



**Issue Date: 25 September 2009**

**BALCA Case Nos.: 2009-TLN-00088  
2009-TLN-00089**

**ETA PWD Case Nos.: 2210, 2211**

*In the Matter of:*

**SIERRA AT TAHOE SKI RESORT,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Dolores Fabregas  
*Pro se for the Employer*

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

### **DECISION AND ORDER**

These matters involve appeals of two prevailing wage determinations (“PWDs”) made by a Certifying Officer (“CO”) at the Employment and Training Administration’s Chicago National Processing Center. Sierra at Tahoe Ski Resort (“the Employer”) requests the PWDs for its applications for temporary alien labor certification under the H-2B non-immigrant program. The prevailing wages were determined pursuant to 20 C.F.R. 655, Subpart A, and based on the Employer’s *Application for Prevailing Wage Determination*, ETA Form 9141.

Because the same or substantially similar evidence is relevant and material to each of these appeals, I have consolidated these matters for decision. *See* 29 C.F.R. § 18.11. Unless otherwise noted, the following Statement of the Case is based on BALCA Case 2009-TLN-00088, which is representative of the issues in both cases. The applications are nearly identical in regard to the issues raised and dealt with by the CO, and the evidence and argument presented by the Employer.

## Review Process

In brief,<sup>1</sup> in order to begin an H-2B labor certification application, the regulations provide that an employer must request a PWD from the National Processing Center (“NPC”). 20 C.F.R. § 655.10(a). In general, if the job opportunity is not covered by a collective bargaining agreement, the NPC will derive the PWD from an Occupational Employment Statistics (“OES”) survey using the regulatory guidelines.<sup>2</sup> 20 C.F.R. § 655.10(b),(c) and (d). If the job opportunity is not covered by a collective bargaining agreement or a professional sports league’s rules or regulations, the NPC will consider wage information provided by the employer either before or after the OES PWD is made. 20 C.F.R. § 655.10(f)(1). The employer’s wage information must meet certain regulatory criteria. 20 C.F.R. § 655.10(f)(2) and (3). If the NPC finds that the employer-provided survey is not acceptable, it must inform the employer in writing of the reasons why it was not accepted. 20 C.F.R. § 655.10(f)(4).

After receiving this notice, the employer is permitted to submit supplemental information, file a new PWD request, or acquiesce to the initial PWD. 20 C.F.R. § 655.10(f)(5). The NPC is required to consider one supplemental submission. 20 C.F.R. § 655.10(g)(1) and (2). If the NPC does not accept the survey after considering the supplemental information, the NPF must inform the employer in writing of its decision. 20 C.F.R. § 655.10(g)(2). The employer then may apply for a new PWD, appeal, or acquiesce to the initial PWD. 20 C.F.R. § 655.10(g)(3).

If the employer appeals, the NPC is required to review the appeal “and accompanying documentation, including any supplementary material submitted by the employer.” 20 C.F.R. § 655.11(b). The NPC Director determines which CO will review the request for review. 20 C.F.R. § 655.11(c). That CO reviews the PWD “solely on the basis upon which the PWD was made” and may either affirm or modify the PWD. 20 C.F.R. § 655.11(d). The employer then has the option to request BALCA review of the CO’s PWD decision. 20 C.F.R. § 655.11(e). BALCA may only consider “only legal arguments and only such evidence that with within the record upon which the decision on the PWD by NPC was based.” 20 C.F.R. § 655.11(e)(1). *See also* 20 C.F.R. §655.33(e), as made applicable by 20 C.F.R. § 655.11(e)(4) (limiting BALCA review to the record before the CO when he made his Final Determination).

## Statement of the Case

On July 9, 2009, the Employment and Training Administration (“ETA”) received the Employer’s PWD requests for the positions of “Ski/Snowboard Instructor – Non-Certified” and “Ski/Snowboard Instructor – Level I,” for a period of employment beginning on October 15, 2009.<sup>3</sup> *See* AF 146-151;

---

<sup>1</sup> This is only a summary of the PWD procedure to set the context for this decision. This summary does not relate all of the important details of the regulations.

<sup>2</sup> An employer may also opt to use a current Davis-Bacon Act or Service Contract Act wage determination for the area.

<sup>3</sup> The Employer submitted prevailing wage requests for four applications, with PW Tracking Numbers: 2210, 2211, 2208, and 2209. Prevailing Wage Determinations have not yet been made for 2208 or 2209, thus I will not discuss these cases here.

