



Issue Date: 04 May 2012

BALCA Case No.: 2012-TLN-00030

ETA Case No.: C-12055-58431

In the Matter of:

CANYON STONE, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Wendel V. Hall, Esquire
CJ Lake, LLC
Washington, DC
For the Employer

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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
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("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, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary peakload labor certification from Canyon Stone, Inc. ("the Employer") for 12 "helpers, stone/brick/blockmasons" (hereinafter "helpers") from April 2, 2012 to November 30, 2012. AF 95-102.¹ The Employer stated that the work would be performed in Johnson County, Kansas, and other worksites in Douglas, Franklin, and Wyandotte Counties in Kansas and Jackson County in Missouri. (AF 98). The Employer stated the rate of pay as \$14.01 per hour. AF 99. The Employer also submitted a copy of its ETA Form 9141 prevailing wage determination ("PWD"), obtained from the National Processing Center ("NPC"). AF 108-113. The wage determination provided for Johnson County, Franklin County, Wyandotte County, and Jackson County was \$14.01 per hour, and the wage determination for Douglas County was \$14.46 per hour. AF 113. With its application, the Employer also submitted a recruitment report, showing that it was unable to hire any domestic workers as a result of its recruitment efforts. AF 106-107.

On March 1, 2012, 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 87-92. Specifically, the CO informed the Employer 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

¹ Citations to the 113-page appeal file will be abbreviated "AF" followed by the page number.

minimum wage applicable throughout the duration of the H-2B employment. AF 90. Therefore, the CO required the Employer to submit its ETA Form 9141 PWD and amend its application to offer a wage that equals or exceeds the PWD. AF 90-91. Additionally, the CO required the Employer to submit a copy of its job order placed with the State Workforce Agency (“SWA”) and newspaper advertisements so that the CO could verify that the Employer complied with the pre-filing recruitment requirements. AF 91-92.

The Employer responded to the RFI on March 7, 2012 and submitted the requested documentation. AF 60-85. The Employer stated that it “no longer intends to use H-2B workers or others hired for this job order in Douglas County, KS. While Douglas, KS was inadvertently included in the job order placed [with the SWA] and in the required newspaper advertising, no workers appointed to this specific position will be performing work there.” AF 61. Therefore, the Employer argued that the offered wage of \$14.01, which was the wage provided on the Employer’s application, newspaper advertisements, and SWA job order, is equal to the prevailing wage. AF 61-62.

The Employer submitted a copy of its SWA job order, printed from the SWA’s website, www.kansasworks.com, which listed the wage as \$14.01 per hour and stated that the Employer provides transportation to and from worksites in Johnson, Douglas, Franklin, and Wyandotte Counties, Kansas and Jackson County, Missouri. AF 65. The Employer crossed out “Douglas” by hand. *Id.* The SWA job order also stated that the Employer was seeking 12 “helpers, stone/brick/blockmasons” from April 2, 2012 through November 30, 2012, and stated that “[t]his job order is being placed in connection with a future filing for H-2B foreign labor certification.” *Id.* The Employer also submitted a copy of its newspaper advertisement, which stated that the Employer was seeking 12 “helpers, stone/brick/blockmasons” from April 2, 2012 to November 30, 2012. AF 67-68. The newspaper advertisements listed the worksites as Johnson, Douglas, Franklin, and Wyandotte Counties, Kansas, and Jackson County, Missouri, and stated the rate of pay as \$14.01 per hour. AF 67-68.

On April 3, 2012, the CO denied the Employer’s application. AF 53-59. The CO determined that the Employer failed to comply with 20 C.F.R. § 655.22(e), which requires that the employer offer a wage that equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and

local minimum wage. AF 55. The CO determined that the Employer is offering \$14.01 per hour, while the NPC determined that the highest of the prevailing wage rates among the Employer's worksites was \$14.46 per hour. AF 55-56. Additionally, the CO found that the Employer's job order and newspaper advertisements failed to comply with the content requirements at 20 C.F.R. § 655.17 because the \$14.01 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 56-57. The CO acknowledged the Employer's argument that the Employer no longer intends to use H-2B workers or others hired for the job in Douglas County, Kansas, but stated that it is the Employer's responsibility to ensure that the job order and all advertising materials contain the correct information prior to submission. AF 57. The CO found that because the worksite in Douglas County, Kansas appeared on both the SWA job order and the newspaper advertisement, the advertised wage should have been \$14.46 per hour. *Id.*

The Employer appealed the CO's determination on April 13, 2012, and the Board received the administrative file from the CO on April 23, 2012. On April 27, 2012, the Employer filed a brief contending that although the Employer performs work in Douglas County, Kansas, no H-2B work will be performed there. As such, the Employer argues that the Employer's advertisements and SWA job order complied with 20 C.F.R. § 655.17. The CO filed a brief asserting that denial of certification was proper because the Employer's offered wage was less than the PWD. The CO argues that because Douglas County was included in the SWA job order and advertisements, the offered wage should have been \$14.46 per hour.

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 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 require an employer to offer a wage that equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and the local minimum wage. 20 C.F.R. § 655.22(e). The regulations also require an employer to include the wage offer in the SWA job order and newspaper advertisements. 20 C.F.R. §§ 655.15(e)(2); 655.15(f)(3); 655.17(g).

The Employer requested a PWD for Johnson County, Douglas County, Franklin County, and Wyandotte County, Kansas, and Jackson County, Missouri. AF 111. The NPC determined that the PWD for all counties except for Douglas County was \$14.01 per hour, and determined that the PWD for Douglas County was \$14.46 per hour. AF 113. The Employer published two newspaper advertisements and a SWA job order indicating that it needed 12 helpers from April 2, 2012 to November 30, 2012. AF 65-68. The Employer stated that it needed these 12 helpers in Johnson, Douglas, Franklin, and Wyandotte Counties in Kansas and Jackson County, Missouri, and that the wage was \$14.01 per hour. *Ibid.*

In the Employer's RFI response, it indicated that it inadvertently requested a PWD for Douglas County and included Douglas County in its advertisements, SWA job order, and ETA Form 9141, but no longer intends to use "H-2B workers or others hired for this job order" in Douglas County. AF 61. On appeal, the Employer argues that it does intend to use workers in Douglas County, but contends that it is only going to use domestic workers and not H-2B workers.²

I find the Employer's shifting justification for the inclusion of Douglas County in its ETA Forms 9141, 9142, SWA job order, and newspaper advertisements, is unpersuasive. Further, the Employer's attempt to distinguish between jobs that are "H-2B" and "non-H-2B" is misguided. When an employer conducts its domestic recruitment and anticipates a shortage of U.S. workers to perform the temporary labor or services

² The Employer asserts that the "CO acknowledges that no H-2B work will occur in Douglas County, Kansas." Employer's brief ("ER Br.") at 6. This contention misinterprets the CO's position. The CO acknowledged the Employer's *argument* that no H-2B workers would perform work in Douglas County, but found that it is the Employer's responsibility to ensure that all advertisements contain the correct information. Thus, a more accurate summation of the CO's position is that it need not weigh the credibility of the Employer's assertion that H-2B workers will not be working in Douglas County, because the Employer is bound by the information that it disseminated to the public in its advertisements and SWA job order. The CO found that because Douglas County, Kansas was provided as a worksite location in the SWA job order and advertisements, \$14.46 is the appropriate prevailing wage, and therefore the wage the Employer was required to offer.

needed, it does not know how many U.S. workers, if any, it will be able to hire. An employer will only know how many workers it needs to hire, *i.e.*, how many positions it has available. Thus, a job only becomes an H-2B job *after* the employer has concluded its domestic recruitment and knows how many H-2B workers it needs based on how many domestic workers it was able to hire. Although the Employer in this case attempts to argue that it was using the SWA job order and newspaper advertisements to advertise for *additional* non-H-2B positions in Douglas County, the Employer's advertisements and SWA job order clearly state that the Employer needs 12 helpers – the precise number of H-2B workers that the Employer seeks to sponsor through this petition – from April 2, 2012 to November 30, 2012, in Johnson, Douglas, Franklin, and Wyandotte Counties in Kansas and Jackson County, Missouri.³ As the Employer's recruitment report states that the Employer was unable to hire any domestic workers, there is no basis for concluding that the Employer has hired domestic workers to perform work in Douglas County. Finally, I find it highly unlikely that the Employer would seek a PWD for Douglas County and include Douglas County on its application if it never had any intention that H-2B workers would perform work in that location. Based on the foregoing, I find that Douglas County, Kansas is one of the Employer's worksites.

The H-2B regulations require an employer to offer a wage that equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and the local minimum wage. 20 C.F.R. § 655.22(e). As the highest of the prevailing wages among the Employer's worksites is \$14.46 per hour,⁴ but the Employer's offered wage is only \$14.01 per hour, the Employer has failed to comply with Section 655.22(e). Likewise, the Employer's newspaper advertisements and SWA job order also do not comply with Section 655.17(g).

³ The Employer's SWA job order also stated that the job order was placed in connection with a future filing for H-2B foreign labor certification. Such language certainly undermines the Employer's argument that it was using the SWA job order to advertise additional jobs in Douglas County that were available only for domestic workers.

⁴ The H-2B regulation at Section 655.10(b)(3) provides that "[i]f 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." As such, the Employer should have offered a wage of \$14.46 for all of its worksites.

Accordingly, I find that the CO's denial of temporary labor certification was proper.

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