



**Issue Date: 30 March 2012**

**BALCA Case No.: 2012-TLN-00023**

ETA Case No.: C-12020-57541

*In the Matter of:*

**CREATION LANDSCAPE**

**d/b/a**

**AUTOMATIC RAIN,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Ramon Cervantes  
Alternative Labor Services  
Lexington, Kentucky  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Harry Sheinfeld, Counsel for Litigation  
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 January 20, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Creation Landscape d/b/a Automatic Rain ("the Employer") for 10 landscape laborers from March 1, 2012 to December 31, 2012. AF 354-408.<sup>1</sup> The Employer stated the rate of pay as \$8.65 per hour. AF 354. With its application, the Employer submitted a prevailing wage determination ("PWD") that was valid from December 20, 2010 to March 23, 2011 with a rate of pay of \$8.31 per hour. AF 364-368.

On January 26, 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 345-353. 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 352. The CO noted that the PWD submitted with the Employer's application was valid for the Employer's previous, but not current, H-2B application. *Id.* Therefore, the CO required the Employer to submit its ETA Form 9141

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<sup>1</sup> Citations to the 409-page appeal file will be abbreviated "AF" followed by the page number.

Prevailing Wage Determination in order to verify that the Employer complied with the pre-filing requirements. *Id.*

The Employer responded to the RFI on February 2, 2012. AF 19-344. The Employer stated that it was very confused about the wage regulations due to changes with the H-2B prevailing wage rule between August 2011 and January 2012. AF 19-20. The Employer stated that it did not realize that it did not have a valid PWD until it received the RFI, and that it would abide by the PWD as soon as it arrived.

On February 27, 2012, the CO denied the Employer's application. AF 14-18. The CO explained that the H-2B regulations require an employer to obtain a prevailing wage determination that is valid either on the date recruitment begins or the date the employer files its application for temporary labor certification. AF 17. The CO found that the Employer did not obtain a valid PWD until after it filed its application in violation for the requirements under 20 C.F.R. § 655.10.

On March 7, 2012, the Employer requested BALCA review, asserting that confusion surrounding the H-2B prevailing wage regulation implementation date contributed to its failure to timely request a PWD. The CO filed a brief urging that the denial of certification be affirmed. The CO acknowledged that there were unusual circumstances in 2011 surrounding the precise wages to be paid by H-2B employers, but asserted that those circumstances are irrelevant to an employer's duty to request a PWD.

## **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."

The Employer in this case began its recruitment on December 29, 2011 and filed its application on January 20, 2012, but did not request a PWD until January 27, 2012. AF 11-13, 354-408. The Employer's PWD is valid from February 17, 2012, to June 30, 2012. AF 11. As such, the Employer failed to comply with Section 655.10(a)(2).

Moreover, the fact that the Employer may have been confused about when ETA's new H-2B prevailing wage rule went into effect has no bearing on the Employer's obligation to request a PWD.<sup>2</sup> The H-2B wage rule only affected how wages are calculated, not an employer's obligation to obtain a PWD. As the Employer failed to begin its recruitment or file its application while it had a valid PWD, 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

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<sup>2</sup> On October 5, 2010, ETA published a proposed rule revising the methodology by which H-2B prevailing wages would be determined. 75 Fed. Reg. 61578 (Oct. 5, 2010). The final rule was published on January 18, 2011, with an effective date of January 1, 2012. 76 Fed. Reg. 3452 (Jan. 18, 2011). ETA was subsequently ordered by the Eastern District of Pennsylvania to move the effective date forward. *CATA v. Solis*, Dkt. No. 119, 2011 WL 2414555 at \*4 (E.D. Pa. June 16, 2011). In response, ETA amended the effective date of the wage rule to September 30, 2011. Proposed Rule, 76 Fed. Reg. 37686 (June 28, 2011); Final Rule, 76 Fed. Reg. 45667 (Aug. 1, 2011). Due to litigation challenging the September 30, 2011 effective date of the rule, ETA notified employers that the wage rule would be postponed to November 30, 2011. 76 Fed. Reg. 60720 (Sept. 30, 2011). Subsequent legislation prohibited the use of any federal funds to implement, administer, or enforce the H-2B wage rule until October 1, 2012. See Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 546 (Nov. 18, 2011) (postponing until January 1, 2012); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 110 (Dec. 23, 2011) (postponing until October 1, 2012). While I understand that many employers may have been confused about the effective date about the new wage rule, the changing effective date never impacted an employer's duty to request a PWD.