U.S. Department of Labor

Board of Alien Labor Certification Appeals
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NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: 10/05/99
Case No.: **1998 INA 096**

In the Matter of:

SUPER MEX RESTAURANT, Employer,

on behalf of

MARTIN CASTANEDA-JUAREZ, Alien

Appearance: F. E. Ronzio, Esq., of Los Angeles, California, for Employer and Alien
Certifying Officer: R. M. Day, Region IX.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that SUPER MEX RESTAURANT ("Employer") filed on behalf of MARTIN CASTANEDA-JUAREZ ("Alien") under§ 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. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26. [1]

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[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On April 12, 1996, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Cook, Mexican Style" in its Mexican Restaurant.[2] The Employer described the Job to be Performed as follows:

> Cook, season and prepare a variety of Mexican style, sauces, according to prescribed Mexican recipes.

AF 20, box 13. (Copied verbatim without change or correction.) The Job Offered was classified as "Cook, Specialty, Foreign Food, under DOT Occupational Code No. 313.361-030.[3] The Employer required high school education plus two years of experience in the Job Offered. No "Other Special Requirements" were stated. The wage offered was $8.65 per hour for a forty hour week with time and a half for overtime beyond a forty hour week. The workday hours were from 11:00 A.M. to 7:00 P.M. *Id*., boxes 10-12, 14, 15.

Notice of Findings.[4] Subject to rebuttal, the CO denied certification on December 30,

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[2] A National of Mexico, the Alien was born 1970. He worked in a restaurant in Mexico from January 1986 to January 1988. From January 1989 to January 1992 he worked in a Mexican restaurant in California. From February 1992 to December 1993 he worked as a day laborer in various jobs. Employer hired him to work in the Job Offered in January 1994, and he remained in that position until the date of application, although his Statement of Qualifications gave no evidence that he has a visa to live and work in the United States, and his visa status was described as "EWI." AF 61-66.

[3] 313.361-030 **COOK, SPECIALTY, FOREIGN FOOD** (hotel & rest.) Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.). *GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77*

[4] **20 CFR § 656.25(c)** If a labor certification is not granted, the Certifying Officer shall issue to the employer, with a copy to the alien, a *Notice of Findings*, as defined in §656.50. The *Notice of Findings* shall: (1) Contain the date on which the *Notice of Findings* was issued; (2) State the specific bases on which the decision to issue the *Notice of Findings* was made; (3) Specify a date, 35 calendar days from the date of the *Notice of Findings*, by which documentary evidence and/or written argument may be submitted to cure the defects or to otherwise rebut the bases of the determination, and advise that if the rebuttal evidence and/ or argument have not been mailed by certified mail by the date specified.

1996, concluding that the Employer had not established that its wage offer of $8.55 per hour equalled or exceeded the prevailing wage of $11.29 per hour. See 20 CFR §§ 656.20(c)(2),[5] 656.21(e), and 656.40(a)(2)(i). AF 17. The Employer initially disputed the state employment security agency ("state agency") finding regarding the correct amount of the prevailing wage for this position. AF 30-31, 37, 46-47. Instead of amending the wage offer, the Employer chose to contest that finding in a rebuttal, which the CO rejected as unsatisfactory. After the job was advertised at the hourly rate of $8.55, no U. S. workers applied for the position. AF 19, 23-28.

Confirming the state agency's finding of prevailing wage, the NOF explained that this position is among the occupations for which a prevailing wage determination has been made under the Service Contract Act ("SCA"), and that the hourly rate designated under the SCA was considered to be the prevailing wage for labor certification purposes. "The issue," said the NOF, "is whether the occupation is one where a Service Contract prevailing wage determination has been made, not whether the employer has a contract with the Federal Government," citing Technical Assistance Guide No. 656, Part I, Section O, Subsection 2; 20 CFR § 656.40(a)(1), and **Standard Drywall**, 88 INA 099 (May 24, 1988)(*en banc*).
By way of rebuttal, the Employer was told either to increase the salary offer to equal or exceed the prevailing rate of pay or to submit countervailing evidence that the prevailing wage determination is in error and that the Employer's wage offer equals or exceeds the correct prevailing rate. "A statement that the employer does not have a contract with the federal government is not an acceptable reason," added the NOF. AF 17-18..

Rebuttal. On January 27, 1997, the Employer filed a rebuttal that consisted of a wage survey by the owner of the Employer, a survey of wage rates for hourly employee wage rates by the California Restaurant Association, and counsel's argument reiterating Employer's previously stated position as to the application of the Service Contract Act to this case. AF 07-08.

Final Determination. The CO denied certification in the Final Determination, dated April 23, 1997. AF 05-06. The CO said the reason for denial was that Employer's wage offer of $8.55 per hour was below the prevailing wage of $11.29 per hour, which violated 20 CFR §§ 656.20(c)(2), 656.20(g), and 656.21(g)(4). Recapitulating the NOF and the rebuttal, the CO said

> The occupation is one for which a prevailing wage determination has been made under the Service Contract Act. This wage is considered to be the prevailing wage for labor certification purposes. The issue is whether the occupation is one where a Service Contract prevailing wage determination has been made, not whether the employer has a contract with the Federal Government.

AF 06. Citations omitted. Addressing the rebuttal, the CO concluded that the arguments that the Employer is a privately owned restaurant and that it would not have a contract with the Federal Government are not acceptable reasons. *Id*.

Appeal. On April 28, 1997, the Employer appealed to BALCA and later filed an

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[5] **20 CFR § 656.20(c)** "Job offers filed on behalf of aliens on the *Application for Alien Employment Certification* form must clearly show that: ... (2) The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay 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..."

appellate brief. See AF 01. Employer later filed a brief in which it discussed the National Restaurant Association Survey and its own survey of employers in the Los Angeles geographical area, both of which supported its contention that the wage offered for this position was above the levels indicated by both surveys. The Employer argued that hiring at the wage it offered for this position will not adversely affect the wages or working conditions of U. S. workers similarly employed in the place of intended employment. Rejecting the CO's finding as "based on other artificial means to reach a conclusion," Employer relied on a U. S. Circuit Court of Appeals matter in the Second Circuit, and a District Court case, whose location was not supplied by the brief and, noting that the state agency had never challenged the validity of the surveys it filed in the rebuttal, argued that the CO was required to certify the Job Offered.

Discussion

Burden of proof. In all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification, notwithstanding its construction of the holdings in various cases addressing the prevailing wage regulations.[6] The imposition of the burden of proof is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[7]

Prevailing wage. The issue appealed disputes the determination of the correct amount of the prevailing wage. 20 CFR § 656.40 promulgated the criteria the CO must follow in determining the prevailing wage for labor certification purposes in this proceeding.

> (a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by §656.21(b)(3), shall be determined as follows:(1) If the job opportunity is in an occupation which is subject to a wage determination in the area 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., 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. ...

The issue Employer raised under 20 CFR § 656.40(a)(1) was not whether an employer

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[6] Moreover, the Panel is required to construe this exception strictly, and to resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

[7] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

is subject to the provisions of the Service Contract Act, but whether the occupation was subject to a wage determination under the SCA. **Brad Bartholomay, Jr., Landscape Design and Consultation**, 88 INA 332, (May 31, 1989)(*en banc*); also see **Standard Dry Wall**, 88 INA 099 (May 24, 1988)(*en banc*), and **Berk's Warehousing & Trucking**, 94 INA 579 (Jun. 13, 1996). Contrary to the Employer's arguments in its rebuttal and appellate brief, the Employer's own status under the SCA was not the issue. Moreover, the Employer did not deny that the position of Cook was listed in the SCA Directory, and Employer did not contest the amount of the prevailing wage that the CO found the SCA required for this occupation. See AF 44, 47. Instead, Employer's rebuttal argument and evidence addressed the criteria stated in 20 CFR § 656.40(a)(2), which did not apply to this case.[8] For these reasonins, the Panel finds that the evidence of record supported the CO's conclusion that the Job Offered was an occupation subject to a wage determination under the SCA.

Conclusion. It follows from these findings, that the Employer failed to sustain its burden of proof because it did not establish that the CO used the incorrect prevailing wage. Consequently, we find that the CO correctly denied certification because the Employer failed to sustain the burden of proof that its wage offer equaled or exceeded the correct prevailing rate. The Panel concludes that the NOF provided sufficient notice of the reasons for the denial of certification, and that it told the Employer how to cure the defects found in the application. As the Employer's rebuttal failed to sustain the burden of proof, the evidence supports the CO's denial of labor certification under the Act and regulations. Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

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[8] 20 CFR § 656.40(a)(2) describes the procedure the CO must follow if the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes. In such a case, said the regulation, the prevailing wage shall be computed as follows: "(i) The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages; or (ii) If the job opportunity is covered by a union contract which was negotiated at arms-length between a union and the employer, the wage rate set forth in the union contract shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the 'prevailing wage' for labor certification purposes."

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. 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, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: **1998 INA 096**
SUPER MEX RESTAURANT, Employer,
MARTIN CASTANEDA-JUAREZ, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Huddleston	8/3/99		
Jarvis	9/3/99		

Thank you,

Judge Neusner

Date: July 2, 1999