

U.S. Department of Labor

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Issue Date: 15 April 2009

Case No.: **2009-TLC-00039**

In the Matter of:

**U. S. DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION,**
Prosecuting Party,

v.

**JAB-J CORPORATION
d/b/a ALMA SUNBELT BLUEBERRIES,**
Respondent.

and

Case No.: **2009-TLC-00040**

In the Matter of:

**U. S. DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION,**
Prosecuting Party,

v.

WADE FARMS, INC.,
Respondent.

and

Case No.: **2009-TLC-00044**

In the Matter of:

**U. S. DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION,**
Prosecuting Party,

v.

**CHAMBERS BROTHERS BLUEBERRIES, LLC
and
HORNER FARMS, INC. (jointly),**
Respondent.

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provisions of the Immigration and Nationality Act, 8 U. S. C. § 1101(a)(15)(H)(ii)(a), and its implementing regulations found at 20 C.F.R. Part 655, Subpart B. The three cases have been consolidated for hearing and decisional purposes by agreement of the parties.

On March 6, 2009, the U. S. Department of Labor, Employment and Training Administration, Chicago Processing Center, issued a Notice of Deficiency for non-acceptance for processing of Wade Farms' H-2A application for temporary labor certification pursuant to 20 C.F.R. § 655.107(b)(1).

On March 4, 2009, the U. S. Department of Labor, Employment and Training Administration, Chicago Processing Center, issued a Notice of Deficiency for non-acceptance for processing of Jab-J Corporation's Farms' H-2A application for temporary labor certification pursuant to 20 C.F.R. § 655.107(b)(1).

On March 22, 2009, the U. S. Department of Labor, Employment and Training Administration, Chicago Processing Center, issued a Notice of Deficiency for non-acceptance for processing of Chambers Brothers' H-2A application for temporary labor certification pursuant to 20 C.F.R. § 655.107(b)(1).

Wade Farms, Jab-J and Chambers Brothers timely requested a de novo hearing before an administrative law judge. The three cases were consolidated for hearing. A hearing was held in Savannah, Georgia on April 2, 2009. At that time, evidence was taken and witnesses were called to testify.¹

Background

The reason given by the Certifying Officer of the Chicago Processing Center for not accepting the three applications for consideration pursuant to 20 C.F.R. § 655.107(b)(1) was because the U. S. workers could not be tested because the wages rates, and/or working conditions did not meet the criteria of the regulations. The Certifying Officer determined that the current prevailing piece rate for blueberry handpicking in Georgia is \$0.50 per pound rather than a sliding scale of \$0.35 to \$0.60 per pound which Respondents were offering. (See 20 C.F.R. § 655.105(g)).

¹ The Presiding Judge received into evidence the three administrative files as DX-W (Wade Farms), DX-J (Jab-J) and DX-C (Chambers). The Presiding Judge also received into evidence E. T. Handbook Number 385 as DX-1. Respondents submitted two exhibits: RX-5 (Prevailing Wage Determinations for Agricultural Wage Surveys in Georgia; and RX-6 (information disclosed under Open Records Act).

