



**Issue Date: 10 May 2011**

**BALCA Case Nos.: 2011-TLN-00024**

ETA Case No.: C-11055-54202

*In the Matter of:*

**TDI INTERNATIONAL, INC.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Marvic G. Thompson  
Rozas & Rozas, LLC  
Baton Rouge, Louisiana  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Jonathan R. Hammer, 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 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 24, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from TDI International, Inc.. ("the Employer") for fifteen landscape laborers from March 1, 2011 to December 15, 2011. AF 44-51.<sup>1</sup> The Employer indicated on its ETA Form 9142 that the offered rate of pay was \$8.63 per hour and \$12.95 per hour for overtime. AF 48. With its application, the Employer submitted a copy of its Prevailing Wage Determination ("PWD"), ETA Form 9141, from the National Prevailing Wage Center ("NPWC"). AF 59-64. The NPC determined that the prevailing wage for the position was \$8.63 per hour for the primary worksite in Wayne County, Michigan, and \$8.78 per hour for the additional worksite location in Oakland County, Michigan. AF 62-64.

On March 2, 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 38-43. Among the four deficiencies identified, the CO informed the Employer that it had reason to believe that the Employer is offering a wage which 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 40. The CO determined that the Employer had not complied with the prevailing wage requirements at 20 C.F.R. § 655.10, and required the Employer

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<sup>1</sup> Citations to the 64-page appeal file will be abbreviated "AF" followed by the page number.

provide evidence of its compliance with the advertising content requirements at 20 C.F.R. § 655.17. *Id.*

The Employer responded to the RFI on March 8, 2011 and submitted the requested documentation, including copies of its two newspaper advertisements in The Detroit Free Press and its job order with the Michigan State Workforce Agency (“SWA”). AF 18-37. The Employer’s newspaper advertisements and job order offered the position at a wage of \$8.63 per hour and overtime at \$12.95 per hour. AF 27-29.

On April 6, 2011, the CO denied the Employer’s application. AF 11-17. The CO determined that the Employer failed to comply with the regulations at 20 C.F.R. § 655.10, because it failed to offer and advertise the position at a wage at least equal to the prevailing wage obtained from the NPWC. AF 13-14. Based on the Employer’s ETA Form 9141, the CO determined that there would be multiple worksites in Wayne County and Oakland County, Michigan, and therefore the Employer could not offer an hourly wage less than \$8.78 per hour. AF 13. As the Employer’s job order and newspaper advertisements offered the job at a wage of \$8.63 per hour, the CO determined that the Employer failed to offer a wage which equaled or exceeded the highest of the prevailing wage, the federal minimum wage, state minimum wage, or local minimum wage in violation of 20 C.F.R. § 655.10, and failed to comply with the advertisement content requirements at 20 C.F.R. § 655.17. AF 14-17.

The Employer appealed the denial, arguing that the prevailing wage discrepancy was an oversight that should be excused as harmless error. AF 1-10. The Employer also asserts that because it advertised the correct wage for one county, it should receive certification for that county. AF 1. In its brief, the CO argues that the Employer’s application was properly denied based on its failure to comply with the H-2B wage requirements. Additionally, the CO argues that the Employer cannot receive certification for only one county, because it is not evident from the record whether or how the 15 requested workers would have been divided between the two counties, or whether the work would take place during the same time period in both counties. Accordingly, the CO requests that the CO’s determination be affirmed.

## 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)(3).

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.

The H-2B regulations require an employer to conduct several recruitment steps prior to filing an application for temporary labor certification. 20 C.F.R. § 655.15. The regulation at 20 C.F.R. § 655.15(e) requires an employer to place a job order with the State Workforce Agency ("SWA") serving the area of intended employment, and Section 655.15(f) requires an employer to place a newspaper advertisement on two separate days. Both the job order and the newspaper advertisements must satisfy the advertisement content requirements provided at Section 655.17. 20 C.F.R. § 655.15(e)(2), (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, because the job opportunity involves multiple worksites, the Employer is required to offer the position at a wage of \$8.78 per hour, reflecting the highest applicable wage among its worksites in Wayne County and Oakland County, Michigan. However, the Employer's job order and newspaper advertisements list the wage as \$8.63

per hour. Therefore, the Employer has failed to comply with the 20 C.F.R. § 655.10(a)(3) and the advertisement content requirements at Section 655.17(g).

The Employer does not dispute that it advertised the wrong wage, but argues that it is harmless error, or, in the alternative, that it should receive certification only for Wayne County. I find that a 15 cent per hour discrepancy between the offered wage and the prevailing wage cannot be lightly dismissed as harmless error, as the wage discrepancy could have discouraged a qualified U.S. worker from applying for the position. Additionally, the CO correctly points out that the Employer's request for certification for workers only for Wayne County worksites is not feasible, as there is no evidence in the record to demonstrate how the workers would have been divided between the two counties.

Accordingly, I find that the CO properly denied certification.

### **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