

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 March 2019

BALCA Case No.: 2019-TLN-00035
ETA Case No.: H-400-18352-283755

In the Matter of:

TEJAS STONE WORKS, INC.,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Anique Watson
Action Visa Assistance
203 N. Jackson Ave.
P.O. Box 363
Wylie, Texas 75098
For the Employer

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200 Constitution Ave.
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For the Certifying Officer

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)¹; 20 C.F.R. § 655.6(b)². 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). 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

Tejas Stone Works, Inc. ("Employer") is a stone masonry business in Denton, Texas that specializes in "hardscapes such as entry features, specialty pavements, retaining walls, pavilions, etc." AF at 64, 76.³ Employer submitted an H-2B application because it begins construction on its hardscapes in the warmer months, resulting in an increased demand for stone masons between April and mid-December. AF at 64.

On January 7, 2019, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification for ten mason laborers from Employer. AF at 43. On January 30, 2019, the CO issued a Notice of Deficiency, finding one deficiency. AF at 54, 57. Specifically, the CO found that

in Section F.c. of the ETA Form 9142 and on the submitted job order, the employer indicates that it is paying a wage of \$15.15 for the following locations: Denton County, TX, and the following BLS Areas: Dallas-Plano-Irving, TX Metropolitan Division, and the Fort Worth-Arlington, TX Metropolitan Division. However, the employer submitted an ETA Form 9141, Prevailing Wage Determination that only lists a prevailing wage for Denton

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

² On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 (Apr. 29, 2015). The rules provided in the IFR apply to applications "submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015." IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

³ Citations to the Appeal File are abbreviated as "AF." For purposes of clarity, the "P" prefix on each page number of the Appeal File has been omitted (e.g., "P60" becomes "60").

County, TX, and the BLS Area of Dallas-Plano-Irving, TX Metropolitan Division.

AF at 57. The Notice of Deficiency then instructed Employer to modify the application by either providing evidence to satisfy the regulatory requirements or removing the worksite locations not supported by a Prevailing Wage Determination. *Id.* If Employer was to provide additional evidence, its response had to "include, but [was] not limited to, an ETA Form 9141, Prevailing Wage Determination that shows a valid prevailing wage for all worksites on the employer's application." *Id.*

On January 31, 2019, Employer responded by explaining that the omission of the Fort Worth – Arlington TX Metro Division worksite from the ETA 9141 was a clerical error and that the prevailing wage would not change if that worksite was included. AF at 48. In its modification, Employer handwrote the Fort Worth – Arlington TX Metro Division information identified in the Notice of Deficiency on a copy of the original Form ETA-9141 addendum. AF at 51–52. Employer acquired this additional information from the Foreign Labor Certification Data Center, and not the National Prevailing Wage Center. AF at 48–50. Employer cites what appears to be the May 9, 2005 version of the ETA's *Prevailing Wage Determination Policy Guidance* to assert that it is permissible to use the online wage library to support a prevailing wage rate. AF at 48.

On February 4, 2019, the CO issued a Final Determination denying employers application because

the worksite and the worksite's wage cannot be handwritten onto the ETA Form 9141. Regulations at 20 C.F.R. 655.10(a) requires that prevailing wage determinations be obtained from the National Prevailing Wage Center. The employer cannot self-administer wage rates or authorize wages. The employer did not submit a compliant ETA Form 9141, Prevailing Wage Determination that shows a valid prevailing wage for all worksites on the employer's application, and did not amend its application to remove any worksites for which it did not obtain a Prevailing Wage Determination.

Therefore, the employer did not overcome the deficiency.

AF at 46.

On February 6, 2019, BALCA received Employer request for review of the CO's Final Determination. AF at 1. Employer explains the handwriting on the original document was for ease of comparing wage rates and parallel

information between the 9141 and 9142; also, the handwritten information came directly from the Department of Labor's website. *Id.* Employer argues that the Fort Worth – Arlington TX Metro Division information was ten cents lower than that rest of Dallas area and would not affect the outcome of the prevailing wage determination. *Id.*

PROCEDURAL HISTORY

On February 21, 2019, I issued a Notice of Assignment and Expedited Briefing Schedule, where I took notice that both the Solicitor and Employer's agent indicated via email that they did not plan on filing briefs in this matter. I informed the parties that they still had seven business days from the receipt of the appeal file to submit briefs. The seven business days have lapsed, and neither party filed a brief.

STANDARD OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. §655.33(e). After considering the evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)–(3).

DISCUSSION

The regulations require an employer to advertise positions at a wage at least equal to the prevailing wage. 20 C.F.R. § 655.10(a). The regulations also specify that the prevailing wage is to be obtained from the National Prevailing Wage Center. *Id.* Employer's reference to the 2005 guidance is unpersuasive because the language permitting the online sources to determine a prevailing wage rate is in direct conflict with the language of § 655.10(a) requiring the source for the wage rate to be the National Prevailing Wage Center. Also, the 2005 guidance was supplanted in 2009. See Employment and Training Administration, *Prevailing Wage Determination Policy Guidance* 5 (Nov. 2009) (permitting wage rates to be determined from only collective bargaining agreements, the National Prevailing Wage Center, or compliant employer surveys). Obtaining a wage rate from the proscribed sources is strictly required, even if other sources

would provide the same wage result. Considering the regulatory requirements, the undersigned finds that Employer did not submit the proper information to correctly modify its application.

Thus, CO properly denied the application.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

For the Board:

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

Washington, D.C.
WSC/aje