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Issue Date: 03 December 2013

BALCA Case No.: **2013-PWD-00002**
ETA Case Nos.: H-400-13042-222266
H-400-13017-673356
H-400-13042-952115

In the Matter of:

ISLAND HOLDINGS LLC,

Employer.

Appearances: Monte B. Lake, Esquire
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For Island Holdings LLC

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Before: **Almanza, Colwell, Johnson, Reilly, and Rosenow**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the nonimmigrant provisions of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2012), and the regulations promulgated thereunder at 8 C.F.R. § 214.2 and 20 C.F.R. § 655, subpart A (collectively referred to as the "H-2B program"). The H-2B program allows U.S. seasonal employers to hire foreign workers on a temporary basis to perform nonagricultural services or labor if, *inter alia*, "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). An employer seeking to use this program must apply for and obtain a temporary labor certification from the Department of Labor ("DOL" or the "Department"). 8 C.F.R. § 214.2(h)(6)(iii)(A) (2012).

The Employer, Island Holdings, LLC ("Island"), operates a resort in Edgartown, Massachusetts on a seasonal basis. Earlier this year, Island applied for and obtained temporary labor certifications from DOL to employ foreign workers as housekeepers, servers, and cooks for the resort's 2013 season. This appeal involves three "Supplemental Prevailing Wage Determinations" ("supplemental PWDs") that the Department issued to Island after it approved and granted the temporary labor certifications. All three supplemental PWDs purport to increase the wage rate Island must pay the H-2B workers it hired pursuant to the temporary labor certifications.

Because the Department's regulations do not require an employer to comply with a prevailing wage determination issued after the Department has approved and granted the employer's *Application for Temporary Employment Certification* (ETA Form 9142), we VACATE the supplemental PWDs and the increased wage obligations that they purport to impose.

BACKGROUND

The Department's role in the administration of the H-2B program provides the framework and context for the instant appeal. Accordingly, we start with a review of the Department's role before detailing the factual background leading up to the instant appeals.

A. Statutory and Regulatory Scheme

Section 101(a)(15)(H)(ii)(b) of the INA permits an alien to enter the United States on a temporary basis to perform temporary, nonagricultural services or labor if, *inter alia*, "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b).[1] "The question of importing any alien as [an H-2B nonimmigrant] . . . in any specific case or specific cases shall be determined by the [Secretary of Homeland Security], after consultation with appropriate agencies of the Government, upon

[1] Foreign workers who enter the United States under this subsection are commonly referred to as "H-2B workers."

petition of the importing employer." 8 U.S.C. § 1184(c)(1).[2] The Secretary of Homeland Security has delegated this responsibility to the Director of the United States Citizenship and Immigration Service ("USCIS"), an agency within the Department of Homeland Security ("DHS"), but has designated DOL as an agency that USCIS shall consult with to determine whether "unemployed persons capable of performing such service or labor cannot be found in this country." *See* 78 Fed. Reg. 24047, 24048 (Apr. 24, 2013) (citing 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1)).

Pursuant to DHS regulations, an employer seeking to import H-2B workers must apply for and obtain a "temporary labor certification" from the Secretary of Labor *before* it files a petition with USCIS. 8 C.F.R. § 214.2(h)(6)(iii)(A) (2012). A temporary labor certification constitutes the Secretary of Labor's "advice to the Director [of USCIS] on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." Once an employer obtains a favorable determination from the Secretary of Labor, it may petition USCIS to employ foreign workers on an H-2B visa for the time period and under the conditions specified in the temporary labor certification. 8 C.F.R. § 214.2(h)(6).

The Secretary of Labor delegated this authority between two agencies in the Department: the Office of Foreign Labor Certification ("OFLC") in the Employment and Training Administration ("ETA"), which processes applications for temporary labor certification, and the Wage and Hour Division, which enforces the attestations and assurances an employer makes to the Department when it applies for temporary labor certification. 20 C.F.R. § 655.00 (2012).

The procedures whereby a temporary labor certification may be applied for, and granted or denied are set forth in title 20, part 655, subpart A of the *Code of Federal Regulations*. 20 C.F.R. § 655.1 (2012). This subpart sets forth an attestation-based application process composed of three phases. First, an employer must obtain an individualized prevailing wage determination from the National Prevailing Wage Center ("NPWC"). 20 C.F.R. § 655.15(d)(1). Then, the employer must recruit U.S. workers for the job opportunity at a wage that equals or exceeds the prevailing wage calculated by the NPWC. *See* 20 C.F.R. § 655.15(d)(2)-(4). Finally, after the employer completes the recruitment steps specified in the regulations, it may file an *Application for Temporary Employment Certification* (ETA Form 9142) with the OFLC. 20 C.F.R. § 655.20(a). The *Application for Temporary Employment Certification* requests specific information about the employer's job opportunity, including, *inter alia*, the wage the employer proposes to offer for the position. By signing the application, the employer attests that it will abide by a list of enumerated conditions. *See* 20 C.F.R. § 655.22. An employer's compliance with these "attestations" forms the basis of the Department's finding that the employment of foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. After the employer submits its *Application for Temporary Employment Certification*, a Certifying Officer will evaluate the application and make a determination to

