

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUAN JAVIER RIVERA,
individually and on behalf of others
similarly situated,

Plaintiff,

v.

Civil Action No.

THE BRICKMAN GROUP, LTD

Defendant.

**ORIGINAL COMPLAINT AND
REPRESENTATIVE CLASS ACTION**

PRELIMINARY STATEMENT

1. This is an action for unpaid minimum wages, overtime, and damages brought by Plaintiff on behalf of himself and other similarly situated foreign workers who were employed by Defendant pursuant to the Immigration and Nationalities Act H-2B visa program. Plaintiff alleges that the wage violations at issue arose out of a policy and practice of Defendant applicable to other, similarly situated workers. Plaintiff seeks money damages to redress these violations of law.

2. This action is further brought on behalf of Plaintiff individually for damages arising out of his termination from employment following a work related injury.

JURISDICTION

3. This Court has jurisdiction over the subject matter of this action pursuant to 29 U.S.C. § 216(b) (Fair Labor Standards Act), 28 U.S.C. § 1331 (federal question jurisdiction), and

28 U.S.C. § 1337 (actions arising under Acts of Congress regulating commerce).

4. This Court has supplemental jurisdiction over the claims arising under state laws pursuant to 28 U.S.C. § 1367, because those claims are so related to the federal claims that they form part of the same case or controversy.

VENUE

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

6. Plaintiff JUAN JAVIER RIVERA TELLEZ (“Plaintiff Rivera”) is a citizen and resident of the State of Guanajuato, in Mexico who, at times relevant herein during 2003, was lawfully admitted to the United States on a temporary work visa pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(b). (hereafter “H-2B” visa).

7. Defendant BRICKMAN GROUP, LTD. is a corporation organized under the laws of Delaware doing business in the Eastern District of Pennsylvania and other locations.

8. Defendant operated in the Eastern District of Pennsylvania from an office at 375 S. Flowers Mill Road, Langhorne, PA 19047.

a. Upon information and belief, Mark A. Hjelle, a vice-president for Defendant has been based at that location and was the primary Defendant officer responsible for administration of the H-2B worker program for Defendant.

b. Upon information and belief, at times relevant to this proceeding Defendant represented to the U.S. Department of Labor that its principal corporate office was located at that office in the Eastern District of Pennsylvania.

9. Upon information and belief, Defendant during the years 2003 to 2004 utilized

H-2B temporary foreign workers at least at locations in Colorado, Connecticut, Delaware, Indiana, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, and Wisconsin.

10. Plaintiff Rivera seeks to bring his Fair Labor Standards Act (“FLSA”) claim as a representative action on behalf of “all H-2B workers employed by Defendant during 2003 or 2004 and thereafter” and will further represent any such individuals who have additional timely claims arising from employment as H-2B workers during 2002.

11. Plaintiff Rivera seeks to bring his Pennsylvania Wage Payment and Collection Law (“WPCL”) claim on behalf of “all H-2B workers employed by Defendant in Pennsylvania during 2003 or 2004 and thereafter” and any such individuals who have additional similar claims related to their employment in Pennsylvania during 2002.

REPRESENTATIVE CLASS ALLEGATIONS

12. This Complaint is brought as a Representative Action as authorized by the federal Fair Labor Standards Act (FLSA) at 29 U.S.C. Sec. 216(b). Plaintiff will seek prompt discovery in order to permit other potential representative class members to opt-in to this action as provided therein.

13. This Complaint is further brought as a Representative Action as authorized by the Pennsylvania Wage Payment and Collection Law (PA WPCL).

14. It is the position of counsel for the Plaintiffs that neither of these forms of Representative Action are subject to the requirements and Procedures of Fed.R.Civ.P. 23, although some cases have treated claims under the PA WPCL in accordance with Fed.R.Civ.P. 23(b)(3) opt out class claims for damages.

15. In accordance with Local Rule 23.1 counsel states the following as to the requirements of Local Rule 23.1(b)(2) in the event it is determined to apply to any of the claims hereunder.

16. The size of the potential represented class herein is set forth in Paragraphs 30 and 33 below.

17. Plaintiff is an adequate representative of the proposed representative classes hereunder, because:

- a. His claims are typical of those of other persons in the represented class(es).
- b. He is represented by competent counsel with experience in related litigation.
- c. Defendant acted on grounds common to all members of the represented class(es).

18. Alleged questions common to the class are set forth in detail below.

19. Alleged questions of law arise primarily from Defendant's obligations under the federal Fair Labor Standards Act. Those questions are common to both the FLSA and PA WPCL claims.

20. There is little need for individual represented class members to individually control their claims as the issues are common to all persons and primarily involve common issues of law.

21. Counsel is unaware after inquiry of any pending litigation involving this issue with Defendant.

22. This forum is an appropriate forum for concentration of litigation of claims involving the defendant. Defendant's primary representative for the operation of the H-2B program is believed to be located in a corporate office within the Eastern District of

Pennsylvania and the United States Department of Labor Regional Office in Philadelphia is the Regional Office of the DOL which has ruled upon the certification of the largest number of H-2B workers sought by Defendant.

23. No serious difficulties are anticipated in the administration of this matter as a representative action if Defendant promptly cooperates in the provision of information necessary to communicate with potential represented class members.

FACTS

24. At all times relevant herein, Defendant was an enterprise engaged in commerce as that term is defined in 29 U.S.C. §§ 203(r) and (s).

25. For calendar years 2002, 2003, and 2004 Defendant petitioned the U.S. Department of Labor for permission to import temporary foreign workers through the U.S. government's "H-2B" visa program. Defendant sought these visas so that they could hire Mexican laborers, including Plaintiff Rivera, to perform landscaping services.

26. In each of the years 2002, 2003, and 2004 Defendant utilized the services of Ms. Elizabeth Whitley in Lovingson, Virginia to prepare and file applications to the U.S. government for H-2B workers as an agent on its behalf. During calendar years 2002 and 2003 Ms. Whitley operated through Mid-Atlantic Resources Association, Inc. as its president. During calendar year 2004 and thereafter Ms. Whitley operated through Mid-Atlantic Solutions, Inc. as its president.

27. Upon information and belief, DeI-Al Associates, Inc. ("DeI-Al") is a company incorporated under the laws of Texas with its business addresses at 880 Flordon Drive, Charlottesville, VA 22903.

28. In each of the years 2002, 2003 and 2004, Defendant utilized the services of DeL AI and its related entity “DeL AI Guanajuato, Mexico” (collectively referred to as (“DeL AI Associates”) to locate, recruit, and hire Mexican workers to work pursuant to the H-2B visas obtained by Defendant.

29. DeL AI Associates recruited and hired Plaintiff Rivera to work for Defendant in 2003.

30. Based upon information available from the U.S. Department of Labor Defendant received approval from the U.S. Department of Labor to hire a total of 1,675 H-2B landscapers in 2002, 1,923 H-2B landscapers in 2003 (including Plaintiff Rivera) and 2,038 H-2B landscapers in 2004.

31. At all times relevant hereto, the U.S. Department of Labor, Employment Training Administration, Regional Offices in conjunction with local state departments of labor processed applications for labor certification under which Defendant and its agents were required to establish that each of the applications for H-2B workers met minimum standards required by law and regulations of the U.S. Department of Labor.

32. The U.S. Department of Labor Regional Office which received the Defendant’s applications for labor certification for the states of Pennsylvania, Delaware, Maryland, and Virginia was at all times relevant hereto located in the Eastern District of Pennsylvania. Approval by that Regional Office of promised terms and conditions of employment was required in order to obtain certification to recruit H-2B workers.

33. The following table sets forth by state and Regional Office the numbers of H-2B workers for which the U.S. Department of Labor issued labor certifications to Defendant based

upon summary data available from the U. S. Department of Labor:

Brickman Group, Ltd. H-2B Temporary Workers Certified									
State		Region	2002		2003- 2004		2003		2004
CT		1	70		118		50		68
MA		1	30		70		30		40
	Region	1		100		188		80	108
NJ		2	192		512		257		255
NY		2	50		150		60		90
	Region	2		242		662		317	345
DE		3	20		48		28		20
MD		3	220		649		330		319
PA		3	175		509		199		310
VA		3	120		185		100		85
	Region	3		535		1,391		657	734
GA		4	73						
NC		4	62						
SC		4	25						
TN		4	20						
	Region	4		180					
IN		5	199		499		250		249
MN		5	29		77		44		33
MO		5			146				146
OH		5	125		283		130		153
WI		5			20		20		
	Region	5		353		1,025		444	581
CO		6	114		230		115		115
TX		6	150		285		130		155
	Region	6		264		515		245	270
MO		7	1		180		180		
Total			1,675		3,961		1,923		2,038

34. The final approval for issuance of visas was controlled prior to March 1, 2003 by the Immigration and Naturalization Service (“INS”) and thereafter by United States Customs and Immigration Services (“USCIS”) of the Department of Homeland Security. The exact number of H-2B visas issued to H-2B workers for Defendant are unknown by Plaintiff at this time.

35. Upon information and belief, most visas for Defendants H-2B workers, including

Plaintiff Rivera, were processed by the U.S. Department of State, Consulate in Monterrey, Mexico.

36. The work terms which Defendant was contractually bound to pay to all of its H-2B landscapers during the 2002, 2003 and 2004 seasons were determined by, *inter alia*:

- a. The terms offered in the “Applications for Alien Employment Certification” (Form ETA-750) submitted by Defendant through its agents in each of the relevant years to the United States Department of Labor;
- b. Additional documents submitted to either the INS or the USCIS of the Department of Homeland Security and to the Department of State to obtain H-2B visas;
- c. The terms of work set forth in the regulations governing H-2B visas, 20 C.F.R. Part 655; and
- d. The written disclosure of the terms of work offered by Defendant provided to H-2B workers by Defendant’s recruiter Del-Al Associates.

37. Each of the Job Orders submitted to the U.S. Department of Labor included the following certifications in Part 23 of Form ETA-750:

- a. “The wage offered equals or exceeds the prevailing wage and I guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.”

- b. “The job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law.”

38. Upon information and belief, Mark A. Hjelle was the corporate officer of Defendant who executed the ETA-750 certifications on behalf of defendant.

39. Upon information and belief, the Job Order under which Plaintiff Rivera was recruited for employment was assigned number T-2003-PA-03384920 by the U.S. Department of Labor Philadelphia Regional Office and offered employment through December 1, 2003. That application for H-2B workers specifically guaranteed that Plaintiff Rivera would be paid *not less than* \$6.47 per hour for the first 40 hours worked, and not less than \$9.71 per hour for work over 40 hours in a week. The ETA-750 certification for that job was executed by Mr. Hjelle.

40. The work contracts applicable to Defendant’s H-2B workers were employed by Defendant were required to offer such workers hourly wages for the first 40 hours per week equal to the required prevailing wage for such work in the area in which they were employed. Such required prevailing wages were determined by state departments of labor subject to review by the U.S. Department of Labor pursuant to regulations and procedures of the U.S. Department of Labor based upon representations by the Defendant as to the work to be performed by workers.

41. The contract promised workers overtime at a rate of one and one-half times the base wage in accordance with the federal Fair Labor Standards Act (FLSA) and state law overtime requirements for all hours worked in excess of 40 hours per week.

42. In order to get to Defendant’s operations and commence work under the 2002, 2003, and 2004 work contracts, Plaintiff Rivera and other H-2B workers incurred various fees

and expenses, including, but not limited to, visa fees and bus fare and subsistence from their home towns in Mexico to Monterrey, Mexico.

43. Required costs itemized for Plaintiff Rivera by Del-AI Associates in Guanajuato, Mexico on about March 13, 2003 were as follows:

Description of Costs Incurred	Amount	Sub-Total
Services of Del-AI	81.00	
Services for Recruiter of Del-AI	35.00	
Deposited in Bank for Visa	100.00	
Visa Cost	100.00	
Sub-total paid directly by Plaintiff		316.00
Transportation to border	55.00	
Crossing Bridge at Border	6.00	
Transportation to work	110.00	
Food	35.00	
Sub-total Paid to Del-AI		206.00
Total Cost	522.00	

44. Upon information and belief, Plaintiff had additional costs directly incurred by him for transportation from his home in Celaya, Guanajuato, Mexico to the office of Del-AI Associates in Guanajuato, Mexico.

45. All of the expenses described above in Paragraphs 42-44 were primarily for the benefit of the Defendant as a matter of law under the Fair Labor Standards Act (FLSA).

