U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 August 2003

BALCA Case Nos.: **2002-INA-282**
2002-INA-283
2002-INA-284
2002-INA-285
2002-INA-286
2002-INA-291

ETA Case Nos.: **2001-WA-09513872/ET**
2001-WA-09513850/ET
2001-WA-09513853/ET
2001-WA-09513851/ET
2001-WA-09513849/ET
2001-WA-09513852/ET

In the Matters of:

AZTECA MEXICAN RESTAURANT, INC.,
Employer,

on behalf of

IVAN CONRRADO RAMOS, ARMANDO GARCIA MOCTEZUMA, GILDARDO RAMIRES AVILEZ, JUAN CARLOS REYES CEBALLOS, ZENEN HERNANDEZ FIGUEROA, ADOLFO RENTERIA,
Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Bart Klein
Attorney for Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Azteca Mexican Restaurant, Inc. ("Employer") filed six applications for labor certification[1] on behalf of (Aliens) Ivan Conrrado Ramos, Armando Garcia Moctezuma, Gildardo Ramires Avilez, Juan Carlos Reyes Ceballos, Zenen Hernandez Figueroa, and Adolfo Renteria, in the Spring of 2001.[2] Employer sought to employ all six Aliens for the same position, "Mexican Specialty Cook." (AF, 47-50)[3] In the Spring of 2002, the Certifying Officer ("CO") denied certification for all six applications. The issue on appeal in all of the cases is whether the CO erred in classifying this position as one for which a prevailing wage determination has been made under the Service Contract Act (SCA). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision.[4] *See* 29 C.F.R. § 18.11. We find that the CO properly required the SCA prevailing wage for these positions.

BACKGROUND

Employer filed its initial applications for alien labor certification and offered a wage of $8.47

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[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U .S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. 656.27(c).

[2] In this decision, "AF" refers specifically to the Ivan Corrado Ramos Appeal File as representative of the Appeal File in all of the appeals. A virtually identical application was filed for all six Aliens and the issues raised and dealt with by the CO (*i.e.*, NOF, FD, etc.,) in each case are identical.

[3] As noted in the Appeal File, Employer has documented that it currently employs a kitchen staff of ten Mexican Specialty Cooks, three Prep Cooks, four Dishwashers and seven Bussers.

[4] We are in receipt of Employer's November 18, 2002 motion which requests that BALCA order the Certifying Officer to transmit the case-file for a seventh Alien, for the same position, and consolidate the matter. In light of the above disposition, this motion is hereby denied.

per hour for a non-supervisory cook position with the Washington State Department of Labor, Employment Security Department (herein 'local') office. The local office notified Employer that the wage offer for this position, "Mexican Specialty Cook," was below the prevailing rate for the intended place of employment because the job duties did not indicate any supervisory duties. (AF 22-24) Specifically, Item 17 of ETA750 - Part A did not indicate any employees that any Alien worker would supervise.(AF 53-54) The local office assigned the SCA wage since there were no supervisory duties stated on Item 13 of the ETA 750A. Employer's attorney responded by amending #17 on the ETA 750A to show that, for all six cook positions, the worker would supervise one kitchen staff employee. The attorney further stated that since there is a supervisory component to the job position, it is not covered by the SCA prevailing wage and thus the Occupational Employment Statistics ("OES) survey was appropriate.

In the Spring of 2002, the Certifying Officer, stating his intent to deny the applications, found in a Notice of Findings (NOF) that the SCA wage of $13.97 per hour applied. Specifically, the CO found that the "job duties indicated on the application are Cook, thus, Service Contract Act (SCA) prevailing wage . . . is appropriate. " (AF 23) Furthermore, noting that Employer had amended duties for the position from non-supervisory to supervisory, the CO questioned whether the initial job offer of a "Mexican Specialty Cook" existed.[5] (AF 22-24) Employer was informed that it could "rebut these findings by (1) showing that there currently existed an unfilled job opening and (2) submitting countervailing evidence that the occupation is not subject to a wage determination under [the SCA] or (3) increase the salary offer to the scheduled prevailing wage of $13.97 per hour or (4) Retest the Labor Market at the level required by statute." (AF 22-24)

