

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 22 February 2010

**OALJ Case Nos.: 2010-TLC-00017
2010-TLC-00019**

**ETA Case Nos.: C-10015-22176
C-10015-22175**

In the Matter of

NORTH CAROLINA GROWERS ASSOCIATION, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

APPEARANCES: Lee Wicker
P.O. Box 399
Vass, North Carolina, 28394
For the Employer

Stephen Jones
Office of the Solicitor
U.S. Dept of Labor
200 Constitution Ave, NW
Room N-2101
Washington, D.C. 20210
For the Certifying Officer

BEFORE: William S. Colwell
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On January 29, 2010, North Carolina Growers Association (“the Employer”) filed requests for de novo hearings reviewing the Certifying Officer’s determination in the above-

captioned temporary agricultural labor certification matters.¹ See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009).² On February 3, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). When a party requests a de novo hearing, the administrative law judge has five calendar days to schedule a hearing after receipt of the appeal file, and ten calendar days after the hearing to render a decision. 20 C.F.R. § 655.115(a).³

Statement of the Case

Appeal File

The facts of the cases are undisputed. On January 14, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the North Carolina Growers Association (“the Employer”) for temporary labor certification. AF 57-128.⁴ In particular, the Employer requested certification for 27 “Farmworkers and Laborers” between March 4, 2010, and December 10, 2010. AF 57.⁵ The application indicated that the basic rate of pay to be offered for the position was \$7.25 per hour. AF 61.⁶ The application also included a wage survey conducted by the Employer, asserting that

¹ Both applications for temporary labor certification were substantially the same, so the two cases were consolidated for both the de novo hearing and this decision and order. Likewise, since the appeal files do not differ between the two cases, I will only cite to 2010-TLC-00017, unless otherwise noted. 2010-TLC-00017 included a 128-page appeal file, while 2010-TLC-00019 included a 103-page appeal file.

² On December 18, 2008, the Department of Labor (“DOL”) published new rules governing this process that became effective January 17, 2009. 73 Fed. Reg. 77,110 (Dec. 18, 2008). Subsequently, on March 17, 2009, DOL issued a proposal to suspend these rules for nine months and reinstate the rules that were in effect on January 16, 2009. 74 Fed. Reg. 11,408 (Mar. 17, 2009). On May 29, 2009, DOL adopted the proposal as a Final Rule, which would have taken effect on June 29, 2009. 74 Fed. Reg. 25,972 (May 29, 2009). On July 1, 2009, the United States District Court for the Middle District of North Carolina preliminarily enjoined DOL from temporarily suspending the new rules. *N.C. Growers’ Ass’n v. Solis*, No. 1:09CV411 (M.D.N.C. July 1, 2009). As a result, I will apply the rules that became effective January 17, 2009, which were codified in Title 20 of the Code of Federal Regulations.

³ The Office of Administrative Law Judges in Washington, D.C., was closed from February 8, 2010, until February 12, 2010, due to inclement weather conditions. The timeliness of the proceedings was adjusted as weather permitted and with the agreement of the parties.

⁴ Citations to the 103-page Administrative File will be abbreviated “AF” followed by the page number.

⁵ 2010-TLC-00019 requested certification for 6 “Farmworkers and Laborers.” AF 57.

⁶ The basic rate of pay offered for 2010-TLC-00019 was \$9.00 per hour. AF 61.

the appropriate wage for the area was lower than the \$10.14 wage required by the OES calculation used in the regulations. AF 119-128.

On January 21, 2010, the CO found that the application did not meet the requirements of the regulations, and thus, it would not be accepted for consideration unless the Employer submitted a modified application. AF 20-22. Citing to 20 C.F.R. § 655.105(g), the CO found that the Employer did not use the highest of the Adverse Effect Wage Rate (“AEWR”), the prevailing wage rate, or the federal, state, or local minimum wage. AF 22. Specifically, the CO found that the Employer should have offered the basic wage rate of \$10.14 per hour rather than a wage rate of \$7.25-\$9.00 per hour. *Id.*⁷ The Employer’s appeals followed.

In the Employer’s requests for de novo hearings, it argued that other similar labor certification programs allow employers to challenge erroneous wage findings. AF 1-2. The Employer also complained that it tried to contact the Office of Foreign Labor Certification about the wage finding with no success. *Id.* Attached to the request for review, the Employer included its own wage survey as well as pertinent text from the H-2B labor certification program, which outlines the process for appealing the prevailing wage determination for that particular regulatory scheme. AF 3-19.

De Novo Hearing

Per the parties’ agreement, a de novo hearing was held on February 12, 2010.⁸ At the start of the hearing, the Employer submitted a brief, which included relevant case law, as ALJ exhibit 1. Transcript (“Tr”) 7. BALCA cases 1998-INA-00133 and 1998-INA-00133 were admitted as ALJ exhibit 2 and ALJ exhibit 3. Tr 8. The appeal files for 2010-TLC-00017 and 2010-TLC-00019 were also admitted as Respondent’s exhibit (“Rx”) 1 and Rx 2. Tr 9-10. An email sent by the CO on Monday, February 8, 2010, at 3:18 p.m. was admitted as Rx 3. Tr 11-12. An email sent by the CO on Friday, February 12, 2010, at 12:10 p.m. was admitted as Rx 4. Tr 12.

⁷ The CO did not accept 2010-TLC-00019 for consideration because the Employer offered the basic wage rate of \$9.00 per hour rather than the AEWR rate of \$10.14 per hour. AF 20-22.

⁸ The Employer and the CO filed briefs prior to the hearing, and all the pre-filing information has been made part of the record as designated above.

