



Date: **April 7, 2000**

Case No.: **2000-TLC-10**

ETA Case: **4940**

*In the Matter of:*

**WESTERN RANGE ASSOCIATION**

Respondent

BEFORE: John M. Vittone  
Chief Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and its implementing regulations, found at 20 C.F.R. Part 655.<sup>1</sup> This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. § 655.112(a)(2).

**Statement of the Case**

At issue in this matter are a number of applications received from twenty five employer members of the Western Range Association ("WRA")<sup>2</sup>, all of which were denied on "identical" grounds.<sup>3</sup> (AF 19). As the only distinction between these individual files is the name of the employer, it is appropriate to consider them together at this time.

WRA filed 25 labor certification applications on behalf of its member employers on March 13, 2000, with the Region IX Regional Administrator ("RA") of the U.S. Department of Labor,

---

<sup>1</sup>Unless otherwise noted, all regulations cited in this decision are in Title 20.

<sup>2</sup>According to WRA's Request for Expedited Review, it is a non-profit corporation, whose "primary purpose relevant to this appeal is to assist its members in recruiting and hiring ... shepherders." Specifically, the WRA helps its members file H-2A visa applications, and acts as a "joint employer with its members" in so doing. (AF 20).

<sup>3</sup>For a complete listing of employers, see AF 40-41.

Employment and Training Administration. (AF 45-49). In these applications, WRA sought to fill the position of shepherd at a wage of \$700 per month. *Id.*

In order to process these applications, the RA contacted the California Employment Development Department (“EDD”) in order to conduct a wage survey. The survey was conducted from December 10, 1998 to January 9, 1999. (AF 1). At the conclusion of the survey, the EDD determined that the minimum proper wage for foreign shepherders was \$800 per month including housing and meals.<sup>4</sup> *Id.* WRA questioned the results of this survey, and thus conducted its own survey which it alleged produced a minimum wage of \$700 per month including housing and meals.

After a long and tortured discussion between the RA and WRA involving the wage determination, the RA issued a decision denying each of the 25 applications. Specifically, the RA found that the proper prevailing wage was \$800 per month and that the applications were untimely.<sup>5</sup>

(AF 44). On March 24, 2000, WRA requested an expedited hearing. (AF 19-41). The case file was received from the RA on March 31, 2000.

### **Discussion**

The only remaining issue in this case is the propriety of the wage determination by EDD.<sup>6</sup> Specifically, WRA alleges that the wage determination made by the RA is incorrect for the following reasons:

- 1) The EDD applied the procedures of Handbook 385 to wages that should not have been included in the wage array at all because they were not the wages of similarly employed shepherders; and
- 2) the EDD, due to a low response rate, failed to include other domestic shepherd wages in its wage array which should have been included.

(WRA’s brief at p. 3).

The regulations are silent as to the proper method for reviewing a wage determination in H-2A cases. Recently however, the Board of Alien Labor Certifications Appeals and the Administrative Review Board addressed a similar issue in regards to cases involving wage determinations under the Service Contract Act. According to these cases, as little information has been given in the regulations on how to determine these wage rates, the Officer in whom these

---

<sup>4</sup>This determination was made using the DOL’s “51% rule” which is not challenged in this matter.

<sup>5</sup>The RA has withdrawn the issue of timeliness.

<sup>6</sup>In both its request for review and its brief, WRA complains about ETA’s actions after the wage determination was completed. I have reviewed these complaints, but conclude that the efforts and statements by ETA to placate the WRA and WRA’s demands to ETA regarding a new wage determination add nothing to the issue of whether the wage determination was correct. They occurred after th

determinations have been entrusted has great discretion in how these determinations are made. Therefore, when such a determination is challenged, “the central question on appeal . . . is not whether a different methodology from the one chosen by the Administrator might have been *more* reasonable, but simply whether the Administrator's chosen methodology is consistent with the law and the facts before us.” *El Rio Grande*, 1998-INA-133 (Feb. 4, 2000)(*en banc*) citing *COBRO Corp.*, ARB Case No. 97-104 (July 30, 1999), slip op. at 23.

