BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 11, 2001
Case Nos: 2000-INA-261

In the Matter of:

AUTO CLINIC REPAIR
On Behalf of:

JULIO CESAR LARA
Alien

Appearance: Enrique Zuniga, Esq.

Certifying Officer: Armando Quiroz
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Julio Cesar Lara ("Alien") filed by Employer Auto Clinic Repair. ("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 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, 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) 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 not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis

must demonstrate that the requirements 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 means in order to make a good faith test of U.S. worker availability.

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 arguments of the parties.

STATEMENT OF THE CASE

On April 20, 1998, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Auto Mechanic/Body Man in its Auto & Truck & Body Collision business.

The duties of the job offered were described as follows:

> Auto Mechanic/Body Man: Repair Automobiles in different stages of collision repair will work mainly repairing mechanical components, but will also straighten frames, and do some body work where necessary.

No education and three years experience in the job were required. Wages were $15.00 per hour. No employees were supervised and the employee would report to the Owner/Operator.(AF-19-35)

On March 15, 2000, the CO issued a NOF proposing to deny certification. The CO found that Employer had violated the prevailing wage determination which had been made under the Service Contract Act of $18.63. The CO stated: "Although the Employment Development Department advised the employer that the position is a SCA wage occupation and that the SCA wages are not rebuttable, the employer contends that the SCA was intended for government and not the private sector. However the issue is whether a SCA prevailing wage determination has been made and not whether the position is in a government entity or private sector." Corrective action was amendment of the prevailing wage rate and readvertising. Alternatively, if Employer contends the job opportunity is not one for which a SCA wage determination has been made, documentation must be furnished to substantiate the claim. (AF-15-17)

Employer, in its rebuttal received on April 20, 2000, stated that the issue is whether the prevailing wage for the area is the true prevailing wage. Employer submitted its own wage survey for the area which showed mechanics' wages ranging from $7.50 to

$15.00 per hour. The SCA was intended to apply to labor which involves a contract with the Federal (or other) governments and should not be applied to this case. (AF-6-14)

On April 26, 2000, the CO issued a Final Determination, denying labor certification. The CO found that the issue was not that addressed by Employer, i.e., whether the wage determination was based on prevailing wages in the area, but rather whether the job occupation is one for which a determination has been made under the SCA. (AF-4-5)

Employer appealed, May 11, 2000 (AF-1-3)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp.,1988-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 1992-INA-321 (Aug. 4, 1993). Where the CO reasonably requests specific information to aid in the determination of whether certification should be granted, the employer must provide it. Landscape Service Corporation, 1996-INA-085(Jan. 26, 1998).

The regulations provide for the establishment of the prevailing wage at those rates provided for covered job opportunities under Davis-Bacon, Service Contract or McNamara O'Hare Service Act. As stated by the CO the issue is whether a wage determination has been made under any of the above Acts for the occupation involved and not whether the position involves a government contract. In labor certification applications, the Employer's arguments must be addressed toward whether the occupation is covered under the Acts and not whether or not the established prevailing wage rates under these Acts is "reasonable". Under the circumstances, the CO's denial of certification was proper. See, Reliable Mortgage, supra.

ORDER

The Certifying Officer's denials of labor certification are AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge