



Issue Date: 28 May 2009

OALJ Case No.: 2009-TLC-00051  
ETA Case No.: C-09099-19320

*In the Matter of*

**TWIN STAR FARM,**  
*Employer*

Certifying Officer: Robert E. Myers  
Chicago Processing Center

### **DECISION AND ORDER**

On May 18, 2009, Twin Star Farm (“the Employer”) filed a request for review of the Certifying Officer’s (“the CO”) denial of the Employer’s application for temporary agricultural labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1). During a subsequent phone call, the Employer’s manager requested administrative review rather than a de novo hearing. *See* 20 C.F.R. § 655.115 (describing the two types of review offered in H-2A cases).<sup>1</sup> On the evening of May 20, 2009, this Office received the Administrative File from the Certifying Officer. In 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).

#### **Statement of the Case**

On April 9, 2009, the Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification for seven workers. *See* AF 5, 55-76.<sup>2</sup> In the application, the Employer described the job duties as follows:

Manually plant, cultivate, and harvest vegetables, fruits, nuts and field crops. Use hand tools, such as shovels, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties may include tilling soil and applying fertilizers; transplanting, weeding, thinning, or pruning crops; applying pesticides; cleaning, packing, and loading harvested products. May construct trellises, repair fences and farm buildings, or participate in irrigation activities. Set up and operate irrigation equipment. Operate tractors, tractor-drawn machinery, and self-propelled

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<sup>1</sup> 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, which can be found at 73 Fed. Reg. 77,207-77,229 (Dec. 18, 2008). I will cite the regulations as they will appear when codified.

<sup>2</sup> Citations to the 76-page Administrative File will be abbreviated as “AF” followed by the page number.

machinery to plow, harrow and fertilize soil, or to plant, cultivate, spray and harvest crops. Repair and maintain farm vehicles, implements, and mechanical equipment. Harvest fruits and vegetables by hand. Apply pesticides, herbicides or fertilizers to crops. May pack apples. Inform farmers or farm managers of crop progress. Identify plants, pests, and weeds to determine the selection and application of pesticides and fertilizers. Clear and maintain irrigation ditches. Record information about crops, such as pesticide use, yields, or costs. Must have one month experience in above.

AF 57. The specific job title used was “farmworkers, laborers and crops.” AF 55. The Employer planned to pay the workers \$9.51 per hour. AF 59.

On April 15, 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 33-34. The CO requested that the Employer modify the application to correct several deficiencies. AF 35-36. Relevant to this appeal, the CO wrote that, pursuant to 20 C.F.R. § 655.105(g), the Employer must offer the highest of the Adverse Effect Wage Rate (“AEWR”) in effect at the time the Employer begins recruitment, the prevailing hourly wage or piece rate, or the Federal or State minimum wage. AF 36. The CO noted his inability “to determine a wage rate based on the information provided.” AF 36. In particular, the CO found that the Employer failed to identify “what types of fruits workers will be handling and what crop activities are applicable to this job opportunity.” AF 36. Quoting a May 21, 2008, New York State survey, the CO listed various piece rates for handpicked apples and pears. AF 36. The CO requested that the Employer “amend their wage offer to include any applicable piece rates related to a particular crop or crop activity.” AF 36. The CO also requested that the Employer “provide a list of all crop activities and a list of fruits associated with this job opportunity.” AF 36. Last, the CO requested that the Employer “make all applicable amendments to reflect any required piece rates in Appendix A.1 of the Form ETA 9142 and in Item 11 of the Form ETA 790 and the Form ETA 790 attachments.” AF 36.

Subsequently, the Employer submitted a response to the modification letter. *See* AF 19-32. Therein, the Employer clarified that it requires workers to harvest apples by hand from dwarf trees “for fresh market.” AF 20, 28. The Employer explained that it pays “by the hour only” to ensure “maximum quality of the apples.” AF 20. On April 23, 2009, Tashana Stoudamire, an ETA employee at the Chicago National Processing Center, sent an e-mail requesting guidance and assistance regarding the Employer’s response to Bonnie Lance, an employee at the New York State Workforce Agency. *See* AF 17, 18. On April 24, 2009, Ms. Lance sent a trio of replies informing Ms. Stoudamire that the Employer “HAS to offer the piece rate and an hourly rate so this modification in response to the deficiency letter should not be accepted.” AF 16-17. Ms. Lance wrote that she relied upon the following statement from “the previous H-2A supervisor:”

Last year we specifically asked USDOL:

*If apple picking is mentioned in the job description, must the piece rate from the prevailing wage survey be quoted along side the AEW?*

**Response:** the employer must offer and pay the applicable piece rate determined to be the prevailing method of payment for that wage reporting areas. However, the employer is also required to disclose the hourly adverse effect wage rate as a guarantee.

AF 17. On April 27, 2009, Ms. Stoudamire requested that Ms. Lance contact the Employer to “inform them that they must offer the applicable piece rate of \$.75 per 1 1/8 bushel box for hand-picking fresh market dwarf trees and get their permission to amend the application.” AF 16. Later that day, Ms. Lance reported that, during a telephone conversation, a representative of the Employer refused to modify the application and stated that “they do not pay a piece rate,” that they “have not in many years,” and that other local employers had job orders accepted without offering a piece rate. AF 16; *see* AF 14-15.

