



Issue Date: 29 March 2012

BALCA Case No.: 2012-TLN-00026

ETA Case No.: C-12030-57841

In the Matter of:

PISCATAQUA LANDSCAPING CO., INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Booth R. Hemingway¹
President, Piscataqua Landscaping
Eliot, Maine
For the Employer

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

¹ Although Kemal Benouis, Esquire filed the Employer's application and RFI response materials, Mr. Benouis did not file a brief with the Board.

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 30, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary peakload labor certification from Piscataqua Landscaping (“the Employer”) for 15 laborers from March 12, 2012 to November 30, 2012. AF 89-98.² The Employer stated that work would be performed in Eliot, Maine, and other worksites in York County, Maine. AF 92. The Employer also stated the rate of pay as \$9.92 per hour. AF 93.

On February 6, 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 81-88. 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 84. 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. AF 84-85. 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 85-86.

The Employer responded to the RFI on February 14, 2012 and submitted the requested documentation. AF 39-80. The Employer submitted a PWD that listed the prevailing wage for the Employer’s primary worksite as \$9.92 per hour, and an addendum to the PWD showed prevailing wages for the Employer’s additional worksites ranging from \$9.25 to \$10.18 per hour. AF 69-80. The Employer also submitted a PWD

² Citations to the 98-page appeal file will be abbreviated “AF” followed by the page number.

that was valid from September 20, 2010 to June 30, 2011 that showed the prevailing wage as \$10.10 per hour. AF 63-68.

On March 2, 2012, the CO denied the Employer's application. AF 31-37. 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 33. 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 35-37. 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 regulation at Section 655.10(b)(3) provides:

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 of \$9.92, rather than offering \$10.18 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.

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