 2008, the Department of Labor published new rules governing this process that became effective January 17, 2009. *See* 73 Fed. Reg. 77,110 (Dec. 18, 2008). Since the Employer filed its application after the new regulations took effect, I will apply the new regulatory provisions. When discussing the new regulations, which can be found at 73 Fed. Reg. 77,110, 77,207-77,229 (Dec. 18, 2008), I will cite the provisions as they will appear when codified.

² Citations to the 47-page Administrative File will be abbreviated as "AF" followed by the page number.

metropolitan area in which the Employer's fish farm is located—for the job title “Farmworker, Farm and Ranch Animals” is \$13.19. AF 16. On February 18, 2009, ETA received a facsimile from the Employment Service Division of the Alabama Department of Industrial Relations. AF 10. The document's author—whose signature does not appear on the Administrative File's copy—wrote that the AEW for the Employer's position is actually \$8.53. AF 10. The author wrote, among other things, “This is a Fish Farm and does not deal with Farm Animals. Mr. Compton has used the H2A program for many years.” AF 10. On February 25, 2009, the Employer's representative sent an e-mail to ETA explaining that Chip Crabtree, whom she identified as “the H-2A program officer,” “does not think that \$13.19 per hour is an applicable rate.” AF 9. The Employer's appeal followed.

Statement of the Issue

The regulations governing administrative review of H-2A determinations direct the administrative law judge to review the record “for legal sufficiency.” § 655.115(a)(2). The sole issue before me is whether the wage rate offered by the Employer, \$9.50, is at least equal to “the highest of the AEW in effect at the time recruitment is initiated, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.” *See* §§ 655.105(g); 655.108(d). There is no dispute that the offered wage exceeds the federal and state minimums. Likewise, the CO found that no relevant prevailing wage data existed. AF 18, 24; *see* § 655.100(c) (defining “Prevailing Hourly Wage” as “the hourly wage determined by the [State Workforce Agency] to be prevailing in the area in accordance with State-based wage surveys.”). Accordingly, this appeal turns on whether the CO properly determined that the AEW is \$13.19.

Discussion

At the outset, I note that the new H-2A regulations quite deliberately change the way ETA sets the AEW. *See, e.g.*, 79 Fed. Reg. 77,110, 77,173 (Dec. 18, 2008). Previously, for most H-2A opportunities, ETA annually published a single AEW for each state. *See* 20 C.F.R. § 655.107 (2008). As the Employer has observed, Alabama's 2008 AEW was \$8.53. *See* 73 Fed. Reg. 10,288, 10,289 (Feb. 26, 2008). Under the new regulations, which I describe in detail below, the AEW for a particular job title can change depending on factors such as, for example, the level of experience or types of specialized skills that the Employer requires. On March 17, 2009, the Department of Labor published a proposed rule that would suspend the new regulations for 9 months and reinstate the old regulations while the Department reconsiders the new regulations “in light of issues that have arisen” since their publication. *See* 74 Fed. Reg. 11, 408 (Mar. 17, 2009). **If the Department suspends the new regulations, the Employer might obtain certification upon refilling an application containing the \$9.50 wage offer.** Unfortunately for the Employer, the new regulations apply to the application the CO rejected. For the reasons that follow, I affirm the CO's determination under the new regulations.

The new regulations define the AEW as “the minimum wage that the Administrator, OFLC determined must be offered and paid to every H-2A worker employed under the DOL-approved *Application for Temporary Employment Certification* in a particular occupation and/or area . . . to ensure that the wages of similarly employed U.S. workers will not be adversely affected.” § 655.100(c). The regulations require that the CO base the AEW determination “on

published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey.” § 655.108(e). The CO must obtain wage information “using the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center Web Site (<http://www.flcdatcenter.com/>).” *Id.* The regulations also require the CO to document the determination on an ETA form that the CO must provide to the Employer. § 655.108(f). Based on the way the CO assembled the Administrative File, whether the CO complied with this requirement is unclear. Nevertheless, any error would be harmless because the CO eventually supplied the form in the Administrative File, and the Employer had an opportunity to review the document before providing arguments in brief.