On May 11, 2009, the Employer’s manager, Richard Garvilla, sent an e-mail to ETA’s Chicago National Processing Center. AF 12. Mr. Garvilla stated that he has “not paid piece rate in many years” and that “[m]any” neighboring farms have submitted H-2A applications without offering a piece rate. AF 12. Mr. Garvilla also named two such farms and listed ETA case numbers for each. AF 12. Last, Mr. Garvilla offered to provide a copy of documentation associated with the Employer’s previous year’s application, which he stated “was approved” without an offer to pay a piece rate. AF 12. The Chicago National Processing Center’s May 12, 2009, response stated that the information provided “is under review” and that the assigned analyst will send official notification after rendering a final decision. AF 11. That same day, the CO denied the Employer’s application. AF 7. The CO explained that 20 C.F.R. § 655.105(g) requires that the Employer offer the highest of the AEW, the prevailing hourly wage or piece rate, or the federal or state minimum wage. AF 9. The CO wrote that “[t]he State of New York has indicated a prevailing piece rate of \$.75 per 1 1/8 bushel box for apple, hand pick fresh market dwarf tree.” While the CO acknowledged that the Employer “will pay the hourly [AEW] of \$9.51 per hour,” he found that the Employer’s refusal to “pay the required piece rate of \$.75 per 1 1/8 bushel box for this activity” requires denial of the application pursuant to 20 C.F.R. § 655.105(g). AF 9. The Employer’s appeal followed.

### **Statement of the Issue**

The sole issue before me is whether the wage rate offered by the Employer, \$9.51, 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. In the denial letter, the CO conceded that \$9.51 is the AEW for the job opportunities at issue. AF 9; *see* AF 47 (containing the CO’s AEW calculation). Likewise, the CO found that no relevant prevailing hourly wage data existed. *See* AF 47, 52 (providing only prevailing piece rates for handpicking apples for market from dwarf trees in the Employer’s wage reporting area for 2008); *see also* 20 C.F.R. § 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 Employer must pay the prevailing piece rate for the Employer’s wage reporting area—\$.75 per 1 1/8 bushel box—rather than the AEW of \$9.51. *See* AF 52; 20 C.F.R. § 100(c) (defining “Prevailing piece rate” as “that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.), to be determined by the SWA according to a methodology published by the Department.”).

### Discussion

20 C.F.R. § 655.115(a)(2) requires that the ALJ review the record for legal sufficiency. Since the regulations do not define “legal sufficiency,” I apply an arbitrary and capricious standard when conducting an administrative review. *See Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (A.L.J. May 16, 2008). Based on the record before me, I conclude that the CO acted arbitrarily in denying the Employer’s application and reverse his determination.

In short, the CO did not identify any valid source of law requiring that the Employer pay workers on a piece rate rather than an hourly basis. In his determination, the CO merely cited 20 C.F.R. § 655.105(g), which, as discussed above, requires only that the Employer offer “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.” The CO did not find that the prevailing piece rate exceeded the AEW and therefore could not deny the application under the regulation cited.

Furthermore, nothing in the final rule permits ETA to require an Employer to pay workers on a piece-rate basis. Rather, several regulations provide additional protections for workers when an Employer pays on a piece-rate basis. *See, e.g.*, 20 C.F.R. § 655.104(1)(2). On its website, ETA published a set of *Frequently Asked Questions* (“FAQs”) about the new H-2A regulations. *See* Employment and Training Administration, Office of Foreign Labor Certification, *H-2A Frequently Asked Questions, H-2A Final Rule Issued December 18, 2008, Round One*, [http://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_faqs\\_round1.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2A_faqs_round1.pdf) (last visited May 27, 2009). In response to a question about whether an employer must pay the AEW, ETA wrote:

Not necessarily. The wage must be the highest of the AEW, prevailing hourly wage or piece rate, or the Federal or the State minimum wage rates. *If the wage is based on a piece rate, then the potential hourly wage must be equal or above the highest of the four sources.*

*Id.* at 4 (emphasis added). ETA’s response does not suggest that the CO will require employers to pay by the piece when the resulting potential hourly wage exceeds the AEW, the prevailing hourly wage, and the government minimum wages. Rather, it suggests that if an Employer uses a piece rate, the potential hourly wage based on that piece rate must at least equal the highest of the four other wages. This interpretation is consistent with the CO’s wage determination worksheet, which contains a blank “Piece Rate Conversion” field. *See* AF 47.<sup>3</sup> Ultimately, the

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<sup>3</sup> The Administrative File does not contain ETA’s January 9, 2009, *Prevailing Wage Determination Policy Guidance: Temporary Agricultural Employment* (“Guidance Letter”). The CO uses the Guidance Letter in making wage determinations under the new regulations. *See Forkland Springs Farm, LLC*, 2009-TLC-34, slip op. at 3

Employer does not wish to use a piece rate, and the CO has not cited valid authority that would compel it do so.<sup>4</sup>

Accordingly, it is hereby **ORDERED** that the Certifying Officer's decision is **REVERSED**.

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

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(A.L.J. Mar. 19, 2009). The Administrative File contains only Appendix A, the worksheet the CO uses when applying the Guidance Letter. As far as I can tell, ETA has not published the Guidance Letter on its website.

<sup>4</sup> Ms. Lance's third-hand statement of ETA policy appears to have served as the CO's only basis for requiring the Employer to use a piece rate. *See* AF 17. In his brief, the CO quotes ETA's website containing the prevailing piece and wage rates for New York, which states, "The above rate(s) for New York must be applied in evaluating job orders submitted for activities scheduled for 2009-2010." *See* AF 53. The page also reads, "If the worker is to be paid on a piece rate basis, the piece rate shall be no less than the piece rate prevailing for the activity in the area of intended employment." *Id.* This sentence precludes the CO's apparent interpretation that, if only a prevailing piece rate is listed, an employer must pay workers by the piece.