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In the Matter of

Southern Mississippi Pinestraw, LLC,
Employer,

Certifying Officer:
Chicago National Processing Center

Appearances:

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For the Certifying Officer

Before:

Linda S. Chapman
Administrative Law Judge

Case No.: 2014-TLN-00037

**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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009). Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). § 655.33. The administrative review is

limited to the appeal file¹ prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and “such evidence as was actually submitted to the CO in support of the application.” § 655.33(a), (e).

STATEMENT OF THE CASE

On June 25, 2014, the Employer filed an H-2B application (ETA Form 9142) for 40 “General Forestry Workers” to be employed from July 7, 2014 to December 1, 2014 at multiple worksites on a seasonal basis. The application’s Statement of Temporary Need stated:

Southern Mississippi Pinestraw, LLC contracts are seasonal contracts and work performance periods are entirely dependent on seasons of the year and weather conditions as we work according to the growth and dormancy cycles of nature and vegetation which may include trees, foliage and the debris of such. These work performance periods are consistent with the season of growth and dormancy in the area in which we hold contracts and the weather condition of those areas. Those growth/dormancy factors determine into our seasonality and temporary need.

The application noted that the possible duties could include

[a] combination of all the related tasks: Mulch, gather mulch material post plant, remove forest debris & other General Forestry activities per SCA Forest Land Management Services.

AF 36.

The CO requested further information from the Employer on July 2, 2014. The CO’s Request for Further Information (RFI) noted that the proposed prevailing wage in the application and pre-filing recruitment was a range from \$7.78 to \$12.15 an hour, and requested the Employer to submit evidence that the offered wage equaled or exceeded the highest applicable prevailing wage among all relevant worksites, pursuant to 20 C.F.R. §§ 655.22(e), 655.17(g), and 655.15(e)(2) and (f)(3). AF 29-31. The CO noted that the Employer had listed and advertised a wage range of \$7.78 to \$12.15 an hour, but based on the ETA Form 9141, the Prevailing Wage Determination, \$12.15 an hour, was determined as the proper prevailing wage issued by the National Prevailing Wage Center (NPWC). AF 30.

The CO also required the Employer to submit proof that all of the worksites listed within the area of unintended employment were, in fact, with normal commuting distance, pursuant to 20 C.F.R. §§ 655.20(d) and 655.4. AF 32-33.

In its reply on July 8, 2014, the Employer argued that the Request for Information (RFI) claimed that the job should have been classified as a landscaping job, and not a forestry job, and “in essence,” retroactively reclassified the job opportunity after the Employer’s opportunity to re-advertise the positions had expired. The Employer claimed that the RFI was based on the premise that “DOL may retroactively change a final prevailing wage determination.” AF 15-26.

¹ The administrative file is cited to herein as “AF” followed by the page number.

The Employer argued that:

The RFI purports to alter the Final PWD. The basis for this action is a disagreement with NPWC's judgment that the job opportunity at issue is a forestry occupation, rather than landscaping as the RFI prefers. A review of the regulations, however, fails to reveal any authorization for revising a final PWD. The *Island Holdings* [case] established that DOL could not revise the amount of a prevailing wage for a particular occupation retroactively. By analogy, it follows that DOL may not achieve the same result by modifying the occupation (and therefore, the corresponding wage rate) after a Final PWD has been issued.

AF 24. In addition, the Employer claimed that it qualified for certification under the "Special Guidelines for Processing H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations," (TEGL 27-06), which it interpreted to authorize a "range of wages per area of intended employment." AF 25.

The CO found that the Employer had not addressed the deficiencies in the RFI, and denied the Employer's application on July 21, 2014. AF 73-81. The CO agreed with the Employer that under the special procedures of TEGL 27-06, covered employers may use multiple wage rates. But the CO found that the Employer's application did not qualify for these special procedures. The CO stated:

The job duties as listed on ETA Form 9142 and in the employer's job order and newspaper advertisement, describe a job opportunity that is consistent with the mulching and gathering of landscaping materials. The statement of need confirms that the employer's business operations consist of raking and baling of pine straw. These job duties are not consistent with the primary function of the TEGL 27-06 special procedures which is designated for tree planting and reforestation.

AF 10. The CO also found that the Employer did not address the request in the RFI regarding the locations where the work would be performed, and this deficiency was another basis for denial of the Employer's application. AF 14.

The Employer appealed the denial to the Board of Alien Labor Certification Appeals (BALCA) on July 28, 2014 (AF 1-6. The Employer argued that the CO misapplied the H-2B regulations for the use of prevailing wage rates, and also argued that TEGL 27-06 was applicable to its operations. AF 3.

On July 31, 2014, I issued a Notice of Docketing, notifying the parties that BALCA had docketed the appeal, and providing them an opportunity to submit briefs on an expedited basis. On August 19, 2014, I issued an Order granting the Employer's request to supplement the administrative file.

On August 19, 2014, counsel for the CO filed a brief, arguing that the CO correctly denied the Employer's application for H2-B certification, based on the Employer's failure to

submit the information and documentation required by the RFI. The CO noted as an example that the Employer failed to establish that the \$7.78 wage rate could properly be applied at any of its worksites, given the \$12.15 wage rate in the prevailing wage determination.

The CO argued that the Employer mistakenly invoked TEGL 27-06 to support its effort to use both of its proposed prevailing wage rates. The CO stated that the gathering of pine straw is explicitly recognized as a “minor” activity under the TEGL, and that the activities contemplated under the TEGL which are entitled to special procedures are the planting of trees and reforestation. But the Employer does not conduct tree planting or reforestation activities, and so is not entitled to apply the special procedures to its operations.

The CO also disputed the Employer’s claim that the CO sought to “revise” the prevailing wage determination, and that the CO had “vacated the Final PWD and decided that the prevailing wage for all worksites was \$12.15 per hour.” According to the CO, the NPWC and the CO simply used the information in the proposed PWD, the \$12.15 highest proposed prevailing wage, to determine, based on the H-2B regulations, the proper prevailing wage. The CO argued that the Employer’s analogy to *Island Holdings* was inapt, and the CO simply effectuated the usable portion of the Employer’s prevailing wage determination.

Counsel argued that, contrary to the Employer’s claims, the CO correctly applied the “plain language” of 20 C.F. R. §§ 655.10(a) and 655.17(g), noting that in his final determination, the CO stated:

However, Departmental regulations at 20 CFR sec. 655.10(b)(3), are very specific in that they state “if the employer has multiple worksite locations the prevailing wage shall be based on the highest applicable wage among all relevant worksites.” Furthermore, under regulation 20 CFR sec. 655.17 the employer is required to advertise a range of wages in which the lowest wage is not less than the highest prevailing wage for all worksite locations.

Finally, counsel for the CO argued that the Employer’s deficient pre-filing recruitment and application provided sound bases for the denial of the Employer’s application, and given the invalid wage range, the pre-filing recruitment could not constitute a fair test of the U.S. labor market for the job opportunity, and could reasonably be expected to discourage U.S. workers from applying for the job opportunity.

In its brief, submitted on August 20, 2014, the Employer argued that it complied in full with the H-2B regulations, and that certification was therefore mandatory. The Employer argued that none of the CO’s reasons for denying its application had merit, and the denial should be reversed.

The Employer argued that the NPWC determined that it was working within two areas of intended employment, each of which had different prevailing wages. However, the CO concluded that the Employer was working within a single area of employment, and had to pay the highest available wage, \$12.15 an hour. According to the Employer the NPWC’s conclusion was final and binding on the CO “as a matter of law,” and was factually correct. The Employer

noted that the closest commute between the listed worksites was almost two hours, and the longest was almost five hours. Because the term “area of intended employment” is based on reasonable commuting distances, the Employer argued that there was no basis for “agglomerating” the two worksites.

The Employer felt that the CO’s brief suggested that the CNPC was justified in treating its application as one area of intended employment because the Employer did not provide information that there were two. But according to the Employer, the CO was “well aware” that it was dealing with two areas of intended employment, as the application listed all of the worksites, and all the CO needed to do was look at a map. The Employer claimed that the CNPC also knew there were two separate areas of employment because that was its position as of March 21, 2014. According to the Employer, the “Final PWD” established that there was only one prevailing wage for the worksites in Mississippi, \$7.78, and only one prevailing wage for the worksites in Alabama, \$12.15. The Employer offered those wages, and the CO may not base its denial of the application on that grounds.

The Employer also argued that its advertising complied with the requirement to advertise the range of applicable wage offers, because it offered \$7.78 for Mississippi work and \$12.15 for Alabama work. The Employer noted that the CO claimed that if the Employer had multiple worksite locations, it was required to advertise a range of wages in which the lowest wage was not less than the highest prevailing wage for all worksite locations. The Employer claimed that the CO misquoted the regulation by “omitting” its limitation to “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 Employer stated:

CNPC’s assertion that an employer is required to pay the highest prevailing wage of any worksite, where located, is incompatible with the language of § 655.10(b)(3). Nor does § 655.10(b)(3) have any applicability here since NPWC determined that there was only one prevailing wage for each area of intended employment.

The Employer argued that the CO misstated the requirement of § 655.17(g), which specifically requires that the advertising communicate multiple wage offers through publication of a range, and even the CO admitted that it complied with this requirement.

The Employer argues that the third basis for the CO’s denial, that the H-2B workers would be working in more than one area of intended employment, relies on a misquotation of the applicable section, which provides:

Certification of more than one position may be requested on the application as long as all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

The Employer argues that this section only applies when an application seeks certification for multiple positions, but not when an employer seeks certification for multiple beneficiaries, *i.e.*, 20 general forestry workers, for a single position. According to the Employer,

this section prescribes a rule for a situation not present here, when an application seeks certification of more than one position, such as cooks and servers.

The Employer argued that even using the CO's interpretation, it complied, stating that TEGL 27-06 establishes that if an occupation is tree planting or "related to reforestation," multiple areas of intended employment are "perfectly acceptable." The Employer argued that the CO misapprehended the job duties in determining that pine straw gathering is not a reforestation-related activity, claiming that the job involves "much more than just gathering pine straw." The Employer's job description provided that:

Possible duties: according to SCA Contracts, individual may be asked to perform a combination of all the related tasks: Mulching, placing mulching materials around seedlings, post planting, removing excessive vegetation around seedling, applying repellent or fertilizer, inhibit plant disease & other related General Forestry activities as per SCA Forestry Land Management Services. Extensive bending, stooping, walking, heavy lifting up to 50 lbs.

The Employer stated that the NPWC had the "correct understanding," which led it to correctly classify the position as general forestry work. According to the Employer, the NPWC's determination was final and binding on the CO, and the Employer relied on it when advertising. The Employer argues that the CO's "attempted post-advertising revision of NPWC's classification is impermissible as a matter of law."

Even if the NPWC's PWD were not conclusive as a matter of law, the Employer argues that the Court should give it dispositive weight "as a matter of NPWC's greater expertise." According to the Employer, the mechanism for correcting errors by the NPWC in reviewing job descriptions and classifying jobs is through a post-determination, pre-advertising appeal at the Employer's options. Citing to *Island Holding*, the Employer argues that the regulations do not provide for any post-advertising revision of a final PWD.

The Employer also argued that pine straw gathering falls within reforestation, citing to the SCA Dictionary of Occupations, stating that "gathering forest materials" such as pine straw is included as a "Forestry and Logging" occupation. In addition, TEGL 27-06 provides that employers can require tree planter workers to perform minor reforestation related job activities such as pine straw gathering, and thus it follows that "pine straw gathering" is a reforestation related job activity within TEGL 27-06.

The Employer argues that there is no rational basis to deem pine straw gathering to be landscaping, a position that would lead to "absurd results." The Employer states:

If the fact that landscapers buy pine straw is enough to make a pine straw gatherer into a landscaper, would not the fact that chefs buy vegetables transform farmers into chefs? Would the fact that tailors buy wool convert shepherds into tailors? The list is endless. Occupations are defined by what people do, not who buys or uses the product.

DISCUSSION

The CO may only grant an employer's petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the United States 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). 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 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).

In this case, the Employer argues that the CO "vacated the final PWD" by deciding that the prevailing wage for all worksites was \$12.15 an hour. Setting aside the Employer's characterization of the NPWC proposed wage determination as a "final" wage determination, the CO correctly noted that both the NPWC and the CO used the information provided in the Employer's proposed wage determination, which reflected that the highest proposed prevailing wage was \$12.15 an hour, to determine what was the proper prevailing wage based on the regulations.²

These regulations provide that

[i]f the employer has multiple worksite locations the prevailing wage shall be based on the highest applicable wage among all relevant worksites.

20 C.F.R. § 655.10(b)(3). In other words, the CO used the portion of the Employer's proposed prevailing wage determination that was applicable under the regulations.³

Nor do the guidelines in TEGL 27-06 allow the Employer to use both of its proposed prevailing wage rates. The job duties of gathering pine straw are specifically recognized as minor activities under the TEGL. As the CO notes, the activities that are contemplated under the TEGL as entitled to special procedures are the planting of trees and reforestation. The Employer does not conduct tree planting or reforestation activities, and thus is not entitled to apply the special procedures under the TEGL.

I do not credit the Employer's argument that its job duties should be classified as tree planting or reforestation because, in addition to pine straw gathering, the job duties included mulching, post planting, removing excessive vegetation around seedlings, applying repellent or

² The NPWC determined that the prevailing wage was \$7.78 an hour in one area (Mississippi), and \$12.15 an hour in the other (Alabama). But the fact that the NPWC determined that there were two areas of intended employment, with different prevailing wages, does not compel the "final and binding" conclusion that the Employer is entitled to offer the lower rate in Mississippi. Under the regulations, the Employer must offer the highest wage rate, \$12.15 an hour, in both areas of intended employment.

³ The Employer's reliance on *Island Holdings* for the proposition that the CO had no authority to revise a final PWD, because *Island Holdings* established that the DOL cannot revise the amount of a prevailing wage for a particular occupation retroactively, is misplaced. Counsel for the Employer failed to mention that this case held that there can be no change in a prevailing wage determination *after certification*.

fertilizer, and other “related General Forestry activities.” In short, the Employer does not plant trees, nor does it engage in reforestation activities. The CO correctly determined that the Special Guidelines applicable to Temporary Labor Certification in Tree Planting and Related Reforestation Occupations was not applicable.

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 was \$12.15 an hour, and the Employer’s offered wage was only \$7.78 an hour at the Mississippi worksite locations, the Employer failed to comply with Section 655.22(e). In addition, since the Employer’s pre-filing recruitment, which advertised a wage rate of \$7.78 for the positions at the worksites in Mississippi, was deficient.

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.

SO ORDERED.

LINDA S. CHAPMAN
Administrative Law Judge