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 Issued: 10/06/99
Case No.: 1999 INA 199

In the Matter of:

SKYLINE CONSTRUCTION CO., INC., Employer,

on behalf of

MARTIN C. FRANCO, Alien.

Appearance: J. P. Karnos, Esq., of Santa Ana, California, for the 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 a labor certification application that was filed on behalf of MARTIN C. FRANCO ("Alien") by SKYLINE CONSTRUCTION CO., INC., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 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 appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and 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

[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).

not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an 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 to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On August 15, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Cement Mason" in its construction business. AF 26. The position was classified as "Cement Mason" under DOT No. 844.364-010.[3] The duties of the Job to be Performed were the following:

> Smooth and repairs surface of concrete walls, floors and sidewalks using hand tools and power tools. Use hand held screed and floats to achieve desired concrete depth. Use broom to obtain rough surface. Brake down and perform fixtures on old concrete surfaces. Grind down rough concrete surfaces or defective areas, using power grinder and hammer. Patch up holes on walls.

AF 26, box 13. (Copied verbatim without change or correction.) The "Other Special Requirements" was, "Resume required." *Id.*, box 15.[4] The education and experience that the

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]844.364-010 **CEMENT MASON** (construction) alternate titles: cement finisher; cement paver; concrete finisher; concrete floater. Smooths and finishes surfaces of poured concrete floors, walls, sidewalks, or curbs to specified textures, using handtools or power tools, including floats, trowels, and screeds: Signals concrete deliverer to position truck to facilitate pouring concrete. Moves discharge chute of truck to direct concrete into forms. Spreads concrete into inaccessible sections of forms, using rake or shovel. Levels concrete to specified depth and workable consistency, using hand held screed and floats to bring water to surface and produce soft topping. Smooths, and shapes surfaces of freshly poured concrete, using straightedge and float or power screed. Finishes concrete surfaces, using power trowel, or wets and rubs concrete with abrasive stone to impart finish. Removes rough or defective spots from concrete surfaces, using power grinder or chisel and hammer, and patches holes with fresh concrete or epoxy compound. Molds expansion joints and edges, using edging tools, jointers, and straightedge. May sprinkle colored stone chips, powdered steel, or coloring powder on concrete to produce prescribed finish. May produce rough concrete surface, using broom. May mix cement, using hoe or concrete -mixing machine. May direct subgrade work, mixing of concrete, and setting of forms. May specialize in finishing steps and stairways and be designated Step Finisher (construction). May break up and repair old concrete surfaces, using pneumatic tools, and be designated Cement Mason, Maintenance (any industry). May spread premixed cement over deck, inner surfaces, joints, and crevices of ships and be designated Cementer (ship-boat mfg.). *GOE: 05.05.01 STRENGTH: H GED: R3 M3 L2 SVP: 7 DLU: 81*

[4]The Alien was born 1964. A national of Mexico, he was living and working in the United States without the permission of a visa of any kind. The Alien completed junior high school in Mexico in 1978. From 1982 to 1984 he worked as Cement Mason for a construction company in Mexico. From 1985 to the date of application he said he was self-employed as a cement mason. AF 75-76. The Appellate File did not contain any evidence supporting the Alien's

Employer required consisted of grade school graduation plus two years of experience in the Job Offered. The work week consisted of forty hours per week of regular time from 8:00 a.m., to 5:00 p.m., on days that were not specified, with no provision for overtime. The wage rate offered was $14.73 per hour. *Id.*, boxes 10-12, 14-15. Although three apparently qualified U. S. workers applied, the Employer did not hire any of these applicants for the Job Offered. AF 35-39, 50-64.

Notice of Findings. On December 15, 1997, the Notice of Findings ("NOF") denied certification, subject to Employer's rebuttal. AF 21-24. The NOF explained that the Employer failed to offer a wage that equalled or exceeded the prevailing wage for a Cement Mason, citing 20 CFR § 656.40(a)(1) as the regulatory authority for this finding. The NOF said that the prevailing wage for the occupation of Cement Mason was $24.25 per hour, as determined under the Davis-Bacon Act, which was materially higher than the hourly rate offered by the Employer in its application.

To rebut this finding NOF explained that the Employer must show that the duties of a Cement Mason are not those of an occupation for which a Davis-Bacon Act determination has been made. The NOF added that a statement that the Employer does not have a contract with the federal government would be insufficient to establish that the occupation was not covered by the Davis-Bacon Act. The Employer was given the option to increase the wage it offered to the level of the prevailing wage and retest the market. In the alternative the Employer was advised that it could contest the wage finding by showing that no Davis-Bacon Act wage determination had been made for this occupation. AF 23-24.

Rebuttal. On March 6, 1998, the Employer filed its rebuttal, which included a letter from its attorney, which the Employer's president countersigned to indicate his agreement and concurrence. As "Exhibit 1", the Employer attached a one-page tabulation of a "Survey done on 15 randomly selected construction companies." The question posed was, "On Non-Government contract, what is the average starting hourly rate for a cement mason with 2 years of experience?" AF 10. Based on its interpretation of 20 CFR § 656.40(a)(1)[5] the Employer cited cases arising in Ohio, Virginia, and the District of Columbia in which U. S. District Courts concluded that a Davis-Bacon prevailing wage did not apply to the matters the courts were considering. In addition, the Employer argued that the median wage for a Cement Mason in AF 26 was the correct prevailing wage.

Final Determination. In the June 4, 1998, Final Determination, the CO denied certification, based on grounds that the Employer refused to offer the prevailing wage for the position of Cement Mason, as determined under 20 CFR § 656.40. The CO recapitulated the wage data of the Application, the NOF, and the rebuttal, and the Employer's refusal to amend the wage rate offered, as described in the corrective action set out in the NOF. The Final

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assertion of his qualifications for this position.

[5]Employer's rebuttal mistakenly cited 20 CFR § 656.40(a)(1) as 20 CFR § 656.50(a)(1).

Determination summarized the argument in the Employer's rebuttal, and it took note of the survey attached to the rebuttal, which showed an average hourly wage of $14.73. The CO explained that the precedents and laws cited by Employer were addressed to litigation that was outside the scope of labor certification, and was inapplicable to this matter, adding that the applicable regulations have established that Davis-Bacon wage rates will apply for operations under which construction is carried out. The Final Determination concluded:

> The employer has not adequately shown that DAVIS-BACON does not apply for the occupation of cement mason.

Appeal. On November 5, 1998, the Employer filed its request for administrative judicial review by BALCA on grounds that the proffered hourly said the precedents and laws cited by Employer's counsel were "outside the scope of labor certification as governing," and was not below the required wage level and that the Davis-Bacon wage determination was not applicable. AF 01.

DISCUSSION

Burden of proof. The CO's findings of law and fact will be affirmed, if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. **Haddad**, 96 INA 001 (Sep. 18, 1997). 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. Because certification of alien workers is an exception to the general exclusion of immigrants, the Panel is required to construe its provisions strictly, and it must 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). Congress enacted § 212(A)(14) of the Immigration and Nationality Act of 1952 (as amended by § 212(a)(5)(a) of the Immigration Act of 1990 and recodified at 8 U.S. C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d 211, 213 (9th Cir., 1979).[6]

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[6] 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. To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Pursuant to the favored treatment Congress legislated for the limited class of alien workers whose skills were needed in the U. S. labor market, 20 CFR § 656.2(b) assigned the burden of proof in an application for alien labor certification under this exception to the general exclusion of aliens under the Act. This regulation quoted and relied on § 291 of the Act (8 U.S.C. § 1361), which provided, "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

Prevailing wage. The Employer appears to argue the Davis-Bacon Act does not apply because it only governs contracts with the U.S. government on government projects. The Secretary of Labor expressly provided the process to be followed by the U. S. Department of Labor in determining the prevailing wage for labor certification purposes by adopting 20 CFR § 656.40, which provides,

> (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 cases cited by the Employer noted in general terms that the Davis-Bacon Act was defined as giving local laborers and contractors a fair opportunity to take part in project when Federal funds are involved and to prevent contractors from bidding for contracts with wages lower than those prevailing in an area. None of these authorities addressed or discussed the either the contents of 20 CFR § 656.40 or its application to alien labor certification under § 212(a)(14) of the Immigration and Nationality act, as amended. Consequently, the Employer was mistaken in its belief that the authorities it cited govern the implementation of certification under the Act.

It is established beyond argument that, if the Job Offered is in an occupation subject to a wage determination under the Davis-Bacon Act, the issue is not whether the employer is subject to the Davis-Bacon Act, but whether the occupation, itself, is subject to a wage determination under that act. **Standard Dry Wall**, 88 INA 099 (May 24, 1988)(*en banc*); see also **Brad Bartholomay, Jr., Landscape Design and Consultation**, 88 INA 332, (May 31, 1989)(*en banc*).[7] As the CO found this job subject to a wage determination under the Davis-Bacon Act and the Employer offered no contrary persuasive evidence, its argument is without merit.[8]

Conclusion. The CO 's finding that 20 CFR § 656.40(a) subjected the position at issue to the provisions the Davis-Bacon Act was supported the evidence of record. Although the CO properly concluded that the prevailing hourly wage rate for the job of a Cement Mason in the place of intended employment was $24.25 under the Davis-Bacon Act, as applied pursuant to 20

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such visa or such document, or is not subject to exclusion under any provision of this Act... ."

[7]See **Berk's Warehousing & Trucking**, 94 INA 579 (Jun. 13, 1996), as to the application of this subsection under the Service Contract Act.

[8]Because the Employer's request for certification was filed within the jurisdiction of a U. S. District Court in the State of California, it is self-evident that the U. S. District Courts cited by the Employer's brief neither govern nor guide the interpretation of the Act and regulations in determining this application. Moreover, as noted *supra*, even if this case was within the jurisdiction of these courts, none of the cases cited referred to either the occupation of Cement Mason or to proceedings under the Act and regulations before this Panel.

CFR § 656.40, the Employer refused to raise its wage offer to the lawful amount required under the Act. Consequently, the CO's denial of certification must be affirmed, and the following order will enter. **Anza Concrete**, 90 INA 329 (Oct. 18, 1991).

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 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.: 1999 INA 199
SKYLINE CONSTRUCTION CO., INC., Employer,
MARTIN C. FRANCO, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: July 26, 1999