[2] The INA delegates this authority to the Attorney General; however, in the Homeland Security Act of 2002, Congress transferred this authority from the Attorney General to the Secretary of Homeland Security. *See* 6 U.S.C. § 236(b).

grant, partially grant, or deny the temporary labor certification requested by the employer. 20 C.F.R. § 655.23(b).

B. Calculation of the Prevailing Wage

In 2005, the Department issued guidance applying the 4-tier skills based methodology it used to calculate prevailing wage rates in the permanent labor certification and H-1B guest worker programs to the H-2B program. *See generally* 78 Fed. Reg. 24047, 24051-24056 (Apr. 24 2013).[3] The Department adopted this methodology when it promulgated regulations to govern the H-2B program in 2008. *See* 73 Fed. Reg. 78020 (Dec. 19, 2008) ("2008 Rule"). Specifically, section 655.10(b)(2), as promulgated in the 2008 Rule, provides that the prevailing wage for an H-2B job opportunity "shall be the arithmetic mean . . . of the wages of workers similarly employed *at the skill level* in the area of intended employment." 20 C.F.R. § 655.10(b)(2) (2009) (emphasis added).[4] If an employer does not provide a survey acceptable to the OFLC under 20 C.F.R. § 655.10(f), the arithmetic mean is derived from data compiled by the Bureau of Labor Statistics (BLS) in the Occupational Employment Statistics wage survey (OES).[5] 20 C.F.R. § 655.10(b)(2) (2008).

In 2009, Comité de Apoyo a los Trabajadores Agricolas (CATA) and several other plaintiffs (collectively "CATA plaintiffs") filed an action against DOL in the United States District Court for the Eastern District of Pennsylvania. *Comité de Apoyo a los Trabajadores Agricolas* (*CATA*) *v. Solis*, No. 2:09-cv-0240-LDD. The CATA plaintiffs challenged various aspects of the 2008 rule as improperly promulgated under the Administrative Procedure Act ("APA"). *Id.*

On August 30, 2010, the United States District Court for the Eastern District of Pennsylvania issued an extensive Memorandum and Order invalidating several provisions of the 2008 Rule, including the language "at the skill level" in 20 C.F.R. § 655.10(b)(2). *CATA v. Solis*, No. 2:09-cv-0240-LDD, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) ("*CATA I*"). Among other things, the court found that DOL failed to articulate a satisfactory explanation to support the use of skill levels in determining prevailing wage rates for positions to be filled by H-2B

[3] The Department adopted this methodology pursuant to section 212(p)(4) of the INA, which provides: "Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level." 8 U.S.C. § 1182(p)(4). In a later rulemaking proceeding, the Department determined that section 212(p)(4) only pertained to the H-1B skilled guest worker program and Permanent Labor Certification program, and did not bind the Department to offering four-tiered wage levels when it calculated prevailing wage rates in the H-2B program. *See* 75 Fed. Reg. 61578, 61580 (Oct. 5, 2010).

[4] Unless the employer's job opportunity was covered by a collective bargaining agreement, (CBA), in which case the CBA would control. 20 C.F.R. § 655.10(b)(1)(2008).

[5] The 2008 Rule also permitted an employer to "use a current wage determination in the area determined under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.,* 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*" 20 C.F.R. § 655.10(5)(2008).

workers. *Id*. In so finding, the court stressed that DOL "never explained its reasoning for using skill levels as part of the H-2B prevailing wage determinations" and never subjected the use of skill levels to notice and comment rulemaking. *Id*. at *19, *25. Because there was not a prior valid rule upon which the Department could rely to calculate the prevailing wage rate for purposes of the H-2B program, the court did not vacate the prevailing wage provisions it found to be invalid; instead, it ordered the Department to promulgate a replacement rule within 180 days.

Following the court's ruling in *CATA I*, the Department issued a Notice of Proposed Rule Making in the Federal Register announcing its intent to change the methodology it uses to calculate prevailing wages for the H-2B program. *See* Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Proposed Rule; Request for Comments, 75 Fed. Reg. 61578 (Oct. 5, 2010). The Department issued a Final Rule codifying these changes to the prevailing wage methodology on January 19, 2011. *See* Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Final Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 Wage Rule"). The 2011 Wage Rule never went into effect, however, due to a federal court order and several appropriations riders that ban the Department from implementing or enforcing it.[6] Consequently, the Department continued to rely on the prevailing wage provisions of the 2008 Rule.

Believing this reliance to be in violation of *CATA I*, the CATA plaintiffs filed a motion asking the court to enjoin DOL from issuing prevailing wage determinations based on the four-tier skills-based methodology. *See* Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary and Permanent Injunctive Relief, *CATA* v. *Solis,* No. 2:09-cv-0240-LDD (E.D. Pa.), Dkt. 152. The United States District Court for the Eastern District of Pennsylvania agreed, and on March 21, 2013, it issued an order vacating the words "at the skill level" in section 655.10(b)(2). *CATA v. Solis,* No. 2:09-cv-0240-LDD, 2013 WL 1163426, *13 (E.D. Pa. Mar. 21, 2013) (*CATA II*). The court noted that DOL was only authorized to issue a temporary labor certification if the employment of foreign workers will not have an adverse effect on the wages or working conditions of similarly employed U.S. workers. *Id.* at *8. Because DOL had found, in the preamble to the 2011 Wage Rule, that prevailing wage determinations based on four-level OES wage rates do result in an adverse effect on similarly employed U.S. workers, the court held that labor certifications based on these prevailing wage determinations "exceed the bounds of DOL's delegated authority." *Id.* at *10. The court explained that vacating the four-level wage component of the 2008 rule "will only disrupt the H–2B program to the extent that the DHS and DOL use the program to issue H–2B visas that they are expressly prohibited from granting." *Id.* at *12. Consequently, the court vacated and remanded section 655.10(b)(2), and gave DOL 30 days to come into compliance. *Id.* at *13.

[6] The Department delayed the effective date of the 2011 Wage Rule after the United States District Court for the Northern District of Florida issued a temporary restraining order, and again after Congress enacted legislation prohibiting the Department from using appropriated funds to implement, administer, or enforce the 2011 Wage Rule. *See Bayou Lawn & Landscape Service v. Solis*, No. 11-cv-0445 (N.D. Fla. Sept. 26, 2011); Public Law No. 112-55, 125 Stat. 552, Div. B, Title V, sec. 546 (Nov. 18, 2011). Subsequent appropriations riders continued this prohibition, and on August 30, 2013, the Department issued a Final Rule indefinitely delaying the effective date of the 2011 Wage Rule. *See* 78 Fed. Reg. 53643 (Aug. 30, 2013).

On April 24, 2013, DOL issued an Interim Final Rule (IFR), effective immediately, which amended the prevailing wage methodology for the H-2B program. The only amendment the IFR made to the existing regulations, as promulgated in the 2008 Rule, was to delete the words "at the skill level" from 20 C.F.R. § 655.10(b).[7]

C. Procedural History

The history of Island's temporary labor certifications for housekeepers, servers, and cooks is substantially similar. For purposes of brevity, we focus our discussion on Island's temporary labor certifications for housekeepers.

Island filed an *Application for Prevailing Wage Determination* (ETA Form 9141) for housekeeper positions in October 2012. AF 29.[8] The NPWC issued a prevailing wage determination shortly thereafter, in which it assigned a prevailing wage of $9.91 per hour, based the level 1 wage in the OES database for "Maids and Housekeeping Cleaners" in Edgartown, Massachusetts. AF 1385. The determination listed a validity period that began on October 20, 2012 and ended on January 31, 2013. AF 1385. Island completed its pre-filing recruitment and filed an *Application for Temporary Employment Certification* (ETA Form 9142) within this validity period. AF 1370-1381.[9] The wage offer Island listed in the application, $10.50 per hour, exceeded the prevailing wage issued by the NPWC. AF 1374.

On February 19, 2013, the National Certifying Officer approved the application and granted temporary labor certification. AF 29; AF 1370. Island relied on this temporary labor certification to file H-2B petitions with USCIS; USCIS approved a petition for 9 H-2B workers in housekeeping positions on March 8, 2013, and a second petition for 9 H-2B workers in housekeeping positions on May 1, 2013. AF 29.

On May 6, 2013, Island received a "Supplemental Prevailing Wage Determination" from the NPWC. The supplemental PWD informed Island that the prevailing wage for the housekeeper positions had increased to $13.00 per hour. The NPWC provided the following explanation for this change:

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[7] The IFR amends section 655.10 by revising paragraph (b)(2) as follows:

> If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section

78 Fed. Reg. 24047, 24061 (Apr. 24, 2013).

[8] "AF" refers to the Administrative File case that the NPWC compiled for case number H-400-13017-673356.

[9] Island filed its application on January 18, 2013. AF 29.

> On April 24, 2013, the Department of Homeland Security and the Department of Labor (DOL) jointly published an Interim Final Rule that revised the methodology by which the DOL calculates prevailing wages under the H-2B program. Under this Interim Final Rule the prevailing wage issued by DOL under 20 CFR § 655.10(b)(2) is the arithmetic mean for the occupation in the area of intended employment as established by the Bureau of Labor Statistics' Occupational Employment Statistics survey. The wage(s) listed below are for the location(s) of work indicated on the ETA Form 9142. **In accordance with the employer's declaration in Appendix B.1, the employer is responsible for compliance with this supplemental prevailing wage determination (PWD) upon receipt of notification by DOL.**
>
> . . .
>
> Should the employer desire to seek a redetermination of this supplemental prevailing wage determination, the employer must submit a redetermination request within 30 days of the date of this letter in accordance with DOL's regulations at 20 CFR § 655.10(g). . . . Should the redetermination not result in a change in the prevailing wage determination, the employer will be expected to pay at least the wage(s) identified in this letter from the date of receipt of this notification.

AF 1359 (emphasis in original). That same day, Island received supplemental PWDs for two other H-2B positions (servers and cooks), both of which the Department had approved and granted a temporary labor certification for on March 1, 2013. AF 29.

On May 13, 2013, Island asked the National Certifying Officer to "cancel (or re-determine)" the supplemental PWDs, which, it argued, imposed a wage obligation that was not authorized by the Department's regulations. AF 1356. Before it received a response to this request, Island filed an "Emergency Motion" with BALCA requesting administrative review pursuant to 20 C.F.R. § 655.11(e)(2). We initially docketed the appeal, but remanded it to the NPWC shortly thereafter with instructions to complete the review process set forth at 20 C.F.R. §§ 655.10 and 655.11. The parties have now completed this review process and Island has again requested administrative review pursuant to 20 C.F.R. § 655.11(e)(2).

JURISDICTION AND STANDARD OF REVIEW

This Board is authorized to hear and decide appeals of prevailing wage determinations issued by the NPWC and affirmed by a Certifying Officer. *See* 20 C.F.R. § 655.11. We will affirm the determination if it is consistent with the governing regulations and if it represents a reasonable exercise of the discretion afforded to the NPWC under the regulations. *See University of Wisconsin-Oshkosh,* 2011-PWD-3 (Mar. 27, 2012); *Emory University*, 2011-PWD-1, slip op. at 6-7 (Feb. 27, 2012); *see also RP Consultants, Inc. d/b/a Net Matrix Solutions,* 2009-JSW-1 (June 30, 2010).

Counsel for the Certifying Officer argues this Board does not have the authority to question the NPWC's authority to issue post-certification prevailing wage determinations. In making this argument, Counsel relies on this Board's holding in *Dearborn Public Schools*, that it

"lacks both the inherent authority to rule on the validity of a regulation and the express authority to invalidate the regulation as written." Certifying Officer's Brief on Remand Concerning the Issuance of Island Holdings Supplemental Prevailing Wage Determinations ("CO's Brief"), at 5-6 (citing *Dearborn Public Schools*, 1991-INA-222, slip op. at 4 (Dec. 7, 1993) (en banc) and *Karl Storz Endoscopy-America*, 2011-PER-40 (Dec. 1, 2011) (en banc)). After citing *Dearborn Public Schools*, Counsel asserts, without additional explanation, that the "Board may not determine whether the agency correctly interpreted and implemented [the court's] order in CATA . . . ." *Id.*[10] Had the Department codified its interpretation of the court's order in the Code of Federal Regulations, we would agree. But Counsel for the Certifying Officer did not identify which regulation it purports this Board would be invalidating if it were to determine "the agency" did not correctly interpret or implement the court's order in *CATA II*. Our review is limited to whether the regulations, as codified at Title 20, Part 655, Subpart A of the Code of Federal Regulations, permit the NPWC to issue the supplemental PWDs at issue in this appeal.

DISCUSSION

As explained above, the INA does not explicitly require an employer to pay a prevailing wage for the labor or services to be performed by H-2B workers. Rather, it permits a foreign national to enter the United States on a temporary basis to perform temporary, nonagricultural labor or services "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Accordingly, we look to the INA's implementing regulations to determine the legal obligations an employer assumes when it employs a foreign worker under the H-2B program. Island argues the Department's regulations do not authorize the NPWC to increase the prevailing wage rate an employer must offer and pay to H-2B workers after the Department has approved and certified the employer's *Application for Temporary Employment Certification*. We agree.[11]

The temporary labor certification process set forth at Title 20, Part 655, Subpart A of the Code of Federal Regulations is premised on the Department's determination that a factual finding as to whether U.S. workers are available to perform a particular a job opportunity cannot be made without first establishing the minimum level of wages, terms, benefits, and conditions for the job opportunity, below which similarly employed U.S. workers would be adversely affected, and comparing this minimum to the wages, terms, benefits, and conditions an employer proposes to offer foreign workers. *See* 20 C.F.R. § 655.0(2). The Department believes this inquiry is necessary because "U.S. workers cannot be expected to accept employment under conditions below the established minimum levels." *Id.* "Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are

[10] Counsel for the CO additionally argues that this Board cannot review whether the IFR was validly promulgated. We need not address this argument, since Island has conceded that this Board does not have the authority to review whether the IFR was validly promulgated. Island's Memorandum In Support of Reversal of Post-Certification Prevailing Wage Determinations, at 14. Accordingly, for purposes of this appeal, we assume that the IFR was validly promulgated.

[11] Because we agree, we need not reach Island's alternative argument that the supplemental PWDs were calculated incorrectly.

actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level, or the level offered to the aliens, whichever is higher." *Id*.

It is thus the employer's inability to recruit U.S. workers "through the offer of wages, terms, benefits, and conditions at least at the minimum level, or the level offered to the aliens, whichever is higher" that enables the Department to certify that "unemployed persons capable of performing such service or labor cannot be found in this country."[12] Consequently, an employer who seeks temporary labor certification must be able to determine "the minimum level of wages, terms, benefits, and conditions, below which similarly employed U.S. workers would be adversely affected," *before* it recruits U.S. workers for a job opportunity.

The minimum wage, below which similarly employed U.S. workers would be adversely affected, is determined by the NPWC in accordance with the procedures established in 20 C.F.R. § 655.10. The IFR revised the methodology by which the Department calculates this wage. In this appeal, we must determine what effect this revision has on an *Application for Temporary Employment Certification* that the Department approved and certified *before* the IFR went into effect.

Section 655.10, which is entitled "Determination of prevailing wage for temporary labor certification purposes" establishes the procedures by which an employer seeking H-2B temporary labor certification must apply for and obtain a prevailing wage determination. First, the employer "must request a prevailing wage determination from the [NPWC] in accordance with the procedures established by [section 655.10]." 20 C.F.R. § 655.10(a)(2012). Within 30 days of this request, "the [NPWC] will enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer." 20 C.F.R. § 655.10(b)(6). The determination will specify a validity period, "which in no event may be more than 1 year or less than 3 months from the determination date." 20 C.F.R. § 655.10(d).

The validity period on the prevailing wage determination dictates the time period in which the employer must begin its recruitment or file its application; it does not purport to affect the time period in which the employer must offer and pay the wage. *See* 20 C.F.R. § 655.10(a)(2) ("The employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing a complete *Application for Temporary Employment Certification* with the Department"); 20 C.F.R. § 655.10(d) ("For employment that is less than one year in duration, the prevailing wage determination shall apply and shall be paid the prevailing wage by the employer, at a minimum, for the duration of the employment."); *see also Goose Downs Farms*, 2010-TLN-64 (July 7, 2010) (interpreting 20 C.F.R. § 655.10(a)(2)).

Section 655.10(b)(6) clarifies that an employer "must offer" the wage in this prevailing wage determination (or higher) "to both its H-2B workers and any similarly employed U.S.

[12] The Department explained this premise in the Notice of Proposed Rule Making it issued prior to promulgating the 2008 Rule. *See* 73 Fed. Reg. 29942, 29946 (May 22, 2008) ("In order for the Secretary to be able to certify that U.S. workers would not be adversely affected by the employment of H–2B workers, an adequate test of the labor market must be conducted. Such a test must include the employer offering and paying a wage that is equal to or higher than the available position's prevailing wage, where the terms, duties and conditions of employment are normal and promote the effective recruitment and consideration of U.S. workers.").

worker hired in response to the recruitment required as part of the application." 20 C.F.R. § 655.10(b)(6). Section 655.10(d) further specifies that "[f]or employment that is less than one year in duration, the prevailing wage determination shall apply and shall be paid the prevailing wage by the employer, at a minimum, for the duration of the employment." Although the meaning of this provision is not entirely clear, the Department explained in the preamble to the 2008 Rule that it revised this provision "to clarify that where the duration of a job opportunity is less than one year or less [*sic*], the prevailing wage determination will be valid for the duration of the job opportunity." 73 Fed. Reg. 78020, 78029 (Dec. 19, 2008).[13]

Section 655.10 does not provide a process by which the NPWC may apprise employers of a change in the prevailing wage rate post-certification. In fact, our review of the regulations reveals that there is only one situation in which the Department would ever issue a prevailing wage for a position it has already certified: when the employer's one-time temporary need lasts 12 months or longer. *See* 8 C.F.R. § 214.2(h)(6)(iv)(B). But the Department may not approve an *Application for Temporary Employment Certification* for more than a 12 month period. *See* 8 C.F.R. § 214.2(h)(6)(iv)(B) ("The Secretary of Labor may issue a temporary labor certification for a period of up to one year."). Consequently, if an employer wishes to employ H-2B workers beyond the initial 12 month period, it must go through the temporary labor certification application process again, *i.e.*, apply for a new prevailing wage determination, conduct another round of recruitment (at the newly determined prevailing wage rate), and submit a second *Application for Temporary Employment Certification*. *See* 20 C.F.R. § 655.20(f).

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[13] Island Holdings argues that section 655.10(d) gives the pre-certification prevailing wage determination final effect for the "duration of the employment." The Certifying Officer disagrees, and relies on dicta in a court order that was issued in the CATA litigation to support his argument that this provision does not prohibit the Department from issuing a post-certification prevailing wage determination. AF 836 (citing *CATA v. Solis*, No. 2:09-cv-240, 2010 WL 4823236 (E.D. Pa. Nov. 24, 2010)). In the order referenced by the CO, the court denied the CATA plaintiffs' Motion for Additional Relief after finding it did not have the power to require the Department to condition its approval of a temporary labor certification on an employer's agreement to pay a different prevailing wage rate on the date the 2011 Rule took effect. *Id.* at *4-5. Although the court found it did not have the power to require DOL issue such a certification, it rejected DOL's argument that section 655.10(d) prohibited the Department from issuing a conditional certification:

> The DOL contends that this provision precludes the DOL from requiring employers to pay a higher wage because it mandates that an employer "shall" pay the PWD "for the duration of employment." The DOL appears to argue that the provision sets both a floor and a ceiling on the wage to be paid "for the duration of employment." But this construction glosses over the phrase "at a minimum," which manifestly sets a floor and not a ceiling. Nothing in § 655.10(d), nor any related regulation, prevents the DOL from devising interim measures to reduce the impact of the deficient methodology. Thus an employer must pay a valid wage for the duration of employment, but it does not follow that an employer must continue paying that wage after it has been deemed to be the product of an invalid regulation.

Id. at *2. But by setting a floor for the employer, the Department sets a ceiling for itself—unless and until it promulgates a new rule to modify the regulation. This is because the Department must follow the procedural requirements mandated in the APA. New rules that work substantive changes or major legal additions to existing rules or regulations are subject to the APA's notice and comment procedures as legislative rules. *See*, e.g., *U.S. Telecom. Ass'n v. FCC*, 400 F.3d 29, 34–35 (D.C. Cir. 2005). If an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required. *Id.* at 35.

The Certifying Officer does not cite, nor can we identify, any regulatory authority that would require an H-2B employer to comply with a prevailing wage determination that the NPWC *sua sponte* issues *after* the Department has approved an *Application for Temporary Employment Certification*. Indeed, it is not clear what "compliance" with a post-certification prevailing wage determination would entail. Section 655.22(e) requires an employer to attest that "the offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage" and that it "will pay the offered wage during the entire period of the approved H-2B labor certification." 20 C.F.R. § 655.22(e) (2012). Because an employer cannot offer U.S. workers a wage that equals or exceeds a prevailing wage that has yet to be determined, we assume the "prevailing wage" in section 655.22(e) refers to the prevailing wage in the pre-certification prevailing wage determination. This interpretation is bolstered by the fact that an employer who pays its H-2B workers a wage that is greater than the wage it offered to U.S. workers runs the risk of violating another regulatory provision, section 655.22(a), which requires an employer to attest that it "is offering terms and working conditions [to U.S. workers] . . . not less favorable than those offered to the H-2B worker(s) . . ." 20 C.F.R. § 655.22(a). If the Department intended to adjust the prevailing wage rate during the period of certified employment, it should have specifically stated so in the regulations, as it did in the regulations governing temporary labor certifications issued under the H-2A agricultural guest worker program. *See* 20 C.F.R. § 655.120(b) (informing employers that if the prevailing wage is adjusted during the period of certified H-2A employment, they "must pay that higher prevailing wage . . . upon notice to the employer by the Department.").

Despite the lack of regulatory text requiring an employer to "comply" with a post-certification prevailing wage determination, the Certifying Officer affirmed three supplemental PWDs in which the NPWC ordered Island to pay its H-2B workers a wage rate that is higher than the wage offer in the *Application for Temporary Employment Certification* approved and certified by the Department. The Certifying Officer relies on four sources for the NPWC's authority to do so: (1) the IFR; (2) an attestation in appendix B.1. of the Application for Temporary Labor Certification; (3) the order issued by the *CATA* court on March 21, 2013; and (4) the Department's "inherent" authority. None is availing.

