BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: December 19, 1996

CASE NO: 95-INA-237

In the Matter of:

UNIVERSITY PHYSICIANS & SURGEONS, INC.,
Employer,

On Behalf of:

MOHAMMAD AHMAD, M.D.,
Alien

Appearance: E. I. Cohen, Esq.
New York, NY
for the Employer and the Alien

Before: Neusner, Holmes, and Huddleston
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Mohammad Ahmad, ("Alien") filed by Employer University Physicians & Surgeons, Inc., ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

The Act provides at § 212(a)(5), that an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) sufficient U. S. workers who are able, willing, and qualified, are not available

at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the provisions of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record on which the CO denied certification and upon the Employer′s request for review, as set forth in the Appeal File ("AF"), and the written arguments of the parties. 20 CFR § 656.27(c).

Statement of the case. On March 11, 1994, the Employer filed an application for labor certification to enable the Alien, a national of Pakistan, to fill the position of staff psychiatrist in the Huntington State Hospital in Huntington, West Virginia.

The job offered was described as follows in Employer's application:

> Provide primary care psychiatry to inpatients and outpatients through examination and treatment.

The rate of pay in the application was "$112,000+," which was made up of fringe benefits up to 35% over a $90,000 base. Those fringe benefits included medical insurance, life insurance, a "disability package," a "retirement package," fourteen paid holidays, and other leave days. The minimum education, training and experience required to perform the job was a doctor of medicine degree with the major field of study in medicine based on four years of training, and three years post graduate training in psychiatry. The other special requirement was that the candidate shall have passed FLEX or be licensed to practice medicine in West Virginia and Board eligible in psychiatry. The worker's immediate supervisor was to be the chief of psychiatry at the hospital.[1] AF 66, et seq.

Employer's application stated it had advertised the position in the December 1993 issue of the Affirmative Action Register on page 43. Although this job was publicized by this advertisement, posting, and word of mouth, the Employer asserted it had received no responses. AF 59-65.

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[1]The documented qualifications of the Alien at AF pp 66 et seq., are consistent with the representations in the application.

On August 10, 1994, the CO’s Notice of Findings, and on August 19, 1994, the CO’s corrected Notice of Finding advised the Employer that the application would be denied, allowing it an opportunity to rebut the findings or remedy any defects cited. The CO said the wage offer of $90,000 per year was below the prevailing wage rate of $112,673 per year, which was based on a wage survey of the area employers of staff psychiatrists, citing 20 CFR §§ 656.20(c)(2), 656.20(g), 656.21(g)(4), and 656.40. Alluding to a letter by Employer's attorney dated June 16, 1994, the CO explained that counsel's representation that Employer would offer a base salary of $90,000 per year plus fringe benefits up to 35% that would bring the total compensation package up to $112,000 per year did not satisfy the need for rebuttal evidence under the regulations. The CO explained that in order for such fringe benefits to be computed as part of the prevailing wage, the Employer must establish (1) the monetary value of each fringe benefit, (2) that the fringe benefits are unique to this occupation in the area of intended employment, and (3) that the fringe benefits had been included in the Employer' Notice of Findings s recruitment efforts by advertisements and posted notices. AF 28-33.

By the Final Determination of December 7, 1994, the CO denied certification on the basis of the information available after reviewing the rebuttal evidence. The Final Determination indicates, however, that Employer's rebuttal did not document or otherwise offer evidence to establish the monetary value of each fringe benefit on which it relied, notwithstanding the directions of the CO in the Notice of Findings. AF 21-24. Instead, Employer contested the cogency, accuracy, and validity of the survey data on which the CO based the preliminary findings. As it failed to sustain its burden of proving the value of the fringe benefits, the Employer limited the amount of its wage offer to $90,000, and no weight can be given to the putative fringe benefits mentioned in its application. AF 10-12.

The CO rejected Employer's survey in determining the minimum wage, explaining that the West Virginia Bureau of Employment Programs survey on which the CO relied encompassed the employment field as a whole without distinguishing between the nature of the various types of public and private employer entities, as did the Employer's survey. The difference between the surveys was that the Employer limited its analysis to the nature and identity of the various employing entities sampled according to geographic and other characteristics. The dominating consideration was that the Employer distinguished between publicly operated and privately operated employers. Such a distinction in this case was ambiguous, however, since the Employer self evidently is a privately owned and operated medical corporation that is engaged in supplying medical personnel at the Huntington State Hospital, on its face a public institution. Its survey focused on the pay rate for doctors who apparently are employed at publicly operated

institutions for this reason, while the survey used by the CO made no distinction among the employers. As a result, the prevailing wage used by the CO was much higher than the scale against which Employer’s offer is measured because Employer’s pay rate was limited to the scale that was being paid to doctors employed by public agencies.

On the other hand, when he addressed Employer’s data on its own terms the CO concluded that the Employer’s prevailing wage materially exceeded the $90,000 base that its advertisement had offered. This led the CO to conclude that this application for certification was inconsistent with the regulatory criteria, and that certification should be denied. AF 14-16. In its January 6, 1995, request for review the Employer repeated the position in its rebuttal, reiterating its argument that the results of its own wage rate survey was more cogent and accurate than the survey used by the CO.

DISCUSSION. In **Kids "R" Us,** 89-INA-311, 312, 344; 90-INA-20, 75, 81, 181, 187 and 216(Jan. 28, 1991)(en banc), the Board held that an employer’s proffer of fringe benefit compensation may be considered in determiing the relevant prevailing wage for purposes of 20 CFR §§ 656.20(c)(2) and 656.40. An employer making such a contention bears a heavy burden to demonstrate the fairness and bona fides of the fringe benefit as part of its wage offer, however. At a minimum the employer must establish the value of its fringe benefits and show that they are not common to the comparable jobs upon which the prevailing wage is based. Employer's unique fringe benefits must be disclosed in the advertisements and posted notices. See **Peddinghaus Corp.**, 88-INA-79(July 6, 1988); **Koba Corp.,** 91-INA-12(May 29, 1991).

This Employer failed to present the required evidence supporting the fringe benefits offered in its advertisement soliciting applications for this job in that it declined to itemize and prove the monetary value of those fringe benefits for the information of potential U.S. workers seeking this position. Employer's apparent refusal to provide this supporting information lessened the impression of the objectivity of its arguments in favor of the Employer's own labor market survey and in opposition to the wage rate market survey by the West Virginia Bureau of Employment Programs, the dispute that is the central issue in this matter.

As the Employer has declined to alter the amount of its wage offer or to support its fringe benefits as part of the wage offer, this application is inconsistent with the provisions of the Act and regulations.

Accordingly, the following order will enter.

ORDER

The Certifying Officer’s denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **University Physicians & Surgeons, Inc. (Mohammad Ahmad)**

Case No. : 95-INA-237

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			

Huddleston			

Thank you,

Judge Neusner

Date: November 14, 1996