Findings of Fact

1. The Georgia Department of Labor conducted a Prevailing Wage Survey for handpicking blueberries from May 27, 2008 to June 16, 2008. The ETA Form 232 with its findings is dated October 17, 2008. (RX-6).
2. On November 10, 2008, the U. S. Department of Labor, Employment and Training Administration (ETA) issued a memorandum titled Prevailing Wage Determination for Agricultural Wage Surveys (ETA-232 Reports) in Georgia. In that memo, ETA noted that the Prevailing Wage determination for handpicking blueberries is \$0.50 per pound. (RX-5, RX-6).
3. Keith Cox² wrote a letter (undated) to Michael Thurman, the Georgia Commissioner of Labor, complaining of the \$0.50 Prevailing Wage determination (piece rate). Mr. Cox noted that “[t]he rate you determined cannot be correct for the entire picking season.” Mr. Cox requested that “you withdraw the piece rate for handpicking blueberries from your submission to the U. S. Department of Labor, or that you submit a range of handpicking rate that range from \$0.35 to \$0.55” per pound. (DX-J; DX-W; DX-C).
4. John V. Bennett³ wrote a letter dated 1-23-2009 to Mr. Thurman complaining of the \$0.50 piece rate. He recommended a sliding piece rate of \$0.40 to \$0.60 per pound. He also insisted that the rate of \$0.50 per pound “may only be possible during a portion of the harvest season, but not for the entire season.” (DX-J; DX-W; DX-C).
5. Dan Bremer⁴ wrote a letter dated 2-12-2009 to Mr. Thurman. He also objected to the \$0.50 piece rate. He noted, “(t)he rate may be correct for part of the harvest season, but certainly not for the entire harvest season. The rate should have shown a range of rates that would be paid at various times in the harvest season. The attached letters suggest a correct range is from \$0.35 to \$0.60 per pound.” (DX-J; DX-W; DX-C).
6. Adair Chambers Peterson⁵ wrote a letter dated 1-27-2009 to Mr. Thurman. She also objected to the \$0.50 piece rate. She requested that “you withdraw the piece rate for handpicking blueberries from your submission to the U. S. Department of Labor, or that you submit a range of handpicking from \$0.35 to \$0.60 per pound.” (DX-J; DX-w; DX-C).
7. Wade Farms submitted its H-2A Application to DOL on 2-20-2009. A Notice of Deficiency was issued by DOL on 3-6-2009. (DX-W). Jab-J submitted H2-A Application to DOL on 2-24-2009. A Notice of Deficiency was issued on 3-4-2009. (DX-J). Chambers Brothers submitted its H-2A Application to DOL on 3-12-2009.

A Notice of Deficiency was issued on 3-27-2009. (DX-C). All three of the applications submitted a sliding piece rate scale of \$0.35 to \$0.60 rather than the Georgia prevailing wage

² The owner of Cox Blueberries Farm.

³ The owner of Alma Sunbelt Blueberries.

⁴ The Agent for three Respondents.

⁵ The owner of Chambers Brothers, Blueberries.

determination of \$0.50. None of the applications specified precisely why a range of piece rates were offered rather than the \$0.50 determined by the State of Georgia.

Testimony

JORGE GOMEZ (Tr. 93-102)

8. Jorge Gomez is the Unit Supervisor for Tifton Career Center with the Georgia Department of Labor. He was part of the team that conducted the 2008 Blueberry Handpicking Survey.⁶ The information he gathered from the majority of the growers was that there was only one blueberry handpicking season. He agreed that most of his information came from owners who were new to growing blueberries. He noted that the next blueberry survey would probably not take place until 2010.

SHERRI WILSON (Tr. 104-119)

9. Sherri Wilson is a supervisor of the wage survey process with the Georgia Department of Labor. She compiled the information regarding the prevailing wages reported in ETA Form 232. (RX-6). She noted that while it is advantageous for growers to participate in the survey, it is not mandatory. She agreed that training for survey training only lasts one day. Ms. Wilson stated that the guidelines for conducting surveys is contained in the Federal Regulations and the ET Handbook Number 385. (DX-1). Copies of the Handbook are not necessarily given to the individuals who actually conduct the surveys. The Handbook requires that 10% of the workers be interviewed. She agreed that fewer than 10% were interviewed, but they try to interview as many as they can. She also agreed that although the Handbook says a survey should be completed in a week, the blueberry survey took about 2 weeks. Forty-four employers participated in the survey.

BENITO ORONA (Tr. 24-91; Tr. 24-94, 161)

10. Benito Orona is an Immigration Program Analyst for the Office of Foreign Labor Certification with a Temporary Program, U. S. Department of Labor. The process for setting the prevailing wage rate has not changed in the last 50 years. The methodology is elaborated in ETA Handbook 385. The states should conduct prevailing wage rate surveys every year. Once they have done their survey and amassed all the raw data, they transfer all the raw data into a summary Form ETA 232. (RX-6). The summary is sent to the U. S. Department of Labor National Office where it is reviewed to ensure that the wage rate conforms to the methodology within the Handbook. Only after it is validated, will the Administrator of the Office of Foreign Labor Certification sign off on it. Mr. Orona stated that this may have been the first ever Georgia Blueberry Survey. He also acknowledged that the \$0.50 wage rate would stay in effect until the next survey was conducted.

