



Issue Date: 29 November 2011

BALCA Case Nos.: 2012-TLN-00005
2012-TLN-00006

ETA Case Nos.: C-11272-55602
C-11272-55601

In the Matter of:

ALLAGASH MAPLE PRODUCTS INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Jeremy Steeves
Allagash Maple Products, Inc.
Skowhegan, Maine
For the Employer

Gary M. Buff, Associate Solicitor
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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
VACATING DENIALS OF CERTIFICATION AND
REMANDING FOR FURTHER PROCESSING

These cases arise 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).

STATEMENT OF THE CASE

On July 19, 2011, Allagash Maple Products Inc. ("the Employer") filed an application for a prevailing wage determination ("PWD") with the National Processing Center ("NPC") covering the H-2B visa classification for the position of "tree tapping laborer." AF1 66-67.¹ On September 29, 2011, the Department of Labor's Employment and Training Administration ("ETA") received two applications for temporary labor certification from the Employer for 50 and 45 "tree tapping laborers." AF1 86-170. The Employer stated that it has a temporary seasonal need for the workers from November 1, 2011 to June 2, 2012. AF1 86. The Employer stated that the rate of pay for the position was \$11.00 per hour. AF1 90.

With the Employer's application, it included a letter stating that it had not yet received the PWD, ETA Form 9141, from the NPC, and so it was relying on the PWD that it received last year, which was \$9.57 per hour. AF1 94. The Employer also submitted copies of its two job orders placed with the State Workforce Agency ("SWA") and the newspaper advertisements placed in the Morning Sentinel on July 31, 2011 and

¹ BALCA Case Numbers 2012-TLN-5 and 2012-TLN-6 involve the same issue on appeal, and the only differences between the two applications are that the application in 2012-TLN-5 requests 45 tree tapping laborers from October 1, 2011 to June 2, 2012, while the application in 2012-TLN-6 requests 50 tree tapping laborers from November 1, 2011 to June 2, 2012. AF1 86, AF2 86. For purposes of simplicity, all citations will be to the 170-page appeal file for BALCA Case No. 2012-TLN-6, ETA Case No. C-11272-55601, which will be abbreviated "AF1" followed by the page number.

August 1, 2011. AF1 101-106. The SWA job orders and newspaper advertisements all indicate that the offered wage for the position is \$11 per hour. *Id.*

On October 6, 2011, the CO issued a *Request for Further Information* (“RFI”), identifying three deficiencies with the Employer’s application, only one of which is at issue on appeal. AF1 68-72. The CO stated that it had reason to believe that the Employer is offering a wage that 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 certified H-2B employment. AF1 70. Therefore, the CO required the Employer to submit a copy of its PWD, ETA Form 9141, in order to verify that the Employer satisfied the pre-filing requirements under 20 C.F.R. § 655.10. *Id.* The CO explained that under Section 655.10, an employer must request a PWD from the National Prevailing Wage Center (“NPWC”), obtain a PWD that is valid either on the date recruitment begins or the date of filing an application for temporary employment certification, and must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC. AF1 70-71.

The Employer responded to the RFI on October 13, 2011. AF1 53-67. The Employer explained that its PWD is still “in process,” even though the Employer filed its request for a new PWD in July 2011. AF1 53. The Employer also submitted an email confirmation from the NPWC showing that the Employer filed its PWD request on July 19, 2011 and the status of the request was “in process.” AF1 66-67. The Employer stated that when it became apparent that delays in processing were indefinite, it proceeded with placing job orders with the SWA, running newspaper advertisements, and then filing its applications. AF1 53. The Employer stated that it was offering \$11 per hour, which was more than the PWD of \$9.57 issued for the position last year. *Id.* The Employer noted that the iCert website indicates that the wage data for jobs in the area has not changed in 2011-2012. *Id.* The Employer also included a copy of its prior PWD of \$9.57 per hour, valid from July 6, 2010 to July 5, 2011. AF1 55-60.

On October 28, 2011, the CO denied certification on the ground that the Employer failed to comply with 20 C.F.R. § 655.10(a)(2). AF1 48-52. The CO acknowledged the Employer’s argument that it attempted to obtain a PWD, but found that

the Employer's failure to obtain a PWD that is valid either on the date recruitment begins or on the date of filing the application precludes certification. AF1 51-52. The CO found that the Employer failed to provide a PWD that was valid either when the Employer began its recruitment on July 27, 2011 or when it filed its application on September 29, 2011. AF1 52.

On November 2, 2011, the Employer sent an email to the CNPC, stating that it had made every effort to obtain a PWD and that it offers a wage that is above the PWD. AF1 46-47. On November 3, 2011, an analyst at the CNPC informed the Employer that its inquiry was under review and a response would be provided as soon as possible. AF1 47. On November 4, 2011, the NPWC issued two PWDs, one for work performed prior to November 30, 2011, and one for work performed after November 30, 2011. AF1 26-34. The PWD for work performed prior to November 30, 2011 is \$8.59 per hour, and the PWD for work performed after November 30, 2011 is \$13.34 per hour. The PWD states that "Employers receiving these two PWDs must list in the Application for Temporary Employment Certification the two wages in Item G.1 as the range of wages to be offered and insert in G.3 that [Employer] will offer a wage of [the wage from the second PWD] for work performed on or after 11/30/11, unless the Department further postpones the effective date of, or is legally barred from implementing, the H-2B Wage Final Rule. AF1 29.

The Employer requested administrative review on November 7, 2011. AF1 1-45. On appeal, the Employer argues that it began its effort to obtain a PWD in July 2011, but had not yet received PWD when it filed its application on September 29, 2011. AF1 1. The Employer reiterates that its offered wage of \$11 per hour is more than the PWD. AF1-2.

BALCA received the administrative file from the CO on November 17, 2011, and the CO filed a Statement of Position on November 21, 2011. The CO argues that the NPWC's delay in issuing a PWD does not excuse the Employer's failure to comply with Section 655.10(a)(2).

DISCUSSION

The H-2B regulations require that an employer filing an H-2B application for temporary labor certification must request a prevailing wage determination from the NPC (or NPWC). 20 C.F.R. § 655.10(a)(1). Under Section 655.10(a)(2), an employer “must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing a complete *Application for Temporary Employment Certification* with the Department.

In this case, the Employer filed its PWD request on July 19, 2011, began its recruitment on July 27, 2011, and filed its application on September 29, 2011. As such, the Employer failed to comply with Section 655.10(a)(2) because it had not yet received a valid PWD either on the date that it began recruitment or filed its application. The Employer received its PWD on November 4, 2011.

Of particular relevance in this matter is the H-2B regulation governing the amount of time that the NPWC has to process PWD requests. The regulation provides:

The NPC will enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer within 30 days of receipt of the request for a prevailing wage determination. The employer must offer this wage (or higher) to both its H-2B workers and any similarly employed U.S. worker hired in response to the recruitment required as part of the application.

20 C.F.R. § 655.10(b)(6). In this case, the NPWC took more than 108 days to issue the Employer’s PWD, clearly violating the time constraints imposed by Section 655.10(b)(6). However, the H-2B regulations provide no procedural or substantive rights or remedies to the CO’s noncompliance with this procedural requirement, and the CO’s failure to comply with the regulation does not render the CO’s denial of certification invalid. *See Stadium Group LLC d/b/a Stadium Club DC*, 2012-TLN-2 (Nov. 21, 2011); *Frey Produce & Frey Bros. #2 and Frey Produce & Frey Bros. #3*, 2011-TLC-403 and 404 (June 3, 2011).

Nevertheless, it is just too obvious that the NPWC’s protracted delay in issuing the PWD was the sole cause of the Employer’s inability to comply with Section 655.10(a)(2). During rulemaking, ETA stressed its commitment to processing requests

for PWDs within 30 days of receipt. 73 Fed. Reg. 78020, 78029 (Dec. 19, 2008).² In this case, the NPWC exceeded that deadline by 78 days. In the context of temporary labor certification, such delay renders it virtually impossible for an employer to comply with Section 655.10(a)(2) and to apply for labor certification in time for its season.

The NPWC issued two PWDs on November 4, 2011. The first PWD covered labor performed up to November 30, 2011, and the second PWD covers work performed after November 30, 2011. I note that as a result of the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 546 (2011) (*hereinafter* “the Continuing Resolution” or “Section 546”), the effective date of the second PWD issued by the NPWC has been postponed to January 1, 2012. *See also* H.R. REP. NO. 112-284, at 197 (2011); 157 CONG. REC. H7528 (daily ed. Nov. 14, 2011). Accordingly, the first PWD of \$8.59 per hour is currently the correct PWD, and will be until January 1, 2012. The Employer is offering \$11 per hour, and fully complied with the requirement under Section 655.10(a)(3) that the offered and advertised wage of \$11 per hour equal or exceed the PWD obtained from the NPWC. As such, there is no concern that the Employer failed to conduct an adequate test of the domestic labor market or that the employment of foreign workers will adversely affect the wages of similarly employed U.S. workers.

Under the precise facts of this case, where the NPWC exceeded the regulatory deadline to issue a PWD by more than two months, I find that it would be fundamentally unfair to deny certification under Section 655.10(a)(2) where the wage offered and advertised actually *exceeds* the PWD that the NPWC eventually issued on November 4, 2011. The NPWC’s gross noncompliance with Section 655.10(b)(6) rendered it impossible for the Employer to comply with Section 655.10(a)(2) and apply for labor certification in time for the beginning of its season. I find that this delay, coupled with the Employer’s compliance with Section 655.10(a)(3), justifies and excuses the

² Although ETA recommended during rulemaking that employers file their PWD requests 60 days prior to commencing recruitment, the context of this recommendation was to accommodate the transition from SWAs issuing PWDs to the NPC issuing PWDs. 73 Fed. Reg. at 78029. As the federalization of the H-2B PWD process was implemented on June 1, 2008, more than three years before the Employer filed its PWD request, the transition was clearly complete when the Employer filed its request.

Employer's failure to either begin recruitment or file its application within the PWD validity period.

Based on the foregoing, the CO's denials of certification must be vacated and remanded for further processing.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's determinations are **VACATED** and these matters are **REMANDED** for further processing consistent with this decision.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge