In the Matter of

FREDERICK COUNTY FRUIT GROWERS ASSOCIATION, INC.,
HARVEY BRUMBACK, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF OF LABOR,

Respondent

Case No. 89-TLC-5

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Before: ROBERT J. FELDMAN
Administrative Law Judge

DECISION ON ADMINISTRATIVE REVIEW

This proceeding is brought pursuant to the provisions of .the Immigration Reform and Control Act of 1986 (8 U.S.C. §ll0l et seq) as amended and the regulations promulgated thereunder by the Secretary of Labor (20 CFR Part 655, Subpart B, 1988).

Statement of the Case

Under date of June 10, 1989, the Frederick County Fruit Growers Association as agent for 21 individual and firm members filed 21 temporary alien agricultural labor certification applications for aliens to pick apples during the month of September of 1989 under the H-2A program. On July 10, 1989, the Regional Administrator rejected all of the applications on the ground that none of them offered workers a piece rate no less . favorable than the piece rate prevailing for the activity in the area. Thereupon the Association duly requested on behalf of the 21 applicants an expedited administrative review of the Regional Administrator's decision.

The telegraphic request for review was received in this office on July 19, 1989 and the Administrative File was received from the Regional Administrator on July 20, 1989. Pursuant to oral direction of the undersigned requiring all briefs, memoranda or other written submissions to be filed before noon on Monday, July 24, 1989 a memorandum in support of Petitioners' request and a statement of the Regional Administrator's position were filed on July 24, 1989. In addition, a motion on behalf of Keith L. Dennis, a farm worker, for leave to submit a brief amicus curiae was granted, and such brief was also filed on July 24, 1989.

H-2A Certification Process

The Temporary Alien Agricultural Labor Certification program (H-2A Program) establishes a means for agricultural employers who anticipate a shortage of domestic workers to apply for permission to bring into the United States non-immigrant aliens to perform agricultural labor or services of a temporary or seasonal nature. The Immigration and Naturalization Service (INS), on behalf of the Attorney General, is authorized to approve an employer's petition to import foreign workers, but INS cannot approve an employer's petition unless the employer obtains from the Department of Labor a certification of two fundamental prerequisites: (1) that there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved : in the petition; and (2) that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. §1101 (a)(l5)(H)(ii)(a).

The regulations provide that upon receipt of an H-2A application, the Regional Administrator must determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§655.101-655.103. If those criteria are not met, the Regional Administrator shall not accept the application for consideration on the grounds that the availability of U. S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria. 20 CFR §655.104(b)

Among the minimum terms and conditions of employment which are required to be offered by the employer are the wage rates at which the H-2(a) workers are to be paid. The employer must offer no less than a guaranteed minimum hourly wage called the Adverse Effect Wage Rate (AEWR). If the employer intends to offer a piece wage rate, the regulations state that such rate "shall be no less than the piece rate prevailing for the activity in the area of intended employment. 20 CFR §655.102(b)(9)(ii)(A)(1988).

As set forth in ETA Handbook 385, prevailing wage rates are established annually on the basis of wage surveys conducted by state employment service agencies. Data is collected on the wages paid to domestic workers in various crops and activities, and the prevailing wage finding is made by identifying the most common method of payment used and then finding the median rate paid at that method. The median rate is the prevailing wage for the crop and is the rate applicable to job orders for the following year. The median wage rate is determined by one of two formulas: The 40% rule applies where 40% or more of the surveyed workers were paid at the same rate, which becomes the prevailing wage rate; the 51% rule applies when no one rate accounts for 40% of the workers, in which event the prevailing rate is the rate equal to or greater than the rate paid to 51% of the surveyed workers.

The rates found by the state agencies are subject to review and revision by the Department of Labor's National Office.

Findings of Fact and Conclusions of Law

In September 1988, the Virginia Employment Commission (VEC), the relevant state agency, surveyed orchards in the Winchester area with respect to their wage rates. In November 1988, the VEC issued a prevailing wage finding for apple picking in the Winchester area at the rate of $.45 per box plus $.05 per box bonus for "bruise-free picking".