AF2 144-149.<sup>4</sup> The Employer noted that there was no Standard Occupational Classification (“SOC”) code for the ski/snowboard instructor position, but that it had previously used the code 39-9031 for Fitness Trainers and Aerobics Instructors. AF 146. The Employer contended that the positions were located in El Dorado County, in the “Northern Mountains Region of California nonmetropolitan area.” *Id.*

The CO issued a Prevailing Wage Determination on July 16, 2009. AF 135. Using the Occupational Employment Statistics (“OES”) as its source, the CO found that the position was properly categorized as Fitness Trainers and Aerobics Instructors, under SOC code 39-9031. *Id.* For the position of Ski/Snowboard Instructor – Non-Certified (BALCA Case 2009-TLN-00088), the CO determined the PWD to be \$13.15 per hour for wage Level 1. AF 135. For Ski/Snowboard Instructor – Level I (BALCA Case 2009-TLN-00089), the CO determined the PWD to be \$16.88/hour for wage Level 2. AF2 133. Both wages were valid from July 16, 2009 through June 30, 2010. AF 135; AF2 133.

The Employer disagreed with the CO’s decision and submitted a request for review on July 24, 2009.<sup>5</sup> AF 123. The Employer stated that it found this wage to be excessively high and requested that the CO reconsider. It asserted that Mammoth Mountain, a similar resort in its same competitive market, received a prevailing wage determination for \$9.00 per hour for the same position. *Id.*

On August 4, 2009, the Employer requested a review for all four of its Prevailing Wage Determinations.<sup>6</sup> AF 83. In this letter, the Employer asserted that the CO was selecting the incorrect region when using the FLC wage library to search for code 39-9013, and that it should be using the “Northern Mountains Region of California nonmetropolitan,” rather than “Sacramento, Arden Arcade-Roseville, CA.” *Id.* The Employer contended that although its resort is located in El Dorado County, it is about 100 miles away from Sacramento. It argued that selecting “Northern Mountains Region of California nonmetropolitan” was more accurate and that this was the region used for their sister resort, Northstar-at-Tahoe Resort, which is only 40 miles away on the other side of Lake Tahoe. *Id.* The Employer asserted that the typical pay rate (and that used for its sister resort,) for a Ski/Snowboard Instructor – Level I was \$11.60 per hour (as opposed to the PWD of \$16.88/hour.) For a Ski/Snowboard Instructor – Non-Certified, it indicated the typical pay rate was \$9.54 per hour (as opposed to the PWD of \$13.15/hour.) The Employer included data from a National Ski Area Association (“NSAA”) annual salary survey as a reference, asserting that “The NSAA survey is the only ski industry-specific wage information we can refer to in determining pay rates, and it includes the majority of ski resorts in the country, breaking them down by region.” AF 83-84.

The survey the Employer enclosed includes wage information from fourteen Ski Resorts in the Sierra Nevada Mountains region, which were based on wages for 1118 incumbents. AF 112-118. The Employer included information for the four positions for which it submitted prevailing wage applications: “Ski School – No Certification,” and “Ski School – Levels 1, 2, and 3 – Ski or

---

<sup>4</sup> Citations to the Appeal File for 2009-TLN-00088 will be abbreviated “AF” followed by the page number. Citations to the Appeal File for 2009-TLN-00089 will be abbreviated “AF2” followed by the page number.

<sup>5</sup> This request for review only refers case #2210.

<sup>6</sup> Although the Employer made reference to all four of its PWD applications and indicated the pay rates for each of these positions in the “Northern Mountains Region of California nonmetropolitan,” I am only considering the information relevant to the two cases on appeal.

Snowboard Instructor.”<sup>7</sup> For the position of “Ski School – No Certification,” the job description is: “Teaches skiing or snowboarding but is not certified. Report hourly rate for group lessons.” The survey includes several wage averages, the median wage, and the lowest and highest wages offered for each position. The weighted average for this position is \$9.68 per hour and the resort average is \$9.54 per hour. For the other position at issue, the job title is listed as “Ski School – Level 1 – Ski or Snowboard Instructor.” The description states: “Report hourly rate for group lessons. Do not include any bonus or other compensation.” The weighted average for this position is \$11.54 per hour and the resort average is \$11.60 per hour. AF 115.

The same CO who made the original PWD issued a Final Prevailing Wage Determination on August 12, 2009, affirming the original PWD. AF 81-82. This determination was summary in form and did not contain any explanation of why the Employer’s survey was rejected.

The Employer requested BALCA review of the August 12, 2009 Final Determinations. AF 65-66. However, the Employer later withdrew its appeal to BALCA, indicating that it was doing so after a discussion with Vincent Costantino, a Senior Trial Attorney representing the CO before BALCA, who suggested that the Employer instead resubmit its PWD appeals to the CO for reconsideration.<sup>8</sup> See AF 19-22. See also *Sierra at Tahoe Ski Resort*, 2009-TLN-79 and 80 (Aug. 26, 2009) (dismissing appeals).

