



Issue Date: 07 December 2011

BALCA Case No.: 2012-TLN-00007

ETA Case No.: C-11279-55612

In the Matter of:

MATTAKESETT PROPERTIES, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Mark A. Snider
Owner and Managing Member, Mattakesett Properties, LLC
Wayland, Massachusetts
Pro Se for the Employer

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Office of the Solicitor
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Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION AND
REMANDING FOR FURTHER PROCESSING

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, 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 October 6, 2011, Mattakesett Properties, LLC ("the Employer") filed an application for temporary labor certification for four maids and housekeeping cleaner, OES/SOC Code 37-2012. AF 98-104.¹ The Employer stated that it has an intermittent temporary need for the workers from November 6, 2011 to March 31, 2012 at its property in Edgartown, Massachusetts. AF 98. The Employer stated that the rate of pay for the position was \$12.13 per hour and indicated that it advertised the job opportunity with the Massachusetts State Workforce Agency ("SWA") from September 6, 2011 through September 16, 2011 and in the The Cape Cod Times from September 11, 2011 through September 12, 2011. AF 102.

On October 13, 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. AF 91-97. 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. AF 94. 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

¹ Citations to the 107-page appeal file will be cited as "AF" followed by the page number.

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. *Id.*

The Employer responded to the RFI on October 20, 2011. AF 68-90. The Employer stated that it submitted its PWD request to the NPWC in September 2011, but its PWD request is still “in process.” AF 76. The Employer asserted that had made several requests to the NPWC regarding its PWD, and stated that it received the following response from the NPWC:

The OFLC National Prevailing Wage Center is experiencing delays in processing prevailing wage determinations as it is currently working to reissue certain determinations to comply with a court order issued June 15, 2011 in the United States District Court for the Eastern District of Pennsylvania. A Notice of Proposed Rulemaking was published in the Federal Register on June 28, 2011, and a Final Rule was published on August 1. All Center resources are currently being utilized to comply with this court order. The processing of Prevailing Wage Determinations, redeterminations, and Center Director Reviews has been temporarily suspended. Processing will resume as soon as full compliance with the court order has been completed by OFLC.

Id. The Employer also included a page that it printed from the Foreign Labor Certification Data Center Online Wage Library, www.flcdatacenter.com, which showed that the H-2B wage for maids and housekeeping cleaners, OES/SOC Code 37-2012, in the Nantucket Island and Martha’s Vineyard nonmetropolitan area, was \$12.13 per hour. AF 87.

On October 26, 2011, the NPWC issued two PWDs, one for work performed prior to November 30, 2011, and one for work performed after November 30, 2011. AF 59-67. The NPWC stated that it received the Employer’s PWD request on September 2, 2011. AF 59. The PWD for work performed prior to November 30, 2011 is \$12.12 per hour, and the PWD for work performed after November 30, 2011 is \$12.13 per hour. AF 60-64. The PWD states that “[e]mployers 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 November 30, 2011, unless the Department further postpones the effective date of, or is legally barred from implementing, the H-2B Wage Final Rule.” AF 63.

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). AF 42-45. The CO found that the Employer failed to obtain a PWD that is valid either on the date that it began recruitment or the date that it filed an application. AF 45. The Employer requested administrative review on November 4, 2011, arguing that it was unable to receive a timely PWD due to the NPWC's delays. On appeal, 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 September 2, 2011, began its recruitment on September 6, 2011, and filed its application on October 6, 2011. AF 59, 98-104. As such, the Employer did not 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.

However, the NPWC also did not comply with the regulation imposing a time limit on the number of days that it has to process PWD requests. The applicable 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 54 days to issue the Employer's PWD in violation of the time limit imposed by Section 655.10(b)(6). The Employment and Training Administration ("ETA") imposed this time limit to address concerns about the NPC's capability to provide timely PWDs and in recognition of the time-sensitive nature of employers' need for labor under the temporary labor certification program. *See* 73 Fed. Reg. 78020, 78027-29 (Dec. 19, 2008).

The NPWC's noncompliance with this regulation does not render the CO's denial of certification invalid. *See, e.g., Allagash Maple Products, Inc.*, 2012-TLN-5 and 6 (Nov. 29, 2011); *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 clear that the Employer in this case tried to comply with Section 655.10(a)(2), but was unable to both comply with this regulation and file its application in time for its season as a result of the NPWC's delay in issuing the PWD. The Employer waited more than 30 days after submitting its PWD request to file its H-2B application, and it attempted to estimate the PWD that would be issued by the NPWC based on the OES wage data. The Employer's estimate and advertised wage of \$12.13 per hour exceeds the PWD of \$12.12 per hour that covers labor performed up to January 1, 2012, and equals the PWD of \$12.13 per hour that covers labor performed after January 1, 2012.²

Accordingly, the Employer fully complied with the requirement under Section 655.10(a)(3) that the offered and advertised wage of 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.

Based on the foregoing, I find that the Employer's noncompliance with Section 655.10(a)(2) was justifiable and excusable. The CO's denial of certification is vacated and remanded for further processing.

² Although the NPWC informed the Employer that the \$12.12 per hour PWD covered labor performed up to November 30, 2011, and the \$12.13 per hour PWD covers work performed after November 30, 2011, subsequent legislation has postponed the effective date of the second PWD to January 1, 2012. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 546 (2011).

ORDER

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

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge