

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 May 2010

OALJ Case Nos.: 2010-TLC-00028

ETA Case Nos.: C-10103-24045

In the Matter of

DELLAMANO AND ASSOCIATES,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

APPEARANCES: Mr. Francis Dellamano
For the Employer

Jonathan R. Hammer, Esq.
For the Certifying Officer

BEFORE: William S. Colwell
Associate Chief Administrative Law Judge

DECISION AND ORDER

On April 23, 2010, Dellamano and Associates (“the Employer”) filed a request for a de novo hearing reviewing the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009). On May 5, 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).

Statement of the Case

The facts of the case are undisputed. On April 13, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Dellamano and Associates ("the Employer") for temporary labor certification. AF 35.¹ The Employer requested certification for 13 "Farmworkers and Laborers-Crop" from June 3, 2010, until November 15, 2010. *Id.* The job duties would include, *inter alia*, "harvest[ing] asparagus, small fruits, apples and pears." *Id.* In his application, the Employer indicated that it would pay its workers \$10.16 per hour, and the workers were required to pick a minimum of "at least 6 bins (120 bushels) fresh market and/or 8 bins (160 bushels) processing fruit per day." AF 37. The prevailing wage determination ("PWD") obtained by the Employer required the Employer to offer a wage rate of at least \$10.16 per hour. AF 20-23.

The CO issued a Notice of Deficiency on April 19, 2010. AF 9-15. Citing to 20 C.F.R. § 655.122(l)(2)(iii), the CO found² that the Employer must amend its application to "indicate piece rates for each crop activity listed." AF 13. The Employer failed to modify its application within the allowed timeframe.³

In its Request for Review, the Employer argued that whether the Employer had to offer a piece rate had previously been decided by *In the Matter of Twin Star Farm*, 2009-TLC-00051. The Employer further remarked that "orders have been submitted, accepted and certified with production standards and no required piece rates." AF 1.

¹ Citations to the 48-page Administrative File will be abbreviated "AF" followed by the page number.

² The Notice of Deficiency listed five deficiencies, however, at the hearing, the CO and the Employer agreed that only one was at issue.

³ The CO agreed at the hearing that pending the outcome of this decision, the Employer would be allowed to amend the remaining deficiencies per the agreement of both parties.

Per the parties' agreement, a de novo hearing was held on April 12, 2010. At the hearing, each party presented one witness and two exhibits⁴ were admitted, including the 48-page appeal file. Tr. 6.

At the trial, Mr. Dellamano testified that “[the Employer does] a lot of picking into bins that we sell directly to the stores or to roadside markets. . . .so that’s why we pay by the hour, to get quality and to get put in the bin what our customer wants.” Tr. 10. However, Mr. Dellamano stated that the Employer needed a “production-type minimum” in order to ensure that a person would not work for an eight hour day and “only pick two bins.” Tr. 11.

Ms. Marie Gonzalez, a certifying officer at the U.S. Department of Labor, Office of Foreign Labor Certification, testified that the Employer’s application was denied because an Employer has “an obligation under 20 C.F.R. § 655.122(l) to offer, advertise in its recruitment, and pay a wage that is the higher of the AEW, the prevailing hourly wage for piece work, or the federal or state minimum wage, or the collective bargaining agreement.” Tr. 23. Ms. Gonzalez further testified that an hourly wage does not exist for apple picking based on the information gathered by the New York State Workforce Agency (“SWA”). Tr. 24. According to Ms. Gonzalez, the SWA identified four activities that workers would perform for the Employer, and all of these activities only have a piece rate wage. Tr. 26-27. The Employer, according to Ms. Gonzalez, would be responsible for paying the worker the AEW as a minimum, but if the worker would have earned more under the piece rate standard, then the Employer would pay the higher piece rate wage. Tr. 29-30. Alternatively, if the piece rate wage was less than the AEW, then the Employer, according to Ms. Gonzalez, would pay the AEW because it is the higher wage. *Id.*

Ms. Gonzalez further testified that the Employer needed to modify its application to “identify the piece rates that were approved and established by the State Workforce Agency” because the Employer had an “obligation to pay the highest of the AEW . . . or the piece rate.” Tr. 32. As a result of this modification, the witness testified that a worker would have had “the

⁴ Mr. Dellamano submitted a copy of the “New York State 2008 Apple Survey—Prevailing Practices, Western Region.” The survey, taken by New York farmers, showed the minimum threshold that farmers required workers to pick per day.

opportunity to earn more on an hourly basis[,] more than what the AWER would have been at \$10.16 per hour.

At the end of the hearing, the Employer declined to submit an oral or written closing argument. Tr. 37. The CO submitted a written brief on May 14, 2010. In his brief, the CO argued that *In the Matter of Twin Star Farm*, 2010-TLC-00051, the Board’s decision “undermines” the “clear regulatory intent to have a prevailing wage and for that wage to be the highest of the five listed options.” The CO further wrote:

It is simply impossible for the CO to make that determination at the time the application is filed. Where the prevailing wage is reflected as a piece rate, that rate must be offered. . . .The employer must structure its wages so the employee receives the highest of the four options.

CO’s brief, pg. 2.

Discussion

H-2A Employers are required to pay both domestic and foreign workers “a wage that is the highest of the AWER, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage.” 20 C.F.R. § 655.102(a). The regulations further iterate that if “*the worker is paid by the hour*, the employer must pay the worker at least the AEW, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate,⁵ in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period.” 20 C.F.R. §655.122(l).

The issue before the Board is whether an Employer, who wishes to pay his workers an hourly wage rather than a piece rate wage due to the nature of the employment,⁶ and who subsequently obtains a valid prevailing wage determination in compliance with the regulations

⁵ There is no indication that a collective bargaining agreement exists in this case, and since the offered wage is higher than both the Federal and State minimum wages, the only issue is whether the Employer must pay the offered wage or the piece rate wage.

⁶ In the present case, the Employer wanted his produce picked for “fresh market,” and as a result, needed his fruits to be handled carefully in order to avoid bruising. According to the application, the Employer required his employees to have a 0% bruise rate. As a result, the Employer preferred to pay his employees an hourly wage.

must then also offer to pay the worker a piece rate wage. The regulations most certainly anticipate that an employer, such as Dellamano and Associates, would wish to pay its workers by the hour. The regulations at 20 C.F.R. § 655.122(l) provide instructions specifically to employers who wish to pay workers by the hour. Moreover, the regulations do not forbid employers from using a piece rate wage simply because the local SWA does not have an hourly rate of pay available.⁷ See *In the Matter of Twin Star Farm*, 2009-TLC-00051 (BALCA May 28, 2009) (holding that an employer did not have to offer both an hourly wage rate and a piece rate).

The CO incorrectly contends that the Employer should have to offer both a piece rate wage *and* an hourly wage because the CO is unable to establish at the time of the application which rate of pay is higher. Yet the regulations unhesitatingly provide that employers are required to obtain a prevailing wage determination (“PWD”) from the National Processing Center (“NPC”). See 20 C.F.R. § 655.10. Moreover, the regulations also provide that the NPC should determine the prevailing wage in accordance with the “procedures established by this regulation.” 20 C.F.R. § 655.10(a).

In the present case, the Employer obtained a PWD from the NPC. The determination noted the piece rates and the hourly wage rate established by the New York SWA for the jobs the Employer listed in its application. On the “Worksheet for Use in Determining Offered Wage Rate,” the NPC listed the “piece rate conversions” as well as the hourly wage rate for general orchard work and arrived at the offered wage of \$10.16 by using the prescribed formula found in the regulations. AF 19. It is somewhat inconceivable that an employer, under the regulations, is expected to offer a piece rate wage as well as an hourly wage rate given that the NPC, who has authority under the H-2A regulations to establish the prevailing wage, determined that piece rates could be converted into an hourly wage rate. Moreover, it is even more troubling that the CO expects an employer, who has received an hourly wage rate from the PWD in compliance with the regulations, to then understand that despite the information provided on the PWD, it must also offer an additional piece rate wage that was *not* listed on the PWD as an “offered wage.” To deny an employer certification because it did not offer a wage that was *not* listed on the official

⁷ The prevailing wage surveys used in establishing the piece rate or hourly wage rate is established by the State Workforce Agency (“SWA”) as a condition for receiving federal funds.

PWD provided by the Department of Labor’s processing center is arbitrary.⁸ See *Twin Star* at slip op. 4. (discussing that the wage determination sheet contains a “Piece rate Conversion field,” which is consistent with the Employer’s idea that an hourly wage is appropriate.)

The regulations specifically allow employers to pay workers by the hour, and nothing within the regulatory scheme implies that workers must pay a piece rate wage instead of an hourly wage. Instead, the opposite is true. The regulations offer several provisions that protect workers from piece rate wages, yet nothing in the regulations contain similar provisions to protect workers from an hourly wage. Moreover, by the very information provided by the NPC on the worksheet allowing for a piece rate conversion, an hourly wage is not only acceptable but anticipated, even when the only available wage information from the local SWA is based on a piece rate wage. Finally, nothing in the ETA’s instructions to the Employer or information contained in the PWD suggests that the Employer should offer not only the official wage rate given by the NPC, but also independently determine the appropriate piece rate wage as well.⁹

It should also be noted that not only is the dual requirement not based on the regulatory scheme, but it also places an unwieldy and impractical burden on the Employer. Under the CO’s theory, the Employer would need to determine the exact amount of fruit picked by the worker at all times. The Employer would then have to determine the amount of money owed to the worker under the piece rate prevailing wage. Assuming that the worker picked more than one type of fruit during any given span, the Employer might have to make this determination using a variety of piece rate wages. If the amount was less than the prevailing hourly wage rate, then the Employer would have to pay the hourly wage rate—if more, then he would need to supplement the hourly wage. While already a complex task given the nature of a farm, this does not take into account what would happen if the worker stops picking apples for a few minutes to work on general orchard work, which is paid by the hour. How far must the employer break down the

⁸ The Board held in *Twin Star* that requiring an Employer to pay a piece rate wage instead of an hourly wage rate was arbitrary given that the CO could not determine that the piece rate wage would be higher than the AWER and given the lack of regulatory authority requiring an employer to use a piece rate wage instead of an hourly wage rate.

⁹ The CO suggested at the hearing that the piece rate wage information was contained on a public website. However, the hourly wage rate is also contained on this exact same website. It is inexplicable that the employer must obtain a PWD from the NPC for an hourly wage rate, but he must then determine the piece rate wage independently from the website.

workers productivity—into minutes, perhaps—in order to arrive at an accurate determination. All of this reasoning also ignores the needs of the employer who wanted the workers to harvest the produce carefully and perhaps slowly in order to avoid bruising the fruit, which was going straight to the market.¹⁰ Ultimately is unreasonable for the CO to require the Employer to determine which rate is appropriate, since the CO, even with his expertise, is unable to make the calculation.

Therefore, the CO improperly denied certification based on the Employer's failure to offer both an hourly wage rate and a piece rate.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **REVERSED** and **REMANDED** for processing consistent with this opinion.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

¹⁰ In the present case, the Employer established a minimum amount of fruit the workers must pick for the day in order to keep his or her job. If the workers picked fruit the entire day, picking only the minimum amount of bushels, the piece rate wage would be higher than the prevailing wage offered by the Employer. However, when determining the hourly wage offer, the worksheet from the NPC clearly took the minimum floor into account. Moreover, the Employer also required the workers to provide general orchard work, which pays an hourly wage *less* than the offered wage rate. Given the NPC's expertise at determining wage rates, and given that they obviously took into account both the higher piece rate wage and the lower hourly wage rate, the Board has no reason to assume that the wage rate was calculated incorrectly.