Thus, on August 25, 2009, the Employer again requested review of the PWD, arguing that the CO chose the wrong region to determine the prevailing wage. AF 24-25. Again, it asserted that the correct region was “Northern Mountains Region of California nonmetropolitan,” and not “Sacramento, Arden Arcade-Roseville, CA.”

On September 3, 2009, a different CO issued a second Final Prevailing Wage Determination, indicating that she had “[r]eviewed the supplemental information submitted by the employer and has affirmed the Prevailing Wage Determination originally issued by the Chicago National Processing Center.” AF 11-14; AF2 11-14. The CO listed three reasons for affirming the prevailing wage determinations. For the first reason, the CO stated that, “The Employer Provided Survey Was Not Based on Valid Statistical Methodology.” The CO indicated that she reviewed the website for Sierra Research Associates (publisher of the survey) and it could not determine whether it was affiliated with the National Ski Area Association (NSAA). The CO contended that if the members were not surveyed, then the survey was invalid. Thus, in accordance with Appendix F of the *Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural*

---

<sup>7</sup> It does not appear that the entire survey was provided by the Employer. The Table of Contents refers to a section entitled “Page Numbers, Job Names, Job Codes,” that does not appear in the Appeal File. This is especially important because one of the reasons for denial was that the survey did not provide job descriptions. Although this survey was submitted twice by the Employer, on August 4, 2009 and on August 25, 2009, it appears that the same selection of pages was submitted. AF 46-52 and 112-118.

<sup>8</sup> In an e-mail from Mr. Costantino to Robert Myers and Lynette Wills, Certifying Officers at ETA, recalling his discussions with the Employer, Mr. Costantino stated: “I indicated that there was no guarantee that you will accept their wage, but that you would consider their information on the correct location for the survey and indicate, if you disagree with it, your reasons for doing so. They could then appeal an adverse decision with a full record of why we disagree with their arguments.” AF 22.

*Immigration Programs*, Revised May 9, 2005 (“*Guidance Letter*”),<sup>9</sup> the CO rejected the survey due to the deficiency in survey methodology. AF 11-12.

For the second reason, the CO asserted that, “The Employer Provided Survey Did Not Include a Description of the Job Duties.” The CO stated that she could not “accurately assess whether the job titles included in the survey were applicable to the position the employer listed in its application for a Prevailing Wage Determination.” The CO asserted that the position on the PWD application was “Ski Instructor – Level I,” and provided a job description. However, the CO noted that the survey provided a wage rate for the position of “Ski School – Non Certified,” and did not provide a job description.<sup>10</sup> Therefore, under 20 C.F.R. § 655.10 (f)(2) and page 15 of the *Guidance Letter*, the CO was unable to compare the job duties to ascertain whether the two positions were similar and whether the survey could be a valid wage source for the occupation. AF 12.

For the third reason, the CO contended that, “The Employer Believes that Determining the Prevailing Wage Based on the El Dorado Region is Incorrect.” The CO said that it determined the prevailing wage by using the USDOL FLC On-Line Wage Library in accordance with the *Guidance Letter*. She asserted that the employer identified El Dorado County as the county where the Ski Resort was located and the area of intended employment on ETA Form 9141, Item D(c)(4). The CO concluded that, in accordance with 20 C.F.R. § 655.10 (f)(2) and page 15 of the *Guidance Letter*, since El Dorado County was located in El Dorado Region (Sacramento-Arden-Arcade-Roseville MSA), the area of intended employment was determined correctly. AF 13.

The Employer requested administrative review on September 4, 2009. AF 1-2. In its brief, the Employer addressed each reason given by the CO for denying its PWD appeal. For the first reason, that the NSAA survey was not valid because the CO could not determine whether those surveyed were NSAA members, the Employer asserted that all fourteen resorts located in the Lake Tahoe region are NSAA members. Regarding the second reason, that the survey lacked a description of job duties, the Employer contended that all ski resorts use the Professional Ski Instructors Association (“PSIA”) standards and certification process for its designations. It asserted that an instructor must pass the PSIA exam to receive a Level 1, 2 or 3 certification and that the descriptions could be found at the PSIA website at [www.psia-w.org/alpine-certification.php](http://www.psia-w.org/alpine-certification.php). Concerning the third reason, the proper region for the PWD, the Employer asserted that its location is “lumped into the Sacramento Metropolitan Statistical area,” but that this classification is not accurate. It contended that Sacramento is “a large city approximately 2 hours away.” It asserted that the small resort communities of Twin Bridges and South Lake Tahoe are much closer, and that they are the areas from which it draws its employees. The Employer contended that its sister resort, Northstar-at-Tahoe, was determined to be in the “Northern Mountains Region of California nonmetropolitan,” and asked for similar special consideration since they were in the same competitive market.

---

<sup>9</sup> The *Guidance Letter* was not included in the Administrative File. However, since the document is publically available online, we take administrative notice of the *Guidance Letter*’s contents. [www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

<sup>10</sup> The survey the Employer submitted provided wage information for four positions. See AF 112-118. In the Employer’s arguments, it compared the “Ski Instructor – Level I” position with the “Ski School – Level 1 Ski or Snowboard Instructor,” not “Ski School – Non Certified,” as the CO has done here. This is likely an error on the CO’s part. However, this error is not relevant to the Employer’s lack of job descriptions in the survey, which is the CO’s second reason for affirming the PWD.

BALCA issued a Notice of Docketing on September 10, 2009. Neither party submitted an appellate brief.

### Discussion

In the CO's second Final Prevailing Wage Determination, she indicated three reasons for affirming the PWD. The first and second reasons are both related to the adequacy of the Employer's survey. Regarding the second reason, the CO stated: "The Employer Provided Survey Did Not Include a Description of the Job Duties," and referred to 20 C.F.R. § 655.10(f)(2) and Page 15 of the *Guidance Letter*. In discussing employer-provided wage information, the regulations state "where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide specific information about the survey methodology, including...survey job descriptions." 20 C.F.R. § 655.10(f)(2). Page 15 of the *Guidance Letter*, which states the criteria for employer-provided surveys, states:

- (3) The job description applicable to wage data submitted by the employer must be adequate to determine that the data represents workers who are similarly employed. *Similarly employed* means jobs requiring substantially similar levels of skills.

*Guidance Letter* at 15. Additionally, at Appendix F, the *Guidance Letter* states: "The survey's job description must match the job description contained in the employer's request for acceptance to use the survey or other wage data for prevailing wage purpose." Appendix F also specifies that the Employer must provide survey documentation which includes "survey job descriptions," among other things.

The Employer's survey stated the position title for each position and included a "description." However, these "descriptions" did not explain the job duties of the position. For the position of "Ski School – No Certification," the job description on the survey is: "Teaches skiing or snowboarding but is not certified. Report hourly rate for group lessons." For the other position at issue, the job title is listed as "Ski School – Level 1 – Ski or Snowboard Instructor," and the description states: "Report hourly rate for group lessons. Do not include any bonus or other compensation." These descriptions are not adequate to determine that the data represents workers who are similarly employed, as is required by the *Guidance Letter*. Thus, the CO was unable to compare the job duties to ascertain whether the two positions were similar and whether the survey could be a valid wage source for the occupation.

In its appeal letter, the Employer argued that all ski resorts use the PSIA standards and that relevant job descriptions could be found at the PSIA website at [www.psia-w.org/alpine-certification.php](http://www.psia-w.org/alpine-certification.php). However, BALCA is only permitted to consider arguments and evidence that were before the CO when the final decision by the CO on the PWD was issued. Thus, I cannot consider this argument and evidence. Moreover, the regulations only require the CO to consider one supplementary submission by the Employer. Thus, I affirm the CO's finding that the Employer's survey did not comply with regulatory criteria. Because I affirm the CO's rejection of the Employer's survey on this ground, I do not reach the other ground cited by the CO for rejecting the survey.

Although the CO properly rejected the Employer's survey, the CO was obliged to take into consideration the Employer's argument that the wrong MSA had been employed to make the PWD. In her Final Determination, the CO found essentially that because the Employer's job location was within El Dorado County, the MSA had been properly determined. The CO, however, did not address the Employer's arguments concerning the absurdity of a differing wage determination for the same job at one of the Employer's own facilities just forty miles away. I disagree with the CO that the *Guidance Letter* at page 15 compels the CO to determine the PWD based on the MSA in which the job is located. Rather, the *Guidance Letter* explicitly says that the border of an MSA is not controlling in identification of the normal commuting area: "an employer location just outside of the PMSA, MSA, or CMSA boundary may still be considered within normal commuting distance." Accordingly, I remand this matter for consideration of what MSA is typically used in the Lake Tahoe area.

Accordingly, the Certifying Officer's Prevailing Wage Determination is hereby **VACATED** and this matter is **REMANDED** for further proceedings consistent with the above.

For the Board:

**A**

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