

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 July 2003

BALCA Case No.: 2002-INA-141
ETA Case No.: P1999-CA-09453212/NO

In the Matter of:

FASHION INSTITUTE OF DESIGN & MERCHANDISING,
Employer,

on behalf of

VICTORIA G. CUARESMA,
Alien.

Appearance: Ronald H. Bonaparte, Esquire
Los Angeles, California
For Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Assistant Business Manager, Education."¹ The CO denied the application and Employer requested

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 record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

review pursuant to 20 C.F.R. §656.26.

STATEMENT OF THE CASE

On March 9, 1999, Employer, Fashion Institute of Design & Manufacturing (“Employer”), filed an application for labor certification to enable Victoria G. Cuaresma (“Alien”) to fill the position of "Assistant Business Manager, Education." (AF 48). The job duties were described as follows:

Directs control of the budget upon approval by the Board, including collection, custody, disbursement, accounting & auditing of all college funds. Duties involve recruiting, supervising & overseeing training of clerical staff, formulating w/Chief Financial Officer (Education) policies & procedures governing financial relations w/students; administering financial aspects of students loans w/Federal & State agencies; keeping records of financial transactions for establishment, using calculator & computer; verifying, allocating & posting details of business transactions to subsidiary accounts in journals or computer files from documents such as receipts, check stubs & computer printouts; preparing checks & records for accounts payable at \$25 million /yr; summarizing details in separate ledgers or computer files & transferring data to the general ledger using calculator or computer; reconciling & balancing accounts; may compile reports to show statistics, such as cash receipts & expenditures; accounts payable & receivable, profit & loss, & other items pertinent to operations of business; preparing & withholding Social Security & other tax; & may complete records to or through trial balance. Must be able to operate an AS 400, WP, EXCEL-Spreadsheets.

(AF 68). The rate of pay was \$36,000 per year. A Bachelor of Arts degree or equivalent in accounting and four years of experience in the job offered or in a related occupation were required.

The California Employment Development Department (“EDD”) notified Employer that the

prevailing wage was \$82,139.20 per year. (AF 142). Employer was requested to amend its wage offer or submit a statement that it would not amend its wage offer. Employer was advised that if it chose the latter option, it needed to submit documentation showing that the wage offered was the prevailing wage for the job in its area. In a "Declaration" signed by Employer's vice president, she listed the benefits provided by Employer, claiming that they totaled \$12,760.00 per year, and should be added to the base salary. (AF 124). In a letter dated June 22, 1999, counsel for Employer stated that while EDD had classified the position as Dictionary of Occupational Titles ("DOT") Section 160.167-058, "controller," the position was more akin to that of "budget officer," DOT Section 161.117-010, which has a minimum wage of \$44,408.00. Employer included a wage survey from the Alien Prevailing Wage Determination, Inc., showing a salary of \$46,745.00 per year for that position.

On August 1, 2001, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 28). Therein, it was noted that bonuses or other incentives, including housing or medical insurance benefits, provided in addition to the cash wage, could not be counted in determining whether the guaranteed basic wage offer equaled or exceeded the prevailing wage. (AF 29). Employer was informed that, at any rate, the incentive needed to be offered and advertised. The CO also determined that the wage being offered was below the prevailing wage of \$82,139.20 per year. Employer was advised that the surveys it had submitted were for the positions of "budget officer," and "budget analyst," while the position at issue was that of "controller." Therefore, neither of Employer's surveys were applicable. Employer was directed to either (1) guarantee payment of the prevailing wage and retest the labor market; or (2) contest the prevailing wage finding by submitting rebuttal establishing that the wage determination was in error and that Employer's wage offer was at or above the prevailing wage. (AF 29).

Counsel for Employer submitted rebuttal on August 23, 2001. (AF 6). Counsel argued that even assuming that the job was that of controller, Employer still disputed the prevailing wage determination, because according to the Department of Labor's OES/SOC Wages, a Level I controller's rate of pay was \$45,989.00, not \$82,139.20, which would fit a Level II controller. (AF 6-7). Employer stated that it would be willing to pay \$48,760.00 per year, which sum would include

base pay and benefits. Included with the rebuttal was a Declaration from Employer's vice president, wherein she stated as follows: "The duties of this labor clearance application is a controller for management of the accounts payable, working with two clerks. This is a Level II position." (AF 22). Employer indicated its willingness to amend the job offer to show 2-4 years of experience, which would render this a Level I position, and included a print-out of the OES/SOC wage listing with its rebuttal.

A Final Determination was issued on October 9, 2001. (AF 3). The CO determined that Employer had failed to satisfactorily rebut the NOF. Specifically, the CO pointed out that while Employer had offered to amend the experience requirements to 2-4 years, instead of the 4 years originally requested, this had not been requested of it, nor had Employer been requested to challenge the job title as determined by the EDD. The CO noted that the prevailing wage was determined by the local Employment Service Office, using wage information as required by 20 C.F.R. §656.40, and based on information submitted with the application. The prevailing wage was also determined based on the job description and the SVP² of the application as originally submitted, the appropriate SVP being 8 (4 to 10 years). The CO found that the benefits provided by Employer were not unique, and Employer had failed to show that they were not common to the comparable jobs upon which the prevailing wage was based. Given that Employer had failed to establish that the CO's determination was in error and that its wage offer was at or above the prevailing wage, Employer remained in violation of 20 C.F.R. 656.20(c)(3). (AF 4-5).

