



Issue Date: 17 May 2011

BALCA Case Nos.: 2011-TLN-00021

ETA Case No.: C-11049-54135

In the Matter of:

EAGLE IRRIGATION, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Charles Horvat
President, Eagle Irrigation, Inc.
Harrison City, Pennsylvania
For the Employer

Gary M. Buff, Associate Solicitor
Matthew Bernt, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the

United States on a one-time, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On February 18, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Eagle Irrigation, Inc. ("the Employer") for fifteen (15) irrigation laborers from December 1, 2010 to September 30, 2011. AF 95-100.¹ The Employer listed the job duties for the position as:

- Use hand tools to install irrigation system at golf course
- Lift/carry 50 pounds
- Dig with shovel
- Pick up rocks
- Entry Level
- Outdoor work experience required
- No irrigation experience required

AF 97. Among the special requirements for the job, the employer stated, "involves frequent stooping, bending and must be able to lift 50 lbs." AF 98. Additionally, the Employer indicated that the offered rate of pay was \$9.84 per hour. AF 99. The Employer submitted a recruitment report with its application, which indicated that 62 U.S. workers were not hired because they lacked outdoor work experience. AF 102-107.

On February 24, 2011, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that it was unable to render a final determination for the Employer's application because the Employer did not comply with all requirements of

¹ Citations to the 107-page appeal file will be abbreviated "AF" followed by the page number.

the H-2B program. AF 86-94. Among the five deficiencies identified, the CO informed the Employer that it had reason to believe that the Employer is requiring experience in an unidentified outdoor occupation. AF 93. Therefore, the CO required the Employer to submit its ETA Form 9141 Prevailing Wage Determination (“PWD”) in order to verify that the Employer’s PWD satisfies the requirements contained in 20 C.F.R. § 655.10. *Id.* In addition, the CO required the Employer to submit copies of the job order that it placed with the State Workforce Agency (“SWA”) and its newspaper advertisements. AF 92-93.

The Employer responded to the RFI on February 25, 2011 and March 4, 2011, submitting the requested documentation. AF 45-85. The summary of the position provided in the Employer’s job order stated, “use hand tools to install irrigation system at golf course; lift/carry 50 lbs., dig with shovel, pick up rocks. No irrigation experience required, entry level; requires supervision; outdoor work experience required.” AF 66. The Employer’s newspaper advertisement included the same description of the duties and requirements of the position. AF 69-71. The only requirements for the job opportunity provided on the Employer’s application for PWD, ETA Form 9141 were that position involves frequent stooping, bending, and the ability to lift 50 pounds. AF 74. The application for PWD stated that no employment experience was required. *Id.*, D-b.4. The National Prevailing Wage Center (“NPWC”) determined that the job opportunity was a wage level I and that the prevailing wage was \$9.84 per hour. AF 75.

On April 8, 2011, the CO denied the Employer’s application. AF 38-44. The CO determined that the Employer failed to comply with 20 C.F.R. § 655.10 because the Employer failed to include the outdoor work experience requirement in its ETA Form 9141, which resulted in the NPWC issuing a PWD based on a Level I wage instead of a Level II wage in consideration of the one month of outdoor experience requirement. AF 42-43. The CO also found that the Employer’s job order and newspaper advertisements did not comply with the content requirements listed at 20 C.F.R. § 655.17, because the wage provided in the advertisements was based on a Level I wage, rather than a Level II wage. AF 40-42. The Employer’s appeal followed.

DISCUSSION

The CO may only grant an employer's petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the U.S. if employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.5(b)(2). Accordingly, an employer is required to obtain a prevailing wage determination from the NPWC and offer and advertise the position in the H-2B application to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC. 20 C.F.R. § 655.10(a).

In addition, an employer filing an H-2B application for temporary labor certification must advertise the job opportunity that is the subject of the application in a newspaper of general circulation and place a job order with the SWA. 20 C.F.R. § 655.15(e), (f)(3). The newspaper advertisement and the job order must satisfy the advertisement content requirements contained at Section 655.17. 20 C.F.R. § 655.17(e)(2), (f)(3). Under 20 C.F.R. § 655.17(g), the advertisements must contain a wage offer that is not less than the prevailing wage.

The Employer argues that it did not intend the statement "outdoor work experience required" to be interpreted as a limitation for the job or as required experience. AF 2. Instead, the Employer asserts that "[w]e were merely trying to point out that the landscape workers do work outside all day and our experience indicates that someone who had never worked outside before may accept the job offer, but they would not continue to work after experiencing this type of employment." *Id.* However, the Employer plainly stated in its job order and newspaper advertisements that outdoor work experience was required, and it rejected 62 U.S. workers based on their lack of outdoor work experience. AF 66, 69-71, 102-107. Consequently, I am not persuaded by the Employer's argument that it was not actually requiring outdoor work experience as a condition of employment.

The Employer failed to include its requirement of outdoor work experience with its ETA Form 9141, which resulted in the NPWC determining that the prevailing wage was \$9.84 per hour based on a wage level I. The CO states that had the Employer included its outdoor work experience requirement in its application for PWD, the PWD would be \$11.86 per hour, based on a wage level II. AF 42. Because the Employer

failed to include its outdoor work experience requirement in its application for PWD, the NPWC did not consider this job requirement in calculating the PWD. Therefore, the wage issued by the NPWC was lower than the proper prevailing wage corresponding to the Employer's experience requirements. As a result, the wage included in the Employer's job order and newspaper advertisements is less than the actual prevailing wage for the job opportunity.

Accordingly, I find that the CO properly denied certification because the wage listed in the Employer's job order and newspaper advertisements is less than the prevailing wage in violation of Section 655.17(g).

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