U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 April 2011

BALCA Case No.: 2011-TLN-00013

ETA Case No.: C-11035-53786

In the Matter of:

TRADE WINDS FARM (TAC, LLC),
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Leonard J. D'Arrigo, Esquire
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For the Employer

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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 4, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from Trade Winds Farm (TAC, LLC) ("the Employer"). AF 57-73.[1] The Employer requested certification for 4 horse groomers from April 1, 2011 to November 25, 2011. AF 57. In describing its temporary need, the Employer stated, in relevant part:

> Trade Winds Farm is in need of grooms for the 2011 spring/summer horse show season in Saratoga County, NY and surrounding locations. Our horses compete in horse shows throughout Saratoga, Onodaga, Westchester, Essex, Suffolk, and Ulster counties of New York during the spring and summer months. Due to the training, daily care and travel to competitions, the farm requires additional grooms during this season. This year's horse show will run from the beginning of April 2011 to the end of November 2011 as demonstrated on the attached 2011 Horse Show Schedule. The Horse Grooms will be needed in advance on the first April show in order to prepare for the start of the show circuit. Since the 2011 horse show season only runs from April to November 2011, it is a seasonal position.

AF 57. The Employer indicated that basic rate of pay for the job opportunity ranged from $8.78 to $9.68, and $13.17 to $14.52 for overtime. AF 61. The Employer noted that the work will be performed in multiple worksites throughout Saratoga, Onondaga, Westchester, Essex, Suffolk, and Ulster counties in New York. AF 60. In its

[1] Citations to the 73-page appeal file will be abbreviated "AF" followed by the page number.

worksite itinerary, centered around horse shows in New York, the Employer provided the following worksite schedule:

1. Pittsford, New York (Monroe County): April 9, 2011-April 10, 2011
2. Syracuse New York (Onondaga County): April 27, 2011-May 1, 2011
3. Saratoga Springs, New York (Saratoga County): May 3, 2011-May 8, 2011; May 11, 2011-May 15, 2011
4. North Salem, New York (Westchester County): May 10, 2011-May 15, 2011; May 17, 2011-May 22, 2011
5. Saugerties, New York (Ulster County): May 25, 2011-May 29, 2011; June 1, 2011-June 5, 2011; June 8, 2011-June 12, 2011
6. Saratoga Springs, New York (Saratoga County): June 14, 2011-June 19, 2011
7. Syracuse, New York, (Onondaga County): June 15, 2011-June 18, 2011
8. Saratoga Springs, New York (Saratoga County): June 21, 2011-June 26, 2011
9. Lake Placid, New York (Essex County): June 28, 2011-July 3, 2011; July 5, 2011-July 10, 2011
10. Saugerties, New York (Ulster County): July 20, 2011-July 25, 2011; July 27, 2011-July 31, 2011; August 3, 2011-August 7, 2011
11. Southampton, New York (Suffolk County): August 11, 2011-August 14, 2011
12. Bridgehampton, New York (Suffolk County): August 28, 2011-September 4, 2011
13. Saugerties, New York (Ulster County): August 31, 2011-September 4, 2011; September 7, 2011-September 10, 2011
14. Syracuse, New York (Onondaga County): September 29, 2011-October 2, 2011
15. Pittsford, New York (Monroe County): November 12, 2011-November 13, 2011

AF 73. The Employer's own farm is located in Rexford, New York, in Saratoga County. AF 60. It is unclear from the Employer's itinerary how often the workers will return to the Employer's farm in Rexford, New York between worksites.

On February 9, 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 52-56. Specifically, 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 54.

Therefore, the CO required the Employer to submit its ETA Form 9141 Prevailing Wage Determination ("PWD") in order to verify that the Employer complied with the pre-filing requirements. *Id.* Additionally, the CO required the Employer to submit a copy of its job order and newspaper advertisements so that the CO could verify that the Employer complied with the pre-filing recruitment requirements. AF 55-56.

The Employer responded to the RFI on February 15, 2011 and submitted the requested documentation. AF 29-51. The prevailing wage provided for the Employer's primary worksite was listed as $9.15 per hour, while the PWDs for the additional worksites ranged from $8.78 to $9.68 per hour. AF 35, 37. The job order that the Employer placed with the New York State Workforce Agency ("SWA") listed the offered wage as a range from $8.78 to $9.68, as did the Employer's newspaper advertisements in The Saratogian. AF 39-40, 42-43.

On March 17, 2011, the CO denied the Employer's application. AF 23-28. The CO explained that pursuant to 20 C.F.R. § 655.10(b)(3), if a job opportunity involves multiple worksite within an area of intended employment and different prevailing wage rates exist for the same opportunity within the area of intended employment, the prevailing wage shall be based on the highest applicable wage among all relevant worksites. AF 26. The CO determined that because the Employer failed to utilize the highest applicable wage among all relevant worksites, 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 was 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. AF 27-28. 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 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.

ETA provided the following explanation for this rule during rulemaking:

> In those cases where a job opportunity involves multiple worksites in an area of intended employment and crosses multiple counties or States and different prevailing wage rates exist because the worksites are located in different Metropolitan Statistical Areas (MSA), the NPC will analyze the different prevailing wage rates and determine the appropriate wage as the highest wage rate among all applicable MSAs. In these cases, the employer will not pay different wage rates depending on the location of the work. The U.S. worker and the foreign worker are both entitled to know and rely on the wage to be paid for the entire period of temporary employment, and that wage will be the highest among the application wages for the various locations of work.

Proposed 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. 29942, 29947 (May 22, 2008) (the proposed rule at section 655.10(b)(3) read, "If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist, i.e. multiple MSAs, the Chicago NPC will determine the prevailing wage based on the highest wage among all applicable MSAs."); *see also* 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) (retaining language in section 655.10(b)(3) "because it provides 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.")

Section 655.10(b)(3) prevents employers from paying different wages at different worksites within the same area of intended employment, and instead requires employers to pay workers one wage: the highest prevailing wage among all worksites. Any dispute in interpretation of this rule is easily resolved by reviewing the regulatory history. ETA's comments make clear that the requirement under Section 655.10(b)(3) is designed to protect both U.S. workers and foreign workers from varying wage rates. ETA acknowledged that U.S. workers may be discouraged from applying for the position if the wage varies by worksite, and ETA explained that the rule is designed to protect foreign workers from possible wage manipulation. Additionally, the rule is intended to provide stability and certainty regarding wages to both employers and workers. Here, the job involves multiple worksites, and therefore, the Employer must offer the highest prevailing wage among all of the worksites. Because the Employer is offering a wage range of $8.78 to $9.68, rather than offering $9.68 for all worksites, the Employer failed to comply with 20 C.F.R. § 655.10(b)(3). Accordingly, the CO's denial of temporary labor certification was proper.

I point out that while the job opportunity involves multiple worksites, it does not appear that all worksites are within the same area of intended employment. The H-2B regulations provide the following definition of "area of intended employment."

> *Area of Intended Employment* means that the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Official notice is taken of the distance between the Employer's first worksite, in Pittsford, New York (Monroe County) and its second worksite in Syracuse, New York (Onondaga County), which is over 78 miles.[2] 29 C.F.R. § 18.45. The distance between the Employer's second worksite and its third worksite, in Saratoga Springs, New York (Saratoga County), is 141 miles, and the distance between the third worksite and the fourth worksite, in North Salem, New York (Westchester County), is 145 miles. Although there is no precise limit on the number of miles that constitutes a "normal commuting distance," here, where many of the worksites are at least 50 miles away from each other, and some over 100 miles away, it is difficult to understand how all of the worksites could be within the same area of intended employment, as defined by the H-2B regulations.

Nevertheless, even if these worksites are not within the same area of intended employment, the CO's denial was still proper. The H-2B regulations provide that "except where otherwise permitted under § 655.3, only one *Application for Temporary Labor Certification* may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer." 20 C.F.R. 655.20(e); *see also* 20 C.F.R. § 656.20(d), "Certification of more than one position may be requested on the application as long as all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment." Therefore, even if the worksites are in different areas of intended employment, the Employer's application for temporary labor certification remains deficient.

[2] http://maps.google.com (last visited April 11, 2011).

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