First, the Certifying Officer asserts that the supplemental PWDs were "issued pursuant to the IFR." But he fails to cite a single regulatory provision that requires Island to "comply" with a prevailing wage calculated *after* the Department had approved and certified its *Application for Temporary Employment Certification*.[14] Instead, the Certifying Officer relies on the following discussion in the preamble to the IFR:

> [U]nder the *CATA II* court's order, and DOL's own factual findings, the U.S. workers and H–2B workers currently employed under approved certifications, based on the invalid wage rates under the 2008 rule, are being underpaid in violation of the INA. *CATA II,* 2013 WL 1163426, *11–12; 76 FR 3463. To come into compliance with the court's order and to ensure that DHS and DOL fulfill the

[14] Indeed, in his brief before this Board, the Certifying Officer acknowledges that ". . . there [is] no specific provision in the regulations describing the issuance of SPWDs. . ." CO's Brief at 12.

> statutory mandate to protect the domestic labor market, DHS and DOL must immediately set new and legally valid prevailing wage rate standards to allow for an immediate adjustment of the wage rates for these currently employed workers. Further delay in setting a legally valid prevailing wage regime will cause continued harm to U.S. workers, foreign workers, and the domestic labor market.

CO's Brief at 12, 14-15 (citing 78 Fed. Reg. 24047, 24056 (Apr. 24, 2013)). This discussion indicates that the Department intended to issue post-certification prevailing wage determinations when it promulgated the IFR. But the regulatory text codified in the IFR does not reflect this intent. As the United States Court of Appeals for the District of Columbia Circuit explained:

> The preamble to a rule is not more binding than a preamble to a statute. "A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers." *Ass'n of American R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C.Cir.1977) (citing *Yazoo Railroad Co. v. Thomas*, 132 U.S. 174, 188, 10 S.Ct. 68, 73, 33 L.Ed. 302 (1889)). "Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble." *Id.*

National Wildlife Federation v. E.P.A., 286 F.3d 554, 569-70 (D.C. Cir. 2002). The regulatory text codified in the IFR does not provide the NPWC with the authority to issue a post-certification prevailing wage determination. Nor does it require an employer to comply with such a post-certification prevailing wage determination. The Department's commentary in the preamble to the IFR assumes that the Department has the authority to change a wage rate mid-season without citing any specific statutory or regulatory provision authorizing it to do so. These statements cannot justify the imposition of a legal obligation that is not otherwise required by law, and which is inconsistent with the Department's existing pre-certification regulatory regime. The Certifying Officer thus erred in relying on the language in the preamble to affirm the supplemental PWDs.[15]

Second, the Certifying Officer argues that Island agreed to pay a wage that equals or exceeds the prevailing wage that "is or will" be issued by the Department when it signed the *Application for Temporary Employment Certification*. In making this argument, the Certifying Officer relies on Paragraph 5 of Appendix B.1 to the *Application for Temporary Employment Certification*. Paragraph 5 is one of 14 paragraphs in the "Employer Declaration" section of Appendix B.1., all of which are preceded by the following statement: "By virtue of my signature below, I HEREBY CERTIFY the following conditions of employment." Paragraph 5 states: "The offered wage equals or exceeds the highest of the most recent prevailing wage that is or will be issued by the Department to the employer for the time period the work is performed, or

[15] This is not the first instance in which we have refused to allow a Certifying Officer to rely on language in the preamble to a final rule that is not supported by the text of the final rule it purports to describe. *See, e.g.*, *S. Chae Holding, Inc*. 2009-PER-135, slip op. at 5 (Mar. 31, 2009) ("If the drafters of the PERM regulations wanted to eliminate something so fundamental as an ALJ's remand authority, they needed to do so in the body of the regulations themselves rather than merely in the preamble to the regulations.").

the applicable Federal State, or local minimum wage, and the employer will pay the offered wage." AF 1378. This paragraph differs from the attestation required under section 655.22(e), *i.e.*, that "the offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage and the employer will pay the offered wage during the entire period of the approved H-2B labor certification." The Department changed the language in Paragraph 5 from the language at section 655.22(e) in an informal notice in the Federal Register. 76 Fed. Reg. 21036 (Apr. 14, 2011) (modifying the attestation at paragraph 5 in an attempt to require H-2B employers to agree to pay a prevailing wage that "is or will be" issued by the Department). The Department made this change in connection with its implementation of the 2011 Wage Rule (which, as discussed above, has been indefinitely delayed).