46. Upon information and belief, at least some of the expenses described above in Paragraphs 42-44 were under Mexican law in effect at the place of recruitment required to be born directly by Defendant or its Mexican agents as a recruiter of Mexican citizens in Mexico for work in the United States.

47. As a matter of policy that Defendant applied to all H-2B workers hired during the relevant seasons, including Plaintiff Rivera, Defendant did not reimburse Plaintiff Rivera or

other H-2B workers during their first week of work for the expenses described in Paragraphs 42-44.

48. Upon information and belief, the terms and conditions of employment provided to Plaintiff Rivera in Mexico by Del-Al Associates as an agent of Defendant failed to include material terms of the Job Offer which were submitted to the U.S. Department of Labor as described in Job Order T-2003-PA-03384920 in Paragraph 39 above. In particular this included material terms of the Job Order as to requirements for requirements to lift 50 pounds. Plaintiff Rivera understood that he was being offered work with Defendant through November 2003.

49. Plaintiff Rivera arrived in Pennsylvania on or about March 24, 2003 and began work immediately thereafter.

50. Defendant established a pay period as reflected on its wage receipts for Plaintiff Rivera beginning on a Monday and ending on Sunday. Pay was due to workers on the Friday after the end of a pay period.

51. The first pay period in which Plaintiff Rivera was employed began on March 24, 2003 and ended on March 30, 2003. According to pay statements prepared by Defendant, Plaintiff was credited with having worked a total of 40 hours of work in that week. Plaintiff Rivera was due wages for that work week as follows:

Period Begin	3/24/2003
Period End	3/30/2003
Pay Day	4/4/2003
Hours Worked	49
Overtime Hours	9
Pay 40 Hours	\$258.80
Pay Overtime Hours	\$87.39
Gross	\$346.19

52. After itemized deductions for taxes totaling \$40.86 Plaintiff Rivera was provided

with net pay in the amount of \$305.30. Based upon the expenses incurred by Plaintiff Rivera in Mexico to get to Pennsylvania in order to work for the employer, Plaintiff should have been due additional pay in the amount of approximately \$522 to reimburse plaintiff for expenses incurred for the convenience of the Defendant as defined by the Fair Labor Standards Act.

53. The failure to provide such supplemental payment to Plaintiff Rivera deprived him of rights protected under both the FLSA and the Pennsylvania Wage Payment and Collection Law (“A WPCL”), 43 P.S. Sec. 260.1 *et seq.*

54. As a result of the expenses described in Paragraphs 42-44 and the Defendant’s policy not to reimburse those expenses, H-2B workers including Plaintiff Rivera employed by Defendant during the 2002, 2003 and 2004 season were not paid at least the FLSA minimum wage or the promised hourly wage for the first 40 hours of work during the first work week.

55. As a result of the expenses described in Paragraphs 42-44 and the Defendant’s policy not to reimburse those expenses, Plaintiff Rivera and other H-2B workers, who worked overtime in excess of 40 hours during the first work week were not paid the promised overtime premium for the hours they worked in excess of 40 hours per week.

Additional Facts Specific to Plaintiff Rivera

56. On April 4, 2003 during his second week of work, Plaintiff Rivera injured his ankle in a work related accident. Plaintiff Rivera was unable thereafter as a result of his injury to perform his usual job duties for the Defendant.

57. On April 11, 2003 was evaluated by a Doctor of Osteopathy (D.O.) selected by the Defendant through its workers compensation insurance program and advised in writing in English that he had an ankle sprain and was to wear an "air splint," avoid climbing stairs or

ladders, and refrain from prolonged standing or walking more than an hour at a time.

58. Upon information and belief, the doctor was not able to directly communicate in Spanish with Plaintiff Rivera.

59. Upon information and belief, Plaintiff Rivera continued to have swelling and pain and believed he was unable to perform duties which Defendant was prepared to assign him to on Monday, April 14, 2003.

60. Upon information and belief, Defendant by and through its supervisors on April 14, 2003 informed Plaintiff Rivera that he was terminated if he did not report to duties that he was assigned.

61. Upon information and belief, Plaintiff Rivera was scheduled for a follow-up clinic visit on April 15, 2003. Upon information and belief, it was the understanding of Plaintiff Rivera that he was advised on or about April 15, 2003 that he would be unable to report to regular job duties for three weeks until on or about May 6, 2003.

62. Plaintiff Rivera was sent back to Nuevo Laredo, Mexico on or about April 16, 2003 by Defendant.

**FIRST CAUSE OF ACTION
FAIR LABOR STANDARDS ACT CLAIM**

63. Defendants violated the rights of Fair Labor Standards Act, 29 U.S.C. §§ 206 and 207 rights of Plaintiff Rivera and other similarly situated H-2B workers, for which Plaintiff Rivera and other similarly situated workers are entitled to relief pursuant to 29 U.S.C. § 216(b).

64. The actions of the Defendants violated provisions both as to minimum wages and overtime requirements of the FLSA.

**SECOND CAUSE OF ACTION
PENNSYLVANIA WAGE PAYMENT AND COLLECTION LAW**

65. The Pennsylvania Wage Payment and Collection Law (WPCL) at 43 P.S. Sec. 260.9a(b), Act of 1961, P.L. 637, No. 329 provides:

(b) Actions by an employe, ... or party to whom any type of wages is payable to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction, by such ... party to whom any type of wages is payable or any one or more employes for and in behalf of himself or themselves and other employes similarly situated, or such employe or employes may designate an agent or representative to maintain such action or on behalf of all employes similarly situated. Any such employe, labor organization, party, or his representative shall have the power to settle or adjust his claim for unpaid wages.

66. Plaintiff Rivera brings this claim as such a Pennsylvania WPCL representative on behalf of himself and on behalf of “all H-2B workers employed by Defendant in Pennsylvania during 2003 or 2004 and thereafter” and any such individuals who have additional similar claims related to their employment in Pennsylvania during 2002.

67. The facts described acts of Defendant constitute violations of the Pennsylvania Wage Payment and Collection Act as to Plaintiff and other similarly situated persons.

68. Plaintiff and such other similarly situated persons are entitled to the amount of unpaid wages, and liquidated damages as authorized by Section 10 (43 P.S. Sec. 260.10) of that Law, and attorneys fees and costs as authorized by Section 9.1(f) (43 P.S. Sec. 260.9a(f)) of that Law.

69. The PA WPCL claims of Plaintiff and other represented persons are appropriately heard by this Court within its supplemental jurisdiction because of the degree to which they are closely intertwined with the interpretation of legal issues under the FLSA. Such claims do not predominate over federal claims herein.

**THIRD CAUSE OF ACTION
BREACH OF CONTRACT**

70. The facts described above constitute a breach of contract for which Plaintiff Rivera is entitled to relief.

**FOURTH CAUSE OF ACTION
WRONGFUL DISCHARGE VIOLATION OF PUBLIC POLICY**

71. Upon information and belief, Defendant filed a report with its Workers Compensation carrier related to the injury suffered by Plaintiff Rivera on April 4, 2003.

72. Upon information and belief, the termination of Plaintiff Rivera was wrongfully terminated in violation of public policy as a result of his work related injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Certify this as a FLSA representative action on behalf of “all H-2B workers employed by Defendant during 2003 or 2004 and thereafter” including claims any such individuals may have arising from their employment as an H-2B workers during 2002.

2. Certify this as a representative Pennsylvania Wage Payment and Collection Law (“WPCL”) action on behalf of “all H-2B workers employed by Defendant in Pennsylvania during 2003 or 2004 and thereafter” including claims any such individuals may have arising from their employment as an H-2B workers during 2002.

3. Grant judgment in favor of Plaintiff and all similarly situated workers who opt-into this action on their Fair Labor Standards Act claim and awarding them their unpaid minimum wages, regular wages and overtime, and an equal amount of liquidated damages.

4. Grant judgment in favor of Plaintiff and the class he seeks to represent on their claim

for violations of the Pennsylvania Wage Payment and Collection Acct and awarding them their actual and liquidated damages as provided by that statute.

5. Grant judgment in favor of Plaintiff Rivera on his contract claim and award him damages for the Defendant's contractual breaches.

6. Grant judgment in favor of Plaintiff Rivera on his claim for wrongful discharge in breach of public policy and award him damages for the Defendant's actions.

7. Award Plaintiffs their costs of court and reasonable attorney's fees pursuant to the Fair Labor Standards Act.

8. Grant such other and further relief as this Court deems just and appropriate.

Dated: April 1, 2005

Respectfully submitted,

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