Per the authority of *El Rio Grande*, 1998-INA-133 (BALCA Feb. 4, 2000) (*en banc*); (BALCA July 28, 2000), the Employer asserted that BALCA has the ability to review prevailing wage determinations in an H-2A claim. ALJx 1. The Employer also emphasized at hearing that the other programs, such as the H-2B program, allow an Employer to challenge a prevailing wage determination. Tr 24-25.

Further, the Employer argued that *El Rio Grande* “considered the same issue in question here . . . [and] [BALCA] found it does have the authority to hear a prevailing wage determination challenge where the underlying temporary worker program does not expressly provide for an appeal.” Tr 22. Once its right to appeal the AEWB has been established, the Employer asserted that it “is entitled . . . [to] an independent wage survey to determine the wage rate.” Tr 24. Accordingly, the Employer stated that it had “plainly demonstrated there is something badly wrong with the DOL’s OES wage determination for the Winston-Salem metropolitan statistical area.” Tr 26.

The CO argued that the Employer has not raised a justiciable issue because:

the H-2A regulations at 20 CFR 655.105 and 655.108 explicitly require that the Certifying Officer take the action (application of the BLS-generated AEWB where it is the highest of four possible H-2A wage rates) against which the NCGA has raised an appeal. The NCGA, in effect, has asked that the pertinent regulations be set aside. However, the Department's administrative law judges do not have the authority to supersede the H-2A regulations.

Rx 3. In furtherance of his argument, the CO asserted that *El Rio Grande* does not confer authority on an administrative law judge to determine if the OES rate is the appropriate wage rate. Tr 16. According to the CO, the certifying officer in *El Rio Grande* “exercised some discretion” in determining the wage rate. Tr 15-16. However, in the present case, “there [was] no such role for the certifying officer. . . . Rather, the certifying officer looks at the four wage rates that are produced elsewhere and applies the highest wage in reviewing applications.” Tr 16.⁹

Discussion

⁹ Closing arguments were waived by both parties. Tr 32.

To obtain temporary labor certification under the H-2A program, the employer must offer whichever wage rate is highest of the “AEWR in effect at the time recruitment is initiated, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.” 20 C.F.R. § 655.105(g). The AEWR will be “based on published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey.” 20 C.F.R. § 655.108(e). The National Processing Center (“NPC”) “must enter the wage rate determination on a form it uses, indicate the source, and return the form with its endorsement to the employer.” 20 C.F.R. § 655.108(f). The regulations require that the job be classified based on the skills it requires and placed into one of four categories according to the regulatory definitions in order to determine the appropriate AEWR wage. *Id.*

The issue before me is whether BALCA has the jurisdiction to overturn an AEWR given to an employer. Because I find that the board does not have jurisdiction to determine whether the BLS through its OES survey has incorrectly determined the wage for a particular area and thus established the wrong AEWR, I affirm the CO’s denial of certification.

The determination of a wage rate is an important aspect of the H-2A program’s endeavors to protect domestic workers. Additionally, the H-2A program, unlike the H-2B and permanent labor certification programs, must move swiftly, so that agricultural employers will be able to make decisions about crops and other time sensitive concerns in an expedient manner. This concern for time is borne out by the program’s abbreviated schedules, including the shortened time for administrative review, compared to the other programs. Likewise, the wage determination under the current regulations has been streamlined for efficiency. Unlike other programs, the AEWR is determined by pre-set criteria established by the BLS without the ability to submit individual wage surveys. The CO has no discretion over how much the wage rate should be other than a determination of what skill level is required for the job.¹⁰ Common sense suggests that

¹⁰ The Employer does not argue that the CO incorrectly classified the job opportunities based on skill level. Rather the Employer argues that the OES wage rate is erroneously calculated and should be set aside.

this process was established to provide consistent wage rates on an expeditious schedule.

Despite the Employer's argument, the regulations do not confer authority on the board to review the validity of the OES wage rate. The Employer points this board to the decision of *El Rio Grande*, 1998-INA-133 (BALCA Feb. 4, 2000) (*en banc*); (BALCA July 28, 2000) as a basis for jurisdiction. *El Rio Grande* held that BALCA had the jurisdiction to review the prevailing wage determination for cases arising out of the Service Contract Act ("SCA"). *Id.* at 4. However, in arriving at this result, the board relied on an ARB decision that detailed the specific methodology for making wage determinations in an SCA case: "We review the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a *reasonable exercise of the discretion* delegated to the Administrator." *Id.* at 5 (emphasis added). The board went on to note that "the Administrator's discretion under the Service Contract Act is perhaps at its broadest when the Administrator is issuing prevailing wage schedules." *Id.* Ultimately, the board held that "applying SCA classifications when making labor certification prevailing wage determinations is inherently an inexact science that requires an exercise of discretion on the part of COs." *Id.* at 10.

The board based its jurisdiction on the cornerstone that the administrator had discretion in determining the wage rate and classifying the worker within a limited set of jobs classifications. However, in the present case, the regulations afford the CO no discretion as to the wage offer for an individual job. Furthermore, unlike in *El Rio Grande*, the Employer is not challenging that its jobs were misclassified under the current OES system, only that the OES system lists a wage that is too high for the job opportunity. This is not a matter of discretion, as was the case in *El Rio Grande*. Rather it is a matter of mathematical calculations established by the BLS and adopted by the H-2A regulations. Since the regulations provide this board with no authority to review the correctness of a wage determination contained in the OES survey, the board finds that jurisdiction does not exist to overturn the findings of the OES survey based on data supplied by an employer. Since Employer did not use the highest of AEWR, the prevailing wage rate, or the minimum wage, the CO properly denied certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge