

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 June 2015

BALCA Case No.: 2015-TLN-00051

ETA Case No.: H-14354-493390

In the Matter of:

WIRELESS COMMUNICATIONS GROUP, INC., dba WCOMGROUP,
Employer.

Appearances:

Phillip Smith, President and CEO, Wireless Communications Group, Inc., Arlington, TX
For the Employer

Emily C. Toler, Esq., Office of the Solicitor, Washington, D.C.
For the Certifying Officer, U.S. Department of Labor, Chicago, IL

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary nonagricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.¹ On May 19, 2015, Wireless Communications Group, Inc., (“Employer” or “WComGroup”) filed a request for an administrative review of the Certifying Officer’s (“CO”) denial of its H-2B application. 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

¹ The Department of Labor sought to amend these regulations in January 2011, 76 Fed. Reg. 3452, and February 2012, 77 Fed. Reg. 10038, but the Department stayed the implementation of these rules pending federal court litigation. See 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 Wage rule.); see, also *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (Apr. 26, 2012) (temporary injunction from implementation of 2012 rule). On April 29, 2015, the Department and the U.S. Department of Homeland Security (“DHS”) jointly published an Interim Final Rule. See 80 Fed. Reg. 24042 (April 29, 2015) (amending the standards and procedures that govern the H-B2 temporary labor certification program). Pursuant to that rule, the Department will “continue to process an Application for Temporary Employment Certification submitted prior to April 29, 2015 in accordance with 20 C.F.R. § 655, subpart A, revised as of April 1, 2009.” See *id.* at 24109, to be codified at 20 C.F.R. § 655.4. Accordingly, as this application was submitted on February 16, 2015, this case will be decided under the regulations at 20 C.F.R. part 655, subpart A (2009).

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.

Following the CO's denial of an application under 20 C.F.R. § 655.32² an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"), to be heard by a panel of the Board or an individual member. 20 C.F.R. § 655.33(a). Based upon a review of the Appeal File, the request for review, and any legal briefs submitted, the Board is required (within ten days of receipt of the appeal file and five days of receipt of the CO's brief) to either affirm the denial of temporary labor certification, direct the CO to grant the certification, or remand the case to the CO for further action. 20 C.F.R. § 655.33(a), (e). In H-2B cases, the BALCA member or panel assigned to conduct the review may only consider the Appeal File and any legal briefs submitted by the parties. 20 C.F.R. § 655.33(e).

STATEMENT OF THE CASE

On December 27, 2014, Employer requested a prevailing wage determination ("PWD") from the Department of Labor's Employment and Training Administration ("ETA") for its position of Tower Service Technician. (AF 139-46).³ Based on Employer's application, the PWD identified two worksites: Tarrant County (Fort Worth/Arlington) and Dallas County (Dallas/Piano/Irving). (AF 145). For Tarrant County, the prevailing wage was established as \$25.82; for Dallas County, the prevailing wage was established as \$19.78. (AF 146).

On February 16, 2015, Employer filed an application with ETA for temporary labor certification for sixteen "Tower Service Technicians" employed from February 27, 2015 through October 27, 2015. (AF 125-189). The job was classified as "Telecommunications Equipment Installers and Repairers" with an SOC (ONET/OES) Code of 49-2022. (AF 125). Employer indicated that the nature of the temporary need was "intermittent." (AF 125). The application included a statement of intermittent need, which specified that:

WComGroup request for temporary certification meets the regulatory standards of intermittent needs because it has not employed permanent or full-time workers to perform tower technician services. Since the work involves the installation and/or construction of cell towers once the tower is constructed or the equipment installed on the towers under the current work agreements the need for the services of the tower technicians will no longer exist therefore the temporary nature of the work/services.

WComGroup currently has two (2) fulltime administrative employees (non-relative) and does not have any tower service technician employees. WComGroup has two (2) work agreements (available upon request) that require 16 tower service technicians to meet the requirements of these work agreements.

² Unless otherwise indicated, references herein are to the 2009 version of the regulations. See footnote 1 above.

³ Citations to the Administrative/Appeal File will appear as "AF" followed by the pertinent page number.

(AF 125 [Section B.9], 131[Addendum Section B.9]). The application specified that worker duties would be as follows:

Repair, install or maintain mobile or stationary radio transmitting, broadcasting, and receiving equipment, and two-way radio communications systems used in cellular communications, mobile broadband, ship-to-shore, aircraft-to-ground communications, and radio equipment in service and emergency vehicles. May test and analyze network coverage.

Primary Responsibilities:

Responsible for the erection, construction and maintenance of wireless towers and co-location system placement. Ensure that work is performed in accordance with all safety and quality guidelines and expectations

1. Assist in the installation of all aspects of wireless cell site foundations, grounding and conduits, with electrical installations where applicable
2. Ensure the highest level of safety and quality control requirements are upheld
3. Installation of up-top equipment including mats, clamping, bracing, supports, antennas, RRUs, cabling, bolting, true up, shooting proper azimuth within tolerances, reading maps and a compass, torque to spec, labeling, picture-taking, documentation, plumb and tilt readings with smart level, etc
4. Assist in the preparation and cleaning of sites
5. Assist in the assembly of monopole, all weld and knock down self support and guyed towers
6. Assist in the antenna installation of microwave parabolic 1 to 15 foot, VHF, UHF, cellular and FM broadcast antennas
7. Assist in the transmission line and installation of foam or air dielectric coaxial, hardline and elliptical wave-guides
8. Responsible for tool inventory and upkeep daily on job site.

(AF 143). Lastly, the application outlined Employer's worksite wage determinations: In Tarrant County, Texas, the listed basic rate of pay is \$25.82 per hour; in Dallas County, Texas, the listed basic rate of pay is \$19.78 an hour.⁴ (AF 146). In copies of Employer's pre-filing recruitment, the employee wages were advertised as \$20 to \$26 per hour for "Temp. Tower Service Technicians in the Dallas-Fort Worth areas."⁵ (AF 150-157).

On February 23, 2015, the CO issued a Request for Further Information ("RFI") and advised Employer that the application was deficient because (1) the employer failed to establish that its need for nonagricultural services or labor is temporary in nature; (2) the employer failed to establish that the number of worker positions being requested for certification is justified and represents any and all bona fide job opportunities; and (3) the employer failed to satisfy all

⁴ For the area listed as "TARRANT-FORT WORTH-ARLINGTON, TX METROPOLITAN DIVISION," the listed prevailing wage is \$25.82 per hour; for the area listed as "DALLAS - DALLAS-PIANO-IRVING, TX METROPOLITAN DIVISION," the listed prevailing wage is \$19.78 an hour. (AF 146). The wage source was listed as "OES (All Industries)."

⁵ Employer is located in Arlington, Texas, which is in Tarrant County. (AF 75).

requirements of the H-2B program. (AF 111-123). In an attachment, the CO listed eight deficiencies based upon failure to comply with the listed criteria for certification. (AF 113-123).

Employer responded to the CO on March 2, 2015, providing arguments relating to each claimed deficiency and supporting documentation. (AF 73-110). On this issue of prevailing wage, Employer explained that the advertised wage range of \$20 to \$26 per hour, “is higher than the prevailing determination of \$19.78 and \$25.82 per hour from NPWC [National Prevailing Wage Center].” (AF 74). As to the Employer’s schedule of yearly operations, Employer explained that it operated on a fiscal twelve-month year under work agreements and that workflow was slow “generally at the end and beginning of each fiscal year” and “[i]ntermittent work flows through the fiscal period for the tower technicians.” (AF 88). Employer further indicated that “Since we have not had an available workforce in the United States to fill the job needs, our ability to take advantage of the available job opportunities in certain areas has been hampered.” *Id.* In response to the request for an explanation as to why the nature of the job opportunity reflected a temporary need, Employer explained that it entered into work agreements with two companies for the construction and installation of telecommunications equipment on cell towers and the 22,400 hours of work required would necessitate the hiring of 16 additional employees. *Id.* Supporting documentation was attached.⁶ *Id.*

On April 23, 2015, the CO issued a Final Determination that denied Employer’s application. (AF 58). Although the CO determined that Employer had corrected five of the listed deficiencies, the denial was premised upon Employer’s failure to show that: (1) the employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed; and (2) the employer failed to satisfy all the requirements of the H-2B program.” *Id.* The Final Determination indicated that three deficiencies remained, including Employer’s failure to list and offer the proper prevailing wage and Employer’s failure to establish a temporary need for workers. (AF 61-66). Accordingly, the CO concluded that Employer did not provide sufficient documentation to overcome these remaining deficiencies. (AF 58-66).