11. Mr. Orona reviewed the instant summary form. The prevailing wage rate methodology has remained unchanged for 50 years. Form ETA 232 provides three methods of payment: hourly; by volume; or by weight. Form 232 shows that of a total of 1,221 workers, most of the

⁶ His training prior to the survey lasted one day.

workers (609) were paid by weight. Page 117 of the Handbook states that you should choose the unit of payment that is paid the highest number of workers (i.e. weight). To make a prevailing wage determination, the 40% rule must first be applied. Forty percent (40%) of 609 is 244. Form ETA 232 shows that 246 workers (over 40%) establish a piece rate of \$0.50 per pound. Mr. Orona noted that it is not mandatory for farmers to participate in a survey. However, it is to a farmer's advantage to participate because he is helping to set the appropriate piece rate.

12. The Federal government does not dictate to a state when and how to conduct surveys. A lot depends on staffing and financial resources. Surveys can be done in the field, through the mail, or by telephone. The data obtained should be at a peak season. Moreover, the Federal government tries to be flexible in the time allowed a state to conduct a survey.

13. Mr. Orona agreed that 10% of the total workers were not interviewed. He further agreed that on page 113 of the Handbook, under special instructions, besides one wage rate being set for an entire crop, sometimes different stages of the harvest such as 1st pick, 2nd pick, etc. are different enough to warrant separate wage rates. However, Mr. Orona noted that separate surveys would have to be done to establish separate specific rates. In the instant case, only one survey was done hence the \$0.50 piece rate. Mr. Orona categorically denied that a sliding piece rate scale may be determined by a survey.

DOROTHY ADAIR PETERSON (Tr. 119-137, 152, 157-160).

Ms. Peterson is the operating partner of Chambers Brothers Blueberries. Ms. Peterson insists there are two different and distinct growing seasons within the blueberry harvest. The first season involves high bush blueberries and the second involves rabbit eye blueberries.

ALTON LANE WADE (Tr. 138-142, 157-160)

Mr. Wade is the owner of Wade Farms. Mr. Wade insists that there are distinct growing seasons for blueberries. The first is the southern high bush which peaks in the second or third week of May. The second is rabbit eye which peaks in the second or third week of June. Mr. Wade acknowledged that he participated in the 2008 survey.

JOHN BENNETT (Tr. 142-161).

John Bennett represents Jan-J Corporation, doing business as Alma Sunbelt Blueberries. He testified that there were two different seasons. The first is high bush blueberries which are all handpicked. The second is rabbit eye blueberries. He also participated in the 2008 survey but does not recall providing any payroll information for the survey period.

DISCUSSION

Under Subsection (b), the employer may request a *de novo* hearing before administrative law judge regarding the denial of a temporary alien agricultural labor certification. The procedures in 29 C.F.R. § 18 apply to the hearings, except that the appeal is not considered a complaint to which an answer is required; if the employer requests, the hearing must be

scheduled within five working days after the receipt of the case file; and the administrative law judge's decision must be made within ten working days after the hearing. The administrative law judge must either affirm, reverse, or modify the OFLC Administrator's determination.

I interpret Section 655.112 to provide that, if an administrative review is conducted under subsection (a), the administrative law judge may only determine the legal sufficiency Certifying Officer's determination. In contrast, when the employer requests a *de novo* hearing, the administrative law judge is not restricted to a determination of the legal sufficiency of the Certifying Officer's determination, but reviews the administrative record and the testimony the hearing, and makes a *de novo* determination. In making my determination in this matter, I have determined that the prosecuting party prevails on either standard, that is, whether I consider only the legal sufficiency of the Certifying Officer's determination, or make a *de novo* determination.

The Immigration and Nationality Act's H-2A program is governed by 8 U.S.C. § 1101(a)(H)(ii)(a) and 20 C.F.R. § 655.90 *et seq.*, and allows an employer to hire temporary alien agricultural workers if DOL determines that there are insufficient qualified, eligible U. S. workers who will be available at the time and place needed to perform the identified work, and that the wages and other terms and conditions under which the alien workers will be employed will not adversely affect U. S. workers similarly situated. 8 U.S.C. § 1188; 20 C.F.R. § 655.100(a)(4)(ii).

The statutory scheme for this program seeks to promote and balance two competing interests - "to assure [American Farmers] an adequate work force on the one hand and to protect the jobs of the citizens on the other." *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978). Furthermore, it is the clear desire of the INA "to protect domestic workers," not to protect employers or alien workers. *Elton Orchards v. Brennan*, 50 F. 2d 493, 499 (1st Cir. 1974).

The burden of proof in the labor certification process remains with the Respondents. *Garber Farms*, Case. No. 200 1-TLC-5 (ALJ May 30, 2001); *Giaquinto Family Restaurant* Case. No. 1996-TLC-INA-64 (May 15, 1997).

In the instant case, the State of Georgia initiated a survey in May of 2008 to establish a prevailing wage rate of handpicking blueberries. Forty-four employers were contacted including at least two of the Respondents. Nothing in the record indicates that anything was even suggested to those conducting the survey that separate wage rates might be applicable as defined under the special instructions on page 117 of the Handbook to Blueberry Picking by any of the employers much less employees. Rather, the evidence shows that the surveys were conducted by Mr. Gomez and others; the raw data was compiled by Sherri Wilson and summarized on ETA Form 232. She applied the 40% rule and determined that the applicable piece rate for blueberry picking is \$0.50 per pound. The summary was passed on to Mr. Orona who verified the figures. This, in turn, was passed on to the Certifying Officer in the Chicago Office of Labor Certification who issued the prevailing wage determination for Georgia on November 10, 2008.

It was not until after November 10, 2008, that letters were written to the Commissioner of Georgia Department of Labor with regard to the possibility that there may be different wage rates with regard to blueberry handpicking. The letters merely suggested that a sliding piece rate should be established. Mr. Orona clearly noted that a sliding piece rate scale may not be

determined by a survey. In order to establish specific piece rates for different stages of harvest, separate surveys must be taken during each stage of the harvest. Mr. Orona's testimony was straight forward and very convincing. Was the survey conducted by the State of Georgia perfect? Perhaps not. However, it appears to have been reasonable. There is no evidence that anyone urged the State to conduct multiple surveys in order to establish separate piece rates during the blueberry harvest. The State, therefore, took one survey and came up with a \$0.50 piece rate for the entire season based on the 40% rule. Should the State have interviewed more employees? Perhaps. However, they interviewed as many workers as they could. There is nothing in the record to suggest that this failure somehow fatally flawed the survey. Employers also suggest that improperly requiring the H-2A employers to participate in the survey may have totally screwed the numbers. Employers offer no evidence in support of this assertion. While no owner is required to participate in a survey, Mr. Orona pointed out that it is always in the best interest of every employer to participate in a survey intended to establish a prevailing wage rate.

My job is to decide whether the actions of the Certifying Officer were arbitrary or capricious. Nothing in the documentary or testimony evidence presented to me convinces me of this. Moreover, my review of the entire record leads me to conclude that the State of Georgia conducted an appropriate blueberry handpicking survey based upon the information on hand at that time. The raw data was properly summarized and presented to the U. S. Department of Labor. In turn, it was appropriately determined that a \$0.50 piece rate for handpicking blueberries in Georgia was appropriate. Moreover, the Certifying Officer's decision denying the Respondent's H-2A applications was appropriate.

Having said that, I am quite concerned that this piece rate may carry over into future years, because the State of Georgia may not have the necessary funds or staffing to conduct an annual blueberry survey(s) as recommended in the Handbook. The Respondents will consequently be unable to make a showing that future blueberry handpicking harvests may be entitled to multiple piece rates. I would strongly urge the U. S. Department of Labor, Employment and Training Division, to confer with the Georgia Department of Labor with the hope of obtaining appropriate survey(s) during the upcoming 2009 blueberry harvest in Georgia.

Accordingly, IT IS ORDERED that Certifying Officer's decisions denying acceptance of the Respondents' H-2A applications IS AFFIRMED.

SO ORDERED.

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DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/ccb
Newport News, Virginia