



**UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

DATE PREPARED: 11-9-83

RE: SOUTH BAY GROWERS, INC., 84-TLC-1

This is a decision in response to the request of South Bay Growers, Inc. for expedited administrative judicial review, pursuant to 20 C.F.R. §655.204(d) of a denial on October 26, 1983, of its application for temporary labor certification by Lawrence E. Weatherford, the Regional Administrator (RA).

On September 9, 1983, the employer submitted an application for 151 lettuce workers. At some point during the processing of the application, a legal action was brought against the Department of Labor to invalidate inter alia "the Adverse Effect Wage Rate" (AEWR) established for 1983 on the ground of violations of the Administrative Procedure Act in connection with rule making. Temporary restraining orders were obtained from the United States District Court for the Southern District of Florida, (Judge Gonzalez), and the United States District Court for the District of Columbia, (Judge Richey) to protect the interests of both parties pending a final decision in the litigation.

The temporary labor certification application was denied on the ground that the availability of U.S. workers could not be adequately tested because the wages did not meet the adverse effect criteria as enumerated at 20 C.F.R. §655.202 and §655.203.

Referring to 20 C.F.R. §655.202(b)(9) it was stated that on September 2, 1983, the Department of Labor published a final ruling in the Federal Register establishing the Adverse Effect Wage Rate (AEWR) of \$4.34 per hour for Florida. The Regional Administrator held that the employer must either pay the new rate or establish a bank letter of credit pursuant to the order of the Court. The employer's current hourly wage offer is \$3.75. According to the court order of Judge Gonzalez on September 20, 1983, the employer must establish a bank letter of credit to secure the payment of any build-up pay that may be required in excess of \$3.75 per hour for lettuce workers.

It is represented by the employer that a letter of credit was not posted and that they do not oppose or dispute the judge's order which was proposed and drafted by the employer's counsel. The employer states that in connection with the sugar companies the amount to be posted was estimated based on the 1982 experience when the letter of credit procedure was previously used. An appropriate amount was estimated which was agreed to by DOL and was posted. This

procedure, when applied to the lettuce workers, amounted to a bond in the amount of \$0.00. Furthermore, the lettuce cutters last year averaged in excess of \$10.00 per hour, and there was no build-up pay. Last years \$.65 per box piece rate has been increased to \$.68 per box this year. It is stated that there is absolutely no possibility that build-up pay will be due to South Bay Growers lettuce cutters no matter what the outcome of the current AEW R dispute. It is alleged that DOL was asked for a figure as to how much of a letter of credit would be necessary and that no one would take a position. The Regional Administrator does not deny this statement. Accordingly, I find that no possibility exists that build-up pay will be due to this employer's lettuce cutters and that no letter of credit need be posted by South Bay Growers, Inc. Further, since the District Court for the Southern District of Florida has granted the temporary restraining order on a finding that payment in excess of \$3.75 could cause irreparable damage to the employer, I find that payment in excess of \$3.75 per hour is unnecessary. This would be consistent with the Order of Judge Gonzalez

With reference to the 20 C.F.R. §655.207(c), the Regional Administrator found that the employer had not complied with Judge Richey's order of June 28, 1983, by increasing piece rates designed to produce \$4.34 per hour with the same productivity rate required to earn the 1982 unpublished AEW R of \$3.82 or by depositing in an escrow account the difference between the amount to which each employee is entitled under the order of June 28, 1983, and the amount actually paid. Under the Richey Formula, the 1983 piece rates would be \$.738 for 1 3/4 bushel box and \$.625 for 1 1/9 bushel box. The employer's current wage offer is \$.68 and \$.575 respectively for these unit piece rates.

The employer quotes Judge Richey's order of June 28, 1983, which in his final paragraph states: ". . . Defendants (DOL) are enjoined from granting temporary labor certification to any employer that fails to adjust his piece-rate so that an employee, working at the same productivity rate required to earn the then applicable AEW R in 1977 or the year in which the employer first applied for temporary labor certification, whichever year is later, may earn the current AER." (emphasis supplied)

The employer contends that Judge Richey requires DOL to compute the percentage increase between the AEW R applicable to the base year (1977 or a later year when an employer first received certification) and the AER published for 1983 and apply that percentage increase in AER's to the piece-rate in effect in the base year to determine the piece-rate required in 1983. It is asserted that as the employer first received certification last year, 1982-83, where there was no AER applicable to this work, such a formula can not be used. Furthermore, 170 AER was indicated on any of the papers filed by the employer or received from ETA in connection with the employer's certification in 1982. There was no oral discussion of any AER applicable to the employers' operation last year or a published AER applicable to the lettuce cutting in Florida last year. Furthermore, it is asserted that the very first mention of any AER for Florida lettuce cutting in 1982 is contained in the denial letter of October 26, 1983, which indicated that DOL intends to apply "the 1982 unpublished AEW R of \$3.82 in the 1982-83 season." The employer submits that DOL cannot legally use retroactively a rate that was unpublished at that time, not made

applicable at that time and unknown to the employer at that time as the Richey Formula is based on an increase in the applicable AEW, and there could be no increase where there was no AEW at all for the employer last year. In this connection, it should be noted that many of the employer's arguments are supported by a memorandum to the Regional Administrator from Charlie C. Jones, Director, Office of Job Service, dated September 28, 1983. He also concluded that the unpublished rate of \$3.82 as the AEW for 1982 could not be utilized and as a factual matter the workers would not be required to increase their productivity rate in order to earn any rate, be it \$3.75 per hour or \$4.34 per hour as all workers would probably earn nearly double that amount. He also believed that there was no way to compare a prevailing wage rate which would be applicable under the Regulations to a projected hourly rate.

While the establishment of an AEW for any given year would be ineffective unless published, the use of the unpublished rate for 1982-83 as set forth in the Regional Administrator's decision of October 26, 1983, appears to be within the spirit and intent of Judge Richey's order of June 28, 1983, which was essentially an equitable remedy to prevent damage to either party pending the outcome of the litigation.

Nevertheless, I find that the Regional Administrator was unfair in denying the temporary labor certification before giving the employer notice of the 1983 piece-rate and the figure to be used for the AEW for 1982. Accordingly, I find that the determination of the Regional Administrator with respect to the piece-rate must be modified to afford the employer at least 7 days to comply with the escrow requirement requirement should it so desire.

#### ORDER

It is ORDERED that:

1. No letter of credit is required because there is no prospect for build-up pay during 1983, 1984 even if the published AEW of \$4.34 should become final.

2. Payment of increased piece rate or establishment of a piece rate escrow account may be required pursuant to the use of the unpublished AEW for Florida lettuce cutting in 1982-1983. The Employer is afforded 7 calendar days from the date of receipt of this order to comply, otherwise the denial of this temporary labor certification is affirmed.

Further review may be obtained by filing a petition with the District Director,  
Immigration and Naturalization Service pursuant to 8 C.F.R. §214.2(h)(3)(i).

LEONARD N. LAWRENCE  
Administrative Law Judge

Dated: 9 NOV 1983  
Washington, D.C.