In April 1989, the Regional Administrator attended a meeting of the petitioning Association, at which concern was expressed that the prevailing wage rate finding above referred to included a bonus that would not apply to apples harvested for processing rather than for fresh market. Shortly thereafter, the Regional Administrator advised the VEC that two ETA.232 reports had to be completed to address the two different apple crop activities in 1988: picking for fresh market with little tolerance for bruises, and picking for processing purposes. Under date of June 6, 1989, VEC advised that in view of the fact that interviewing workers had been rendered impossible by their departure from the area, the original survey data was used to independently recompute wage rates in the manner requested. This resurvey showed that workers picking

apples for processing were paid $.45 a box, while workers who picked apples for the fresh market were paid $.46 per box.

Because the new wage rate findings were not contained in ETA-32 forms and the VEC had not obtained information regarding fresh market and processing apples from nine of the growers, the Regional Administrator's office contacted the nine growers above-referred to by telephone and prepared new ETA-32 forms for submission to the National office. Two new prevailing wage rate findings were issued under date of June 16, 1989: For processing - $.45 per box; for fresh market - $.45 per box plus $.02 per box &bruise-free picking" bonus plus $.06 per box 'end-of-season" bonus. On June 30, 1989, Petitioners filed Temporary Labor Certification applications and job offers stipulating a base rate of $.45 per box plus a range of discretionary bonuses from $.0l to $.l0 per box, depending upon a number of factors including the need for bruise-free picking.

Early in July, the Regional Administrator was informed by Moore and Dorsey, a non-H-2A grower, that there was a mis-understanding as to their wage rate. Their pay scale was $.45 per box plus $.02 per box bonus for "special handling" for fresh market fruit, plus a sliding scale bonus of up to $.06 per box --depending on how carefully a worker picked fruit over the entire season. After consultation with the National office, the Regional Administrator modified the wage survey to conform with the Moore and Dorsey explanation. As a result, the revised prevailing wage for fresh market fruit became $.45 per box, plus $.02 per box for "special handling", plus an end-of-season bonus of up to $.06 per box depending on the extent to which the fruit picked was bruised. Pursuant to ETA Handbook 385, the wage offer of Moore and Dorsey to their 210 domestic workers represents the wages paid to the majority of U. S. workers under the 40% rule or the 51% rule, and is therefore the prevailing wage in the Winchester area.

Petitioners contend that-the original prevailing wage finding of the VEC ($.45 per box plus $.05 bonus for bruise-free picking for all apples) is the official rate, which the Regional Administrator had no authority to revise or alter. They also contend that the Moore and Dorsey rate does not represent the prevailing rate, because 40% and/or 51% formulas, are not fairly applicable where a single large employer controls the median wage in a given area, and because their sliding scale bonus system is a practice, not a wage, and as such is neither normal nor common in the area.

The Administrative File, however, does not support their contentions. In making prevailing wage findings, the state agency is performing a ministerial task. It is not endowed with any power to set immutable standards; but rather, its findings are expressly stated to be subject to review and revision by the ETA National Office. Since it is clear from the record that the Regional Administrator's revisions were approved by the National Office (and Petitioners were so advised), the challenge to his authority cannot be sustained.

With respect to the Moore and Dorsey sliding scale bonus, based on a pre-set schedule of average number of bruises per 20 apple sample with a fixed bonus rate per bruise percentage, Petitioners claim that it is undemocratic or otherwise wrong to require all growers in the area to pay a bonus established by only one big firm. Nevertheless, the regulations and the handbook

clearly prescribe the quantitative worker formulas for determining prevailing wages, and there can be no doubt that the . Regional Administrator's revisions complied fully with existing rules. It is not my function nor my prerogative to invalidate those rules. Whether the bonus system is called a standard or a practice is of little or no consequence. The fact remains that it is a piece wage rate expressly authorized by the regulations. See, e.g., Section 655.102(b)(9)(ii) A.

Petitioners acknowledge that their offers do not meet the $.02 per box mandatory bonus for bruise-free picking or special handling. In addition, it is apparent that their flexible bonus rests entirely in the discretion of the employer, with the result that their offers contain no guaranteed piece rate other than the flat rate of $.45 per box on all apples. The record shows that on both counts Petitioners fail to establish that the wages they offer is no less favorable than the prevailing wage.

In view of the foregoing, I must conclude that the Regional Administrator's non-acceptance of Petitioners' H-2A applications for consideration herein is in all respects affirmed.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: JUL 27 1989
Washington, D. C.

RJF/bac