

CASE STUDY #8

CATA v. Solis

Background

On August 17, 2009, the *Comité de Apoyo a los Trabajadores Agrícolas* (Farmworker Support Committee) (CATA), *Piñeros y Campesinos Unidos del Noroeste* (PCUN) (Northwest Treeplanters and Farmworkers United), the Alliance of Forest Workers and Harvesters, and *Centro de los Derechos del Migrante, Inc.* (CDM) filed a complaint against Hilda Solis, the Secretary of the U.S. Department of Labor (DOL), and the Department of Homeland Security (DHS).

CATA alleged that the prevailing wage rate calculations in the 2008 H-2B rule, that went into effect on January 18, 2009, were contrary to law as they arbitrarily determined the prevailing wage of H-2B employees. According to the 2008 wage rule, the prevailing wage rate could be determined based on a worker's skill level and was divided into four tiers. The average wage for each skill level was then used to determine a worker's appropriate prevailing wage. However, the DOL did not provide any explanation of methodology to calculate a worker's skill level.¹

On August 30, 2010, the Eastern District of Pennsylvania Court ruled that the DOL violated the Administrative Procedure Act by failing to adequately explain its reasoning for adopting skill levels as a part of the H-2B prevailing wage determination process. The court held that the 2008 wage rate calculations were invalid and ordered the DOL to modify this section of the H-2B regulations within 120 days.

The 2011 Wage Rule

On January 19, 2011, the DOL published new regulations (2011 wage rule) that stated that H-2B employers must pay workers a prevailing wage that is the highest of all applicable wage rates. According to this new rule, wages can be calculated in the following three ways:²

- 1) The wage established under the Collective Bargaining Agreements (CBA);
- 2) The rate established under the Davis-Bacon Act (DBA) or McNamara-O'Hara Service Contract (SCA) for the specific occupation in the area of intended employment; and
- 3) The arithmetic mean wage rate established by the OES for the specific occupation in the area of intended employment.

¹ Wage methodology for the temporary non-agricultural employment H-2B program, part 2; final rule. 78 Fed Reg. 24047 (2013). Available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-04-24/html/2013-09723.htm>.

² Wage methodology for the temporary non-agricultural employment H-2B program, part 2; final rule. 76 Fed Reg. 3452 (2011). Available at: http://www.foreignlaborcert.doleta.gov/pdf/H2B_Wage_Final.pdf.

Summary of Events after the Publication of the 2011 Wage Rule

The 2011 wage rule eliminated the four tier wage methodology and only allowed limited use of private employer surveys to determine a worker's wage. According to the new calculations, the DOL estimated that the average wage of H-2B employees would increase by approximately \$4.38 per hour.³ Several employers and employer associations opposed the implementation of the 2011 wage rule and filed lawsuits against the DOL. In response, labor unions, civil rights groups, and immigration experts stepped in to support its passing. As a result, the effective date of the 2011 wage rule was delayed four times to October 1, 2013.

A summary of the modified effective dates of the 2011 wage rule and the events that led to its delay are described below.

- **January 1, 2012** –The DOL originally chose to delay the effective date of the 2011 wage rule to this date in order to alleviate hardship to employers.
- **September 30, 2011** – The wage rule effective date was advanced four months as the Court ruled that imposing the previous delay was outside the mandate of the DOL, which is charged with the protection of workers and not employers.
- **November 30, 2011** – The wage rule was postponed two months after the Louisiana Forestry Association, Inc. and a group of employers from the Northern District of Florida filed two separate lawsuits against the DOL to challenge the implementation of the wage rule.⁴ In response, co-counsel, Edward Tuddenham, Friends of Farmworkers, Northwest Workers' Justice Project, the North Carolina Justice Center, and the Southern Poverty Law Center convened during a congressional briefing to present research that the current H-2B prevailing wage system depresses U.S. workers' wages.⁵
- **October 1, 2013** – The 2011 wage rule was postponed to this final date when Congress enacted the Consolidated and Further Continuing Appropriations Act on November 18, 2011, a spending bill that denies funding to the DOL to implement the 2011 wage rule in order to give Congress time to address the issue. As a result, the DOL continued to rely on the 2008 wage rule.

On September 27, 2012, CATA filed a motion for preliminary and permanent injunction to prevent the DOL from continuing to use the 2008 wage rule. CATA argued that the 2008 wage rule was deemed invalid in 2010 and thus the DOL can no longer use this rule. Six months later on March 21, 2013, the Court issued an order that the DOL can no longer process H-2B visa

³ Friends of Farmworkers. Current Litigation - CATA v. Solis. Available at: <http://www.friendsfw.org/what-we-do/direct-legal-services/high-impact-litigation/>. Accessed August 1, 2013.

⁴ Wage methodology for the temporary non-agricultural employment H-2B program; postponement of effective date. 76 Fed. Reg. 59896 (2011). Available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-09-28/pdf/2011-24969.pdf>

⁵ Press Release. Experts Urge Congress to Support H-2B Prevailing Wage Rule. Available at: <http://www.eneewsp.com/latest-news/latest-national/28062-experts-urge-congress-to-support-h-2b-prevailing-wage-rule-.html>. Accessed August 1, 2013.

applications for employers using the invalid 2008 wage methodology and must disseminate a revised interim wage rule within 30 days. The interim final rule eliminates the use of the four-tier system that was used in the 2008 wage rule and is based off of the overall mean of all persons in one occupation rather than the individual wage levels. This interim final rule went into immediate effect on April 24, 2013 and will stay in effect until the DOL releases the final wage rule on October 1, 2013.⁶

Conclusion:

Despite being unable to advance the effective date of the 2011 wage rule, this interim final rule is a long-awaited victory for CATA and other involved parties. Both the DOL and CATA agreed that the use of the four-tier system artificially lowers wages and has an adverse effect on both foreign and U.S. workers' income. Eliminating the use of the four-tier prevailing wage system in the interim final rule is key in ensuring that workers receive a fair prevailing wage that does not harm temporary foreign guestworkers or U.S. workers until the final wage rule is released.

To read the final rule, [click here](#).

⁶ Wage methodology for the temporary non-agricultural employment H-2B program, part 2; final rule. 78 Fed Reg. 24047 (2013). Available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-04-24/html/2013-09723.htm>.