Employer filed a letter brief requesting redetermination/administrative review on May 11, 2015. (AF 1-57). The Director of the Chicago National Processing Center (“CNPC”) sent the Administrative/Appeal File, electronically, to the Board of Alien Labor Certification Appeals on or about May 19, 2015 and it was received by the undersigned administrative law judge, to act on behalf of the Board, on May 26, 2015.

A Notice of Docketing and Order, issued on May 26, 2015, directed the parties to submit any briefing within five business days of receipt of the appeal file. It also directed the CO to immediately provide the administrative file to the Employer and the Associate Solicitor for Employment and Training Legal Services, if the CO had not already done so.

⁶ According to Employer, Exhibits A through G were attached but the Administrative File only includes Exhibits A through C. (AF 58-110). Employer indicated that Exhibit G included copies of work agreements with Overland Contracting, Inc. (Black & Veatch) and Andrews System, Inc. (AF 88).

The Office of the Solicitor of Labor, on behalf of the CO, timely submitted its brief by email on June 2, 2015. Employer failed to submit a closing brief; however, Employer explained its arguments in its request for administrative review (AF 2-3).

DISCUSSION

Prevailing Wage Pre-Filing Requirement

The first issue is whether Employer sufficiently complied with the prevailing wage pre-filing requirements and obligations of H-2B employers.

The regulations set forth the procedures adopted by the Secretary of Labor to secure information sufficient to determine whether the employment of the foreign worker will adversely affect the wages and working conditions of U.S. workers similarly employed.⁷ 20 C.F.R. § 655.5(b)(2). Accordingly, an employer is required to obtain a prevailing wage determination from the ETA 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.

20 C.F.R. § 655.10(b)(3).

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.⁸

⁷ See footnotes 1 and 2 above.

⁸ 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*

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 two worksites: one in Dallas County, where the prevailing hourly wage is \$19.78, and the other in Tarrant County, where it is \$25.82. (AF 129, 134, 146, 150-57). Therefore, the Employer must offer the highest prevailing wage among all of the worksites. Because the Employer is offering a wage range of \$19.78 to \$25.82⁹, rather than offering at least \$25.82 for all worksites, the Employer failed to comply with 20 C.F.R. § 655.10(b)(3). Accordingly, as Employee failed to follow the requirements clearly outlined in 20 C.F.R. § 655.10(b)(3) and therefore was unable to document that it did so, the CO appropriately denied the application.

Temporary Need for Workers

The second issue is whether Employer failed to establish that its need for nonagricultural workers was temporary in nature.

Under 20 C.F.R. § 655.6(a), an employer seeking a worker under the H-2B program must establish that its need for nonagricultural services or labor is temporary. The section further provides:

(b) The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 C.F.R. 214.2(h)(6)(ii)(B).

20 C.F.R. §655.6(b).¹⁰ To establish an intermittent temporary need, the employer must "establish that it has not employed permanent or full-time workers to perform the services or labor for short periods." 8 C.F.R. 214.2(h)(6)(B)(4). Also, in accordance with Department regulations at 20 CFR 655.21(a), the employer must include attestations regarding temporary

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.")

⁹ Employer stated in its appeal that it rounded up the PWD wage to \$20 to \$26 per hour in its advertisements.

¹⁰ See footnotes 1 and 2 above.

need in the appropriate sections, including a detailed statement of temporary need. 20 CFR 655.21(a)(1)-(3).

In the final determination, the CO indicated that Employer failed to adequately address these requirements. (AF 63-65). To the contrary, Employer has argued that its need is indeed temporary and intermittent, and Employer has submitted argument and documentation addressing the CO's concerns. (AR 3, 37-56, 147-48). However, in the Certifying Officer's Letter Brief, the CO argued that the Employer has not adequately documented its temporary intermittent need. (Certifying Officer's Letter Brief p. 4-5, citing AF 64, 162-77).

Inasmuch as Employer's application fails based upon the prevailing wage pre-filing requirement, as discussed above, it is unnecessary to determine whether the application fails on this basis as well.

CONCLUSION

Based on the abovementioned discussion, I find that Employer failed to comply with the pre-filing obligations required to apply for H-2B workers in that it offered a range of wages instead of the highest prevailing wage for all worksites. Accordingly, I find that the CO's denial of temporary labor certification was proper based upon Employer's failure to comply with the regulations outlined in 20 C.F.R 655.10(b)(3)(2009). Nothing in this Order shall prevent the Employer from reapplying *after* full completion of its pre-filing requirements.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of temporary labor certification, be and hereby is, **AFFIRMED**.

For the Board:

PAMELA J. LAKES
Administrative Law Judge