While these cases arose in a different statutory and regulatory context from the case at bar, the rationale is just as applicable here. I thus hold that the general propositions described in these two cases are applicable to administrative review of wage determinations made while processing H-2A applications.

In reviewing the facts of this case, only one aspect of the wage survey conducted by EDD was contrary to the law and the facts. In the survey, the EDD included information involving shepherders who are not supplied food and shelter as well as those that are. In situations such as the case before us, it has been held that the inclusion or exclusion of benefits should be taken into account when conducting these surveys. In fact, it has been expressly held in a case involving the exact same parties that it was improper to include those shepherders who were not supplied with food and shelter as it skewed their wages higher, and thus did not reflect an accurate determination of the adverse effect wage rate. *Western Range Association*, 1995-TLC-27 (August 28, 1995).

This fact, as it is easily correctable, is not sufficient to invalidate the entire survey. The survey results, with these employees excluded, is shown below:

Rate (amount per unit)	No. of U.S. Workers
\$1100 per month incl. meals and housing	3
\$1000 per month incl. meals and housing	6
\$900 per month incl. meals and housing	1
\$800 per month incl. meals and housing <sup>7</sup>	7
\$775 per month incl. meals and housing	1
\$700 per month incl. meals and housing	6

This totals 24 workers. According to DOL ETA Handbook 395, which has been in use since 1981, the determination begins by calculating 51% of 24, which is 13. Counting up from the bottom of the list, the wage would still be \$800 per month. The inclusion of the workers who were not provided meals and housing was thus harmless error, and presents no reason to overturn the RA’s denial.

---

<sup>7</sup>The RA argues that the response from the employer with employees that were given \$800 per month indicated that it did not provide meals. If these employees are excluded, the wage rate would be \$1000 per month. However, from the survey response provided, it is difficult to determine if the questions regarding the provision of meals refers to the employees making \$800 per month or to the line immediately above which is blacked out. Under these circumstances and the record provided, there is no reason for excluding these employees from the survey, especially considering that EDD included them within its wage determination and stated that meals were provided.

WRA also advanced a variety of other reasons why it believes that the determination was infirm. First, WRA concludes that its determination is more accurate because of difference in response rate between the two respective surveys. However, as stated above, the RA has great discretion in reaching these wage determinations. In attempting to contact 161 possible employers, EDD attempted to draw in every possible employee. Even with a response rate of seventy percent, EDD still managed to include more possible shepherders within the survey as did WRA. As such, I find that methods used by EDD were reasonable. The lack of follow-up calls to further improve this response rate does not change this fact.

WRA also challenges EDD's survey by stating that the disparity between the highest paid worker and the lowest paid worker in the survey's results makes it "very likely" that the higher paid employees "were foreman or other employees with multiple duties." WRA produces nothing other than these bare accusations to prove that the higher paid employees must have supervisory duties, and that employees whose shepherding duties did not take up the full year were paid for other types of duties. The documentation of record indicates that EDD attempted to not include supervisory personnel in the survey. To protect against such misinformation, the survey forms sent out by EDD specifically stated, in a set off paragraph directly before the survey questions, as follows:

NOTE: INCLUDE only full-time shepherders who are legally allowed to work in the U.S.  
**DO NOT** include SUPERVISORS, FOREMEN, or CAMP TENDERS in any of your answers.

(AF 9)(boldface and capitals in original). Further, Erlinda Cruz of EDD explained, when questioned regarding the possible discrepancies, that "We contacted those whose responses were not complete, regardless whether the wages were high or low.....And yes, we made sure that only those with the duties of shepherders were counted." This documentation must be credited over WRA's speculation.

In sum, I find that the survey, as corrected above, was a reasonable means of making the wage determination in this case.

Accordingly, the following order shall enter:

ORDER

The Regional Administrators' denial of temporary alien agricultural labor certifications is hereby **AFFIRMED**.

at Washington, DC

**JOHN M. VITTON**  
*Chief Administrative Law Judge*

JMV/jcg