



**Issue Date: 30 November 2011**

**BALCA Case No.: 2012-TLN-00004**

ETA Case No.: C-11262-55552

*In the Matter of:*

**STAN SWEENEY LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Stan Sweeney  
Hermitage, Arkansas  
*Pro Se for the Employer*

Gary M. Buff, Associate Solicitor  
Heather Filemyr, Attorney  
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**  
**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 September 19, 2011, Stan Sweeney LLC ("the Employer") filed an application for temporary labor certification for 45 forest and conservation workers. AF 33-40.<sup>1</sup> The Employer stated that it has a temporary seasonal need for the workers from October 14, 2011 to April 30, 2012. AF 33. The Employer stated that the rate of pay for the position was \$16.32 per hour and indicated that it advertised the job opportunity with the Arkansas State Workforce Agency ("SWA") from August 25, 2011 through September 4, 2011 and in the Arkansas Democrat Gazette from August 27, 2011 to August 28, 2011. AF 37.

On September 22, 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 28-32. 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 30. 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. *Id.*

---

<sup>1</sup> Citations to the 58-page appeal file will be cited as "AF" followed by the page number.

The Employer responded to the RFI on September 29, 2011. AF 17-27. The Employer stated that it submitted its PWD request to the NPWC on August 11, 2011, one day after its previous PWD expired, but had not yet received a new PWD. AF 17. The Employer explained that its October date of need made it impossible to wait for a prevailing wage determination, and so it relied on the wage data that it found on the FLCDatacenter.com website and determined that the new prevailing wage would be \$16.32 per hour. *Id.* The Employer stated it proceeded with its advertising in order to meet its date of need. *Id.*

On October 24, 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 8-16. The PWD for work performed prior to November 30, 2011 is \$14.16 per hour, and the PWD for work performed after November 30, 2011 is \$16.32 per hour. AF 9, 14. The PWD states that “[f]or employers receiving these two PWDs, it 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 this second, higher 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 Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program Final Rule, 76 FR 3452 (Jan. 19, 2011).” AF 9.

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 3-7. The CO found that the Employer failed to obtain a PWD that is valid either on August 25, 2011, the date recruitment began, or on September 19, 2011, the date the Employer filed its application. AF 7. The Employer requested administrative review on November 7, 2011, arguing that it received a PWD from the NPWC 74 days after filing its PWD request, and that the PWD is exactly the wage used when recruiting U.S. workers. AF 1-2.

BALCA received the administrative file from the CO on November 16, 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 August 11, 2011, began its recruitment on August 25, 2011, and filed its application on September 19, 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. On October 24, 2011, the NPWC issued two PWDs. AF 8-16. The first PWD of \$14.16 per hour covers labor performed up to November 30, 2011, and the second PWD of \$16.32 per hour covers work performed after November 30, 2011.<sup>2</sup>

I note that the H-2B regulations impose a time limit on the number of days the NPWC 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 74 days to issue the Employer’s PWD in violation of the time limits 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*

---

<sup>2</sup> I note that as a result of the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 546 (2011), 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).

*Produce & Frey Bros. #2 and Frey Produce & Frey Bros. #3*, 2011-TLC-403 and 404 (June 3, 2011).

Nevertheless, I find that the Employer's noncompliance with Section 655.10(a)(2) was justifiable and excusable. The Employer waited more than 30 days after submitting its PWD request to file its H-2B application, and the Employer's offered wage of \$16.32 per hour exceeds the PWD that was eventually issued by the NPWC. *See Allagash Maple Products, Inc.*, 2012-TLN-5 and 6 (Nov. 29, 2011). As the Employer is offering \$16.32 per hour, it has fully complied with the requirement under Section 655.10(a)(3) that the offered and advertised wage of \$16.32 per hour equal or exceed the PWD obtained from the NPWC. Accordingly, 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, the CO's denial 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 determination is **VACATED** and this matter is **REMANDED** for further processing consistent with this decision.

For the Board:

A

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