On November 12, 2001, Employer requested review of the denial of certification by the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 1).

²"SVP" denotes the specific vocational preparation time required by a typical worker to learn the techniques, acquire the information and develop the facility needed for average performance of the position. The training may be any combination of vocational education, apprenticeship training, in-plant training, on-the-job training or essential experience in other jobs. An SVP of 8 denotes over 4 years up to and including 10 years.

DISCUSSION

20 C.F.R. §656.40(a)(2)(i) provides that 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 shall be:

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...

In its request for review, Employer cites *Mrs. Carlene Mobley*, 1993-INA-76 (Jun. 24, 1994) to argue that the CO erred in failing to state how he reached his prevailing wage or what source he utilized, contending that this should be grounds for vacating the decision. In *Mobley*, *supra*, labor certification was found to have been properly denied where the CO indicated the basis for his wage survey, and gave serious consideration to the employer's alternate survey, but found it lacking for several reasons. In the instant case, the CO indicated that he utilized the local agency's wage survey, and after considering Employer's surveys, found them to be lacking because they were based on inappropriate job categories. This is not a basis for vacating the CO's decision, as Employer suggests.

Employer further argues that EDD made a mistake in its categorization of the position as a Level II as opposed to a Level I position, inasmuch as Employer advised the CO that the position was a Level I, and not a Level II position. Employer's argument in this respect is not convincing given that Employer itself concedes, by its belated attempt to lower the experience requirement in order to render the position a Level I position, that the appropriate classification for the position as described in the application is not Level I.

With regard to the fringe benefits, Employer contends that the benefits, which included medical, dental, vacation pay and a 401K plan, were unique, and it was these benefits which made the position so attractive. Employer's assertions in this respect, however, are undocumented. No documentation was provided to establish that the benefits being provided herein are in any way unique and "not common to the comparable jobs upon which the prevailing wage is based." *University Physicians & Surgeons*, 1995-INA-237 (Dec. 19, 1996).³

Employer also contends that, according to *Philip Maxwell and Julia Martelli*, 1993-INA-522 (Sept. 23, 1994), it should be allowed to recruit according to the OES mandated wage for a Level I position. In that case, the CO's survey and Employer's surveys were found to be faulty, and a remand was found to be appropriate. Such is not the case here, where the CO's wage determination appears to be accurate.

At issue is the correct job title. The CO classified the position as that of a controller, who is described in the DOT, in pertinent part, as one who

Directs financial activities of organization or subdivision of organization: Prepares using computer or calculator, or directs preparation of, reports which summarize and forecast company business activity and financial position in areas of income, expenses, and earnings, based on past, present and expected operations....May manage accounting department. May direct preparation of budgets. May prepare reports required by regulatory agencies.

DOT 160.167-058. By contrast, the DOT, in pertinent part, describes a budget officer as one who

Directs and coordinates activities of personnel responsible for formulation, monitoring and presentation of budgets for controlling funds to implement program objectives of

³Given that this decision is based on other grounds, however, this topic will not be detailed any further.

public and private organizations: Directs compilation of data based on statistical studies and analyses of past and current years to prepare budgets and to justify funds requested. Correlates appropriations of specific programs with appropriations for divisional programs and includes items for emergency funds.

DOT 161.117-010. The position listed in the ETA 750A is more akin to a controller than a budget officer. The job requires more than budget formulation and presentation, which are listed as the primary duties of a budget officer. The position requires the employee to direct control of the budget and to be more actively involved in the financial activities of the organization, as would be expected of a controller.

When challenging a CO's prevailing wage determination, an employer bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage. *PPX Enterprises, Inc.*, 1988-INA-25 (May 31, 1989)(*en banc*). Labor certification is properly denied where an employer fails to pay the prevailing wage as determined by the CO or, in the alternative, establishes that the lower wage rate offered by the employer is the proper wage rate. *John Lehne & Sons*, 1989-INA-267 (May 1, 1992)(*en banc*).

In the instant case, Employer provided two surveys which were not applicable to the position herein. Employer concedes in its rebuttal that the position is that of controller, but then proceeds to claim that it is a Level I position, not a Level II position – but the Declaration of Employer's vice president describes the job as a Level II position. Even assuming, arguendo, that this was a typographical error, and she meant to state the position was a Level I position, the fact that the job as described was more than a Level I position is made apparent by Employer's willingness to amend the job offer to lower the number of years of experience necessary, in order to make the position Level I. This was not an option given in the NOF. The job description and experience requirements were clearly set forth in the ETA750A, and based upon same, it was determined that the position was that of a controller with a prevailing wage of \$82,139.20 per year, given the years of experience, education and training required.

An employer must offer a wage that is proper for the job described. *Arlen Real Estate Development*, 1988-INA-384 (April 18, 1990). Similarly, an employer cannot change the title of the job so that the wage it is offering will appear to be proper. *Western Bagel Making Corp.*, 1990-INA-255 (January 3, 1991). Employer, in effect, concedes that its wage is incorrect for the job as listed in its application. It has attempted to correct the deficiency by changing the experience requirement. The issue herein, however, is whether Employer offered the prevailing wage for the job advertised. It did not. Labor certification was properly denied, and the following order shall issue.

ORDER

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

Entered at the direction of the panel by:

A

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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review 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 North
Washington, D.C., 20001-8002.

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