In making his AEW determination, the CO used the OES job title “Farmworkers, Farm and Ranch Animals.” AF 17. While the title itself contains no reference to aquaculture, the title’s definition includes farm workers who attend to, among other animals, finfish and shellfish. AF 17. As described by the Employer, the position’s duties include: “Monitor oxygen levels, temperature and record water quality information in book. Feed shrimp and catfish aquaculture ponds. Must be able to work with heavy equipment, boats, nets for casting. Work in and around water. Assist with nursery for the post larvae shrimp and harvesting shrimp in mid-October.” AF 32. The Employer’s aquaculture worker clearly would attend to farm-raised catfish and shrimp, which are finfish and shellfish, respectively. Contrary to the Employer’s assertions, the CO properly used this job title.

After selecting the proper job title, the CO must identify the appropriate skill wage level. *See* § 655.108(g) (describing the four skill wage levels). Pursuant to this directive, the CO determined that the Employer’s position requires a Level 4 skill wage rate. AF 24.³ In doing so, the CO applied ETA’s January 9, 2009, *Prevailing Wage Determination Policy Guidance: Temporary Agricultural Employment* (Guidance Letter). *See* AF 25-28N. The Guidance Letter directs the CO to use a point system in identifying the appropriate skill wage level. AF 28I. Under the Guidance Letter, the CO must tally points depending on whether the position requires certain experience or skills, or if the position has supervisory duties. *See* AF 28I-28K. The Guidance Letter requires the CO to begin the calculation by entering a “1” on the worksheet in all cases. AF 28I. The CO properly did so. AF 24. For Zone 1 jobs, the Guidance Letter directs the CO to enter a “3” in the Wage Level Column when an employer requires more than 6 months of experience. AF 28J.⁴ The Employer requires 24 months of experience, and the CO properly entered a “3” on the worksheet. *See* AF 33, 24. At this point, the analysis could have ended because the CO had already tallied enough points (3 for the experience requirement + 1 automatic) for the highest skill wage level, Level 4. *See* AF 28K (“Determine the wage level by

³ The regulations describe employees receiving Level 4 wage rates as follows:

Level IV wage rates are assigned to job offers for employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees receive only minimal guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment’s procedures and expectations. They generally have management and/or supervisory responsibilities.

§ 655.108(g)(4).

⁴ OWL lists the title’s O*Net JobZone level as “1.” AF 17.

summing the numbers in the Wage Level Column of the worksheet. The sum total shall equal the wage level for the AEWL determination. If the sum total is greater than 4, then the wage level shall be level 4.”).

The Guidance Letter also cautions that the calculation process “should not be implemented in an automated fashion” in order to ensure that the wage level is “commensurate with the experience, special or incidental skills, and supervisory responsibility described in the employer’s job opportunity.” AF 28L. Relying on this passage, § 655.108(g)(4)’s description of employees who should receive Level 4 rates, and the position’s lack of supervisory duties, I might have opted to downgrade the job’s skill wage level were I acting as the CO or reviewing his decision de novo. *See* AF 32. Given the standard of review in expedited administrative review cases, however, I cannot find that the CO acted arbitrarily or capriciously in deciding otherwise. *See Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (A.L.J. May 16, 2008) (noting that the administrative review regulations do not define “legal sufficiency” and applying an arbitrary and capricious standard of review). Importantly, the regulation states only that Level 4 workers “generally have management and/or supervisory responsibilities.” § 655.108(g)(4) (emphasis added). Furthermore, nothing else in the Employer’s job description conflicts with the regulation. Accordingly, I will not disturb the CO’s skill wage level determination. *See* AF 24.

Since OWL lists the Level 4 wage for aquaculture farm workers in the Tuscaloosa metropolitan area as \$13.19, the CO properly concluded that the AEWL exceeded the Employer’s offered wage rate. *See* AF 17.⁵ Under § 655.108, the CO had a legally sufficient basis for rejecting the Employer’s application. Accordingly, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

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JOHN M. VITTON
Chief Administrative Law Judge

⁵ Even if I had decided that the CO should have applied the Level 3 skill wage rate instead, the \$11.18 AEWL still would have exceeded the Employer’s offered wage rate, and affirmance would have been proper. *See* AF 17.