The Certifying Officer's reliance on Paragraph 5 is misplaced. The Department may not require an employer to attest to a condition that is not required by the regulations. This is because the Department cannot impose additional legal obligations on a regulated party without following the procedures mandated by the APA. Among other things, the APA requires an agency to provide notice and comment for those rules intended to bind the public with the force of law. *See, e.g., Gen Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002). The Department implicitly acknowledged this fact in April 2012, when it sought emergency approval to change Appendix B.1. after a federal court enjoined it from implementing or enforcing the H-2B it promulgated in 2012. Specifically, the Department explained:

> DOL is asking for this emergency revision to use the former 1 205-0466 instruments. The reason the forms must revert back to those in effect prior to the 2012 H-2B Final Rule is because the attestations that an employer using the H-2B program must make, which are listed in Appendix B.l, have changed substantially and **the Department cannot require employers to make attestations that are not required by the current regulations**, which will remain in effect if the rule is enjoined.

See Island Exhibit 1, Supporting Statement For Request For OMB Approval Under The Paperwork Reduction Act of 1995, dated April 26, 2012 (emphasis added). In making this request, the Department apparently overlooked the fact that Appendix B.1. included an attestation that was not otherwise required by the regulations.

By changing the attestation in Paragraph 5, without changing the attestation required by section 655.22(e), the Department added a condition to the labor certification that it has no legal basis to enforce. The Department's regulations only authorize the Administrator of the Wage and Hour Division ("Administrator") to find a violation if, *inter alia*, the Employer "substantially failed to meet any of the conditions of the labor certification application attested to, *as listed in § 655.22*, or any of the conditions of the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker in 8 CFR 214.2(h)." 20 C.F.R. § 655.60 (emphasis added). And the Administrator may only assess civil money penalties "upon determining that an employer has willfully failed to pay wages, in violation of the attestation required by § 655.22(e) . . ." 20

C.F.R. § 655.65. It is pointless to order Island to comply with a condition that the Department has no authority to enforce.[16]

Third, the Certifying Officer claims that the court's order in *CATA v. Solis* "implicitly" authorized the Department to issue supplemental PWDs because "[v]acatur of the 2008 wage rule required the reissuance of new and valid wage rates under the H-2B program." CO's Brief at 11. We disagree. The court's order vacated the 2008 Rule, as codified at 20 C.F.R. § 655.10(b)(2). *CATA II,* 2013 WL 1163426, *16. It did not invalidate the Department's regulations at section 655.10(d) or section 655.22(e), which collectively govern the temporal scope of the prevailing wage rate an employer must agree to offer and pay during the period of the approved H-2B labor certification. Nor did it order the Department to modify the terms of temporary labor certifications that the Department had already certified to USCIS. It is not clear that the court would even consider doing so, since, as we explain above, the Department has never explained the benefit of requiring an employer to offer a higher wage to its H-2B workers than the wage the employer offered to U.S. workers when it conducted the pre-filing recruitment. We thus reject the Certifying Officer's "court authorization" argument as meritless.

Finally, the Certifying Officer contends, without the support of legal argument, that the Department has the "inherent authority" to issue supplemental PWDs. "Otherwise," the Certifying Officer argues, the Employer "would be utilizing an illegal wage and both the DOL and DHS would be allowing aliens to be paid an inappropriate wage in violation of the INA." CO's Brief at 12. This argument assumes what the Certifying Officer is trying to prove—that the payment of the supplemental prevailing wage rate is somehow required by law. The Department's regulations do not require an employer to comply with such a determination, and the Department does not have the inherent authority to correct mistakes in a regulation without undergoing the procedures mandated by the APA. *See Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749 (D.C. Cir. 2001). Because the Certifying Officer does not cite any case law or standard to support his contention that the Department possesses the inherent authority he suggests, we decline to further address this argument.

In sum, the Certifying Officer assumes, without citing any specific statutory or regulatory authority, that the Department may require an employer to agree to an undisclosed prevailing wage rate at an unknown future date as a condition for certification. This position is contrary to the current regulations and it is inconsistent with DOL's long-standing practice in administering the H-2B labor certification program.

[16] We further note that a plain reading of the condition to which an employer must certify in Paragraph 5 places an impossible burden on the employer. Unless an employer is able to predict the future, it is difficult to see how an employer could possibly certify that the wage it offers for the job opportunity equals or exceeds a prevailing wage that *will* be issued by the Department.

CONCLUSION

The Department's H-2B regulations do not require an employer to increase the wage it offers and pays its H-2B workers *after* the Department has approved and certified its *Application for Temporary Employment Certification*. It was an abuse of discretion for the Certifying Officer to affirm the supplemental PWDs, which impose a legal obligation that is not otherwise required by law. We therefore REMAND the supplemental PWDs to the Certifying Officer with instructions to vacate the increased wage obligations that they purport to impose.

For the Board:

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge