



Issue Date: 17 August 2011

OALJ Case No.: 2011-TLC-00442

ETA Case No.: C-11174-29626

In the Matter of

GOLDEN HARVEST FARM,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

DECISION AND ORDER

This matter arises under the temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. Employer, Golden Harvest Farm, requested *de novo* review of the Certifying Officer's denial of its Application for Temporary Alien Labor Certification.¹ For the reasons explained below, the Certifying Officer's denial is reversed and remanded for processing.

Background

On June 23, 2011, Golden Harvest Farm (hereinafter "Golden Harvest") submitted an application to the United States Department of Labor seeking temporary alien labor certification for thirty seasonal agricultural positions. Administrative File (AF) at 112. The accompanying wage rate table identified two positions—"Farmworker/Laborer" and "Apples/Harvest"—both of which paid an hourly wage of \$10.25. AF at 123. This rate is the adverse effect wage rate (AEWR) for the state of New York.

On June 29, 2011, the Certifying Officer (CO) issued a Notice of Deficiency (NOD) informing Golden Harvest, *inter alia*, that it must amend its application "to list specific harvesting activities to be carried out for apples and to offer the associated prevailing piece rate." AF at 82.² Citing Title 20 CFR Parts 655.120(a) and 655.1222(l), the CO declared:

¹ During a telephone conference, the parties agreed to proceed with an administrative review in order to consider the issue of whether the CO has the authority to require the Employer to use a piece rate, with a *de novo* hearing to follow in the event that I found in the CO's favor.

² The NOD identified four deficiencies in the Employer's Application, but only one of these deficiencies—"offered wage"—remains in dispute.

Offering a piece rate provides workers with the opportunity to be paid more than the AEW, the prevailing hourly wage rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate; therefore, where a piece rate exists for the particular crop and activity in the area of intended employment, it would be considered the highest of these wages.

AF at 81.

Golden Harvest responded to the NOD on July 12, 2011. AF at 12-44. Per the CO's instructions, it amended its application to specify that the "main crop activity" would be "harvesting apples for retail." AF at 24. Instead of offering an associated prevailing piece rate, however, Golden Harvest alleged that there was no applicable piece rate for the crop activity in question—harvesting apples for retail. AF at 13. Further, it argued that even if there was an applicable piece rate, the regulations do not permit the CO to compel an employer to pay its workers on a piece rate basis (as opposed to an hourly basis). The CO disagreed, however, and on August 1, 2011, denied Golden Harvest's Application for Temporary Labor Certification based on Golden Harvest's failure "to amend its application . . . to offer the associated prevailing piece rate." AF at 6-11.

Discussion

The sole issue before the Board is whether the wage rate offered by Golden Harvest—\$10.25 per hour—is at least equal to "the highest of the AEW, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage." 20 C.F.R. 655.120 (a).³ There is no dispute that the offered wage meets the AEW and exceeds the federal and state minimum wage. This appeal thus turns on whether Golden Harvest must offer the prevailing piece rate for its wage reporting area rather than an hourly wage equal to the AEW.

Under the Regulations, employers are required to pay H2-A workers "a wage that is the highest of the AEW, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage." 20 C.F.R. 655.120 (a). The regulations further specify 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, in effect at the time the work is performed, whichever is highest, for every hour or portion thereof worked during a pay period." 20 C.F.R. 655.122(l) (emphasis added).

According to the CO, the above-cited regulations require employers to pay a piece rate wage whenever a piece rate is found to be prevailing. CO's Brief in Matter of Golden Harvest Farm (hereinafter "CO's Brief") at 4. Specifically, the CO asserts:

³ In conducting the administrative review, I have applied an arbitrary and capricious standard. See *Twin Star Farm*, 2009-TLC-51, slip op. at 4 (A.L.J. May 28, 2009); *Bolton Springs Farm*, 2009-TLC-28, slip op. at 6 (A.L.J. May 16, 2008).

While is not possible to determine whether the prevailing piece rate will be the highest of the wage rates identified in the regulations, where a piece rate is prevailing in an area, the only way to ensure that the highest wage is in fact being paid to workers is to assume that it is the highest available wage rate.

Unlike the other rates listed in Sections 120(a) and 122(l), including the AEW, the total compensation due to a worker being paid a piece rate cannot be determined until the harvesting work has been performed and the pay period has ended. Paying a worker the AEW instead of the prevailing piece rate means that a worker may have received more money had they been paid the prevailing piece rate which is a direct contravention of the regulations.

CO's Brief at 2. The CO goes on to argue that if employers are not required to pay the prevailing piece rate at the time the application is filed, "the regulations become meaningless, and the piece rate will never be paid because there is simply no method of calculating if the piece rate is the highest available rate in advance of the end of each pay period." *Id.*

Notably, however, the above-cited regulations do not suggest that the CO can mandate a particular *method* of payment; rather, they provide specific instructions to employers who wish to pay workers by the hour. Such an interpretation is supported by two previous Board decisions, both of which held that the CO lacked the power to impose a piece rate method of payment upon an employer who wished to pay on an hourly basis. *See In the Matter of Twin Star Farm*, ALJ No. 2009-TLC-00051 (May 28, 2009); *In the Matter of Dellamano and Associates*, ALJ No. 2010-TLC-00028 (May 21, 2010).

Here, the CO did not find that Golden Harvest's employees would, in fact, earn more under the prevailing piece rate. Nor did the CO convert the prevailing piece rate into an hourly rate exceeding the AEW. Rather, the CO simply declared that Golden Harvest must offer the prevailing piece rate because a worker *might* receive more money than he would under the hourly AEW. Such an assumption is based on pure speculation and applies to all employment in which a piece rate wage is found to be prevailing.⁴ It is inconceivable that such a broad-reaching requirement would not be specifically addressed in the regulations—particularly given the intrusion such a mandate would place on an employer's discretion over traditional business judgments.⁵ Because the CO did not identify any valid source of law requiring Golden Harvest Law to pay its workers on a piece rate basis, the CO's denial was legally insufficient, and the CO acted arbitrarily in denying the Employer's application.

⁴ The CO's claim that allowing employers to pay the AEW or other hourly rate, in lieu of the prevailing piece rate, would afford workers no protection, and that "requiring payment of the piece rate, where it is found to be the prevailing wage rate, is the only method to ensure full implementation of the regulatory framework and that the employment of H-2A workers does not adversely affect the wages of U.S. workers" (CO's Brief at 2) is overblown, and without support in the regulations. As Judge Colwell noted in *Dellamano and Associates*, the regulations offer several provisions that protect workers from piece rate wages, but nothing in the regulations contains similar provisions to protect workers from an hourly wage. *Id.* at 6.

⁵ For example, in the instant matter, Golden Harvest explains that because "meeting buyer demand by harvesting the correct fruit at the correct time is critical to its business model," it "encourages workers to take the time to harvest the right fruit by paying them on an hourly basis," which "removes any incentive to sacrifice quality for quantity." AF at 1.

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.

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge