

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 March 2014

BALCA Case No.: 2014-TLN-00012
ETA Case Nos.: H-400-14002-865424

In the Matter of:
PACIFIC COAST CONTRACTING,
Employer.

Appearances: Wendel V. Hall, Esquire
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Washington, D.C.
For the Employer

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Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B guest worker program permits foreign workers to enter the United States on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL” or the “Department”). 8 C.F.R. § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer in the Employment and Training

Administration (“ETA”). 20 C.F.R. § 655.23. If the Certifying Officer denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a). For the reasons set forth below, the Certifying Officer’s denial of temporary labor certification in this matter is AFFIRMED.

BACKGROUND

On January 2, 2014, Pacific Coast Contracting (“Pacific Coast”) filed an *Application for Temporary Employment Certification* (ETA Form 9142) seeking H-2B labor certification for 60 Forestry Worker positions. AF 61. The job description in Section F, Item 5 states that the job duties for the Forestry Worker position are “Tree Planter ONLY.” AF 63-65.

Before Pacific Coast filed this application, it applied for and received two Prevailing Wage Determinations. AF 77-99. One of the Prevailing Wage Determinations, P-400-13317-664744, specifies a range of wages between \$11.75-\$15.69 per hour based on the Service Contract Act (“SCA”) wage for a Brush/Precommercial Thinner in various areas of intended employment. AF 77-88. The job duties listed in this determination include:

[D]ig holes to plant seedling trees without J or U root secure seedling with soil carefully. Maintain seedling growth by spraying, hand-pruning, clearing away surrounding vegetation; pile and remove debris; and other SCA 08010 Precommercial thinner activities. Identify diseased or undesirable trees and remove them, using power saws or hand saws. Think or space trees, using power thinning saws. Maintain tallies of trees examined and counted during tree marking or measuring efforts.

AF 81. The other Prevailing Wage Determination, P-400-13317-510882, specifies a range of wages between \$9.60-\$14.10 per hour based on the SCA wage for a Tree Planter in various areas of intended employment. AF 89-99. The job duties listed in this determination are limited to those of a Tree Planter, *i.e.*, “dig holes to plant seedling trees without J or U root secure seedling with soil carefully and other related activities as per SCA 08730 Tree Planter Forestry Land Management Services.” AF 93.

Pacific Coast also posted a job order with the Nebraska State Workforce Agency (“SWA”), and placed two newspaper advertisements in *The North Platte Telegraph*. The job order and both newspaper advertisements are identical. They contain the following wage offer: “\$9.60/hr up to possible \$15.69/hr . . . wage may vary. DOE. Piece Rate May Apply.” They also contain a job description that lists job duties performed by a Tree Planter *and* a Brush/Precommercial Thinner.¹

On January 8, 2014, the H-2B Certifying Officer (“CO”) issued a *Request for Further Information* (“RFI”) stating that the Department was unable to render a *Final Determination* for

¹ The job description states, in relevant part: “Manual duties outdoors for reforestation: dig holes to plant seedling trees without J or U root secure seedling with soil. Carefully maintain seedling growth by spraying, hand-pruning, clearing away surrounding vegetation; pile and remove debris & other related forestry activities as per Forestry Land Management Services.” AF 73-76.

the above referenced application because Pacific Coast had failed to comply with all of the criteria necessary for certification. AF 56-60. The RFI identified two deficiencies—(1) failure to comply with the pre-filing requirements at 20 C.F.R. §§ 655.10 and 655.22(e); and (2) failure to satisfy the advertising requirements at 20 C.F.R. § 655.17(g)—both of which related to the wage that Pacific Coast offered for the Forestry Worker positions.

Pacific Coast responded to the RFI on January 8, 2013, providing a “corrected” ETA Form 9142; an itinerary of the work to be performed; and copies of the Prevailing Wage Determinations, newspaper advertisements, and job order it had submitted with the initial application. In the “corrected” ETA Form 9142, Pacific Coast amended Section F, Item 5 to include the Brush/Precommercial Thinner job duties that it listed in its job order and newspaper advertisements. AF 24. The itinerary of work to be performed listed the state, county, and dates where work was to be performed, and provided two wages for each location: a “Planter Wage” and a “Thinner Wage.” AF 51.

On January 31, 2014, the CO issued a *Final Determination* denying certification on the ground that Pacific Coast failed to satisfy the advertising requirements under 20 C.F.R. § 655.17(g). AF 11-14. Specifically, the CO determined that Pacific Coast had failed to comply with 20 C.F.R. § 655.17(g) by advertising a wage range that began at a wage lower than the lowest wage in the Prevailing Wage Determination that encompassed all of the job duties to be performed by the Forestry Workers, *i.e.*, the Prevailing Wage Determination that listed job duties performed by both Tree Planters *and* Brush/Pre-commercial Thinners. AF 14.

Pacific Coast requested administrative review before BALCA by letter dated February 5, 2014. AF 1-2. The undersigned Administrative Law Judge issued a Notice of Docketing on February 6, 2014, setting forth an expedited briefing schedule. BALCA received a copy of the Administrative File on February 24, 2014.² The CO filed a statement of position on February 21, 2014; Pacific Coast filed a Brief in Support of Reversal on February 24, 2014.

DISCUSSION

The Department may only certify applications under the H-2B program if, at the time the application is filed, there are not sufficient able and qualified U.S. workers to fill the requested position(s), and employment of the requested foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. 214.2(h)(6)(iv). To ensure that opportunities remain open to qualified U.S. workers, the Department requires employers to test the labor market for qualified U.S. workers at the prevailing wage. See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), 73 Fed. Reg. 78,020, 78,031 (Dec. 19, 2008). To that end, the regulations prescribe specific domestic recruitment steps that employers must complete before filing an application for H-2B labor certification. 20 C.F.R. 655.15 (2009). These steps include the placement of a job order with the SWA in the

² On February 14, 2014, BALCA received a CD-Rom that purported to contain the Administrative File. A BALCA staff member was not able to access the file on this CD-Rom, however, and contacted Counsel for the Certifying Officer on February 24, 2014 to obtain an additional copy. Counsel for the Certifying Officer provided BALCA a copy of the Administrative File that same day.

area of intended employment, and the placement of two print advertisements in a newspaper of general circulation. § 655.15(e), (f). Both the SWA job order and the newspaper advertisements must contain, *inter alia*, “the wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers, each of which must not be less than 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.” § 655.17 (g).

The dispute in the instant case concerns the prevailing wage that Pacific Coast was required to advertise for the Forestry Worker positions. As discussed above, Pacific Coast applied for and received two Prevailing Wage Determinations before it filed the application at issue in this appeal. Only one of these Prevailing Wage Determinations, P-400-13317-664744, accurately describes the job opportunity for which Pacific Coast seeks H-2B temporary labor certification. Compare AF 24 (job duties listed in Section F, Item 5 of the “corrected” ETA Form 9142) with AF 77-88 (Prevailing Wage Determination based on job duties performed by Tree Planters and Brush/Precommercial Thinners) and AF 89-99 (Prevailing Wage Determination based only on job duties performed by Tree Planters). Because Pacific Coast seeks certification for a job opportunity that involves job duties from both tree planting *and* pre-commercial thinning, the Prevailing Wage Determination based solely on work performed by tree planters, P-400-13317-510882, is not the prevailing wage “applicable throughout the duration of the certified H-2B employment.”

Pacific Coast argues that the CO’s denial should be reversed because it advertised “the range of applicable wages in accordance with § 655.17.” See Pacific Coast Contracting’s Brief In Support Of Reversal (“Pacific Coast Brief”) at 2. Specifically, Pacific Coast relies on the SCA implementing regulations to argue that it may offer and advertise a different a wage rate depending on the particular work to be performed during a workweek, *i.e.*, it may offer and pay a separate wage rate for Tree Planter work and Brush/Precommercial Thinner work. See Pacific Coast Brief at 4, citing 29 C.F.R. § 4.169. This argument is unavailing. The H-2B temporary labor certification program is not governed by the SCA implementing regulations, but rather, the H-2B regulations at 20 C.F.R. § 655, subpart A. Thus, even though the H-2B regulations permit an employer to request a Prevailing Wage Determination based on a wage determination made under the SCA, it does not automatically follow that the H-2B regulations permit an employer to request multiple Prevailing Wage Determinations for a single job opportunity, even if that job opportunity involves job duties from multiple SCA-based occupations.

After reviewing the H-2B regulations as a whole, it is clear that the term “multiple wages” in section 655.17(g) does not refer to a range of wages for multiple job duties in a single application. First, the regulations themselves are premised on an employer obtaining a single prevailing wage determination for the job opportunity. See § 655.10(a)(1) (providing that an “employer must request *a* prevailing wage determination from the [Department] in accordance with the procedures established by this regulation”) (emphasis added); § 655.10(a)(3) (providing that an “employer must offer and advertise *the* position to all potential workers at a wage at least equal to *the* prevailing wage obtained from the [Department]”) (emphasis added); § 655.15(d) (providing that [a]n employer filing an application must: (1) obtain *a* prevailing wage determination from the [Department] in accordance with procedures in § 655.10 . . .”) (emphasis added). And second, the term “multiple” only appears in the regulations in a geographic context,

i.e., when a position spans more than one geographic area. See § 655.10(b)(3) (providing that “if a job opportunity involves multiple worksites within an area of intended employment . . . the prevailing wage shall be based on the highest applicable wage among all relevant worksites”; § 655.15(e)(1) (“multiple work locations”).³

The wage range in Pacific Coast’s SWA job order and newspaper advertisements, \$9.60 to \$15.69 per hour, begins at a wage that is lower than the range of prevailing wages identified in the applicable Prevailing Wage Determination, P-400-13317-664744. See AF 80, 85-88 (listing a wage range from \$11.75 to \$15.69 per hour, depending on the geographic area where work is to be performed). By advertising a wage range that begins at a wage rate lower than the range of wages in the applicable Prevailing Wage Determination, Pacific Coast advertised a wage offer that is “less than the prevailing wage . . . applicable throughout the duration of the certified H-2B employment,” in violation of section 655.17(g). It was therefore reasonable for the CO to conclude that Pacific Coast failed to comply with the pre-filing recruitment regulation at § 655.17(g).

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that the Certifying Officer’s denial of certification is **AFFIRMED**.

SO ORDERED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

³ Normally, an employer may not request H-2B labor certification for more than one position on a single application unless “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.” § 655.20(d). Under the Special Procedures for H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations, however, an employer who seeks temporary labor certification for positions involving tree planting and related reforestation occupations may, under certain specified circumstances, file a single master application for services or labor to be performed at worksites covering multiple SWAs. See Special Guidelines for Processing H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations, TEGL No. 27-06, Att. A (June 12, 2007), available at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2446. These Special Procedures provide that “a job opportunity containing a wage offer below the prevailing wage will not be accepted.”