



Issue Date: 06 May 2011

BALCA Case Nos.: 2011-TLN-00022

ETA Case No.: C-11053-54158

In the Matter of:

MARTIN'S LANDSCAPING, INC.,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Laura Miller
Administrative Assistant, Martin's Landscaping, Inc.
Waterbury, Connecticut
For the Employer

Gary M. Buff, Associate Solicitor
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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 occurrence, 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 22, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from Martin's Landscaping, Inc. ("the Employer") for eight landscape laborers from April 1, 2011 to December 20, 2011. AF 93-100.¹ The Employer indicated on its ETA Form 9142 that the offered rate of pay was \$13.94 per hour. AF 97. With its application, the Employer submitted a copy of its Prevailing Wage Determination ("PWD"), ETA Form 9141, from the National Processing Center ("NPC"). AF 106-111. The NPC determined that the prevailing wage for the position was \$15.27 per hour. AF 109. This wage corresponds to the primary worksite address in Chesire, Connecticut. AF 108. An addendum to the PWD shows wage determinations \$13.94 per hour for three additional worksites in Naugatuck and Waterbury, Connecticut. AF 110-111. Additionally, the Employer submitted copies of its newspaper advertisements with its H-2B application, which indicated that the wage for the position was \$13.94 per hour. AF 104-105.

On March 1, 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 the H-2B program. AF 86-92. Among the five deficiencies identified, the CO informed the Employer that it had reason to believe that the Employer is offering a wage which

¹ Citations to the 111-page appeal file will be abbreviated "AF" followed by the page number.

does not equal or exceed the highest of the prevailing wage, the federal minimum wage, state minimum wage, or local minimum wage applicable throughout the duration of the H-2B employment. AF 92. Specifically, the CO determined that the Employer had not complied with the advertising requirement at 20 C.F.R. § 655.17(g) because its newspaper advertisements listed a wage of \$13.94, which was less than the prevailing wage rate of \$15.27 per hour. *Id.* Accordingly, the CO required the Employer to provide evidence of its compliance with 20 C.F.R. § 655.17(g). *Id.*

The Employer responded to the RFI on March 4, 2011 and submitted the requested documentation. AF 6-85. In response to the CO's determination that the offered wage should be \$15.27 per hour, the Employer stated, "Martin's Landscaping has submitted an attachment (addendum) from U.S. Labor Dept. which clearly states that the county in which we work (with the locations) is \$13.94. We have been instructed by this department to advertise at \$13.94, I have been in contact several times concerning this matter." AF 9.

On April 8, 2011, the CO denied the Employer's application. AF 2-5. The CO determined that the Employer's response to the RFI failed to cure the previously identified deficiency with the wage listed in the Employer's newspaper advertisements. AF 5. The CO stated that according to the FLC Data Center, wages in the State of Connecticut are determined based on the specific county and city/town combination, and that the city of Chesire has a prevailing wage of \$15.27 per hour, which is higher than the prevailing wages in the cities of Naugatuck and Waterbury. *Id.* The CO explained that under 20 C.F.R. § 655.10, the Employer is required to offer the highest of the prevailing wage, the federal minimum wage, state minimum wage, or local minimum wage. *Id.* The Co determined that because the Employer failed to utilize the highest applicable wage among all relevant worksites, \$15.27 per hour, it is failing to pay the highest of the prevailing wage, the federal minimum wage, state minimum wage, or local minimum wage in the area of intended employment. *Id.* Additionally, the CO found that the Employer's job order and newspaper advertisements do not comply with the content requirements at 20 C.F.R. § 655.17 because the wage offer is less than the highest of the prevailing wage, the federal minimum wage, state minimum wage, or local minimum wage in the area of intended employment. *Id.*

On April 18, 2011, the Employer appealed the CO's denial, arguing that the \$15.27 wage reflects a foreman's hourly rate, not an entry level position. AF 1. The Employer pointed out that all of the other worksite locations are within the same county, New Haven County, as the primary worksite in Cheshire, Connecticut. *Id.* The Employer added "[w]e have placed numerous calls to the US Dept of Labor, prevailing wage dept. and emails and were told to go by the \$13.94 figure. On Monday April 11, 2011 another call was placed to the State of CT Department of Labor and was told that it was definitely a mistake and the prevailing wage should not differ [within] the same county." *Id.* The Employer also submitted a copy of a 2007 and 2009 PWD from the state of Connecticut and a 2010 PWD from the NPC on appeal.

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 National Processing Center ("NPC") 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 NPC. 20 C.F.R. § 655.10(a).

The H-2B regulations at Section 655.10(b)(3) provide:

(3) If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the same opportunity and staff level within the area of intended employment, the prevailing wage shall be based on the highest applicable wage among all relevant worksites.

This rule is designed "to provide greater consistency and predictability for both employers and the workers and ensures that U.S. workers who are interested in the job opportunity would not be deterred due to varying wage rates. It also ensures greater protection for workers against possible wage manipulation by unscrupulous employers." Final Rule, *Labor Certification Process and Enforcement for Temporary Employment in*

Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78030, 78031 (Dec. 19, 2008)

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 the newspaper advertisements must satisfy the advertisement content requirements contained at Section 655.17. 20 C.F.R. § 655.15(f)(3). Under 20 C.F.R. § 655.17(g), the advertisements must contain “[t]he wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers, each of which must not be less than the highest of the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified H-2B employment.”

Here, the Employer’s newspaper advertisements list a wage of \$13.94, rather than the prevailing wage determination of \$15.27. Therefore, the Employer failed to comply with 20 C.F.R. § 655.17(g) and the CO’s denial of temporary labor certification was proper.

I note that the Employer does not disagree with its obligation to pay the highest of the prevailing wage, federal minimum wage, state minimum wage, or local minimum wage. Rather, it disagrees with the NPC’s PWD of \$15.27 per hour, arguing that it was incorrectly based on a position for a foreman, rather than an entry-level position. However, I have no jurisdiction to review the NPC’s PWD, because the Employer failed to appeal the PWD. If the Employer disagreed with the NPC’s PWD, it should have requested review of the PWD by the NPC within 10 days of receiving the determination. 20 C.F.R. § 655.11(a). Although the Employer asserts that it called and emailed the Department of Labor (and the Connecticut Department of Labor, which does not have the authority to review an NPC PWD), the Employer has not submitted any documentation that supports its argument that it attempted to appeal the PWD. Therefore, the Employer is bound by the PWD of \$15.27.

Accordingly, I find that the CO properly denied certification because the wage listed in the Employer’s 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