In rebuttal, Employer contested the wage finding, asserting that they were relying on the local DOL's practice and advice that if "Foreign Specialty Food Cooks" supervise other employees, the

[5] Specifically, the CO noted that because Employer has applied for certification for the same position on behalf of seven aliens, it appears that the application was modified to include supervision of one employee in Item 17 of the ETA 750A in order to avoid paying the applicable SCA wage. The CO found it highly suspicious that the SCA definition for Foreign Specialty Cook which "excludes food service supervisors and head cooks who exercise general supervision over kitchen activities" (AF 31) comes within reach of this situation so as to also exclude seven cooks who are only responsible for the supervision of one employee.

SCA wage rate does not apply and that the position is covered under the OES survey. (AF 9)[6] Employer argued that the OES wage should be used because the "SCA clearly does not accurately determine the prevailing wage for this position" due to the supervisory duties required for the position. (AF 20). Employer included an organizational chart of the restaurant which showed a need for ten cooks as evidence to support its assertion that there is an unfilled job opening which currently exists.

In a Supplementary NOF (SNOF), the CO did not accept Employer's rebuttal and urged Employer to correct deficiencies by either amending the wage and retesting the labor market or submitting substantiating documentation that SCA rates did not apply. In rebuttal to the SNOF, Employer submitted an organizational chart for the restaurant which listed current employees by job duty as proof of the existence of a job opportunity. Employer's attorney further argued that the Department of Labor should apply the same wage rate it recently approved for an identical occupation in the same location, and that prevailing wage determinations should be consistent among the State Employment Security Agencies. (AF 9) The CO, however, concluded that the SCA wage must apply. Employer failed to document that SCA wages did not apply and, because each application is adjudicated on its own merits, the recent prior approval of a labor certification with a lower prevailing wage was not persuasive.

DISCUSSION

The CO may challenge the employer's classification of a particular position. *Chams, Inc., d/b/a Dunkin' Donuts*, 1997-INA-40, 232 and 541 (Feb.15, 2000) (*en banc*), citing *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 15, 1988) (*en banc*). Employer is then required to provide sufficient evidence to rebut the re-classification. *Chams, Inc., supra*, citing *Theresa*

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[6] The OES is presumptively used for prevailing wages in non-DBA/SCA occupations for purposes of alien labor certification. *El Rio Grande*, 1998-INA-133 (Feb. 4, 2000) (*en banc*), citing General Administration Letters 2-98 and 2-99.

Vasquez, 1997-INA-531 (July 9, 1998). When reviewing a CO's decision to classify a job so as to fall under a SCA occupational definition, the Board primarily looks at whether the CO has made a reasonable classification. *El Rio Grande*, 1998-INA-133 (Feb. 4, 2000) (*en banc*).

In the instant cases, we are not persuaded that the local office or the CO incorrectly classified the occupation as one covered by the SCA. Although Employer amended the job description to include purported supervisory duties, it is apparent that this amendment was solely done for the purpose of attempting to remove the position from an SCA wage. More is required of Employer than simply stating that the position is supervisory and amending the ETA-750A.

In sum, the CO reasonably classified the positions at issue as covered by the SCA, and therefore correctly imposed a SCA wage determination to these applications. The Board has held that where an employer's rebuttal to a prevailing wage citation did not contain either an amended wage offer or indicate a willingness to readvertise at the prevailing rate if the CO rejected the employer's prevailing wage argument, the labor certification is properly denied. *Columbus Hospital*, 1995-INA-282 (Apr. 16, 1996); *Richard Clarke Associates*, 1990-INA-80 (May 13, 1992) (*en banc*) (An offer to readvertise subsequent to issuance of the FD is untimely and the employer must refile as "[t]he regulation contemplates that if an employer contests a prevailing wage determination but does not prevail, he will have to go back to the beginning of the process."). In the instant applications, Employer did not amend the wage offer or indicate a willingness to readvertise if its prevailing wage challenge was unsuccessful.

ORDER

IT IS ORDERED that the Certifying Officer denial of certification in the above-captioned cases is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

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.