

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 22 August 2003

BALCA Case No. 2002-INA-194
ETA Case No. P2000-CA-09498103/ML

In the Matter of:

FALL RIVER NURSERY,
Employer,

on behalf of:

PEDRO RUIZ-RAMIREZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: H. David Schmerin
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Pedro Ruiz-Ramirez (“Alien”) filed by Fall River Nursery (“Employer”) pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the “Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based 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 of the parties.

STATEMENT OF THE CASE

On May 22, 1999, Employer filed an application for labor certification on behalf of the Alien for the position of Farm Equipment Mechanic. (AF 11-12).

On January 10, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that Employer's wage offer was below the prevailing wage for the occupation. (AF 7-9).

The CO found that Employer's wage offer of \$10.00 per hour was below the prevailing wage offer of \$16.21 per hour, as determined by the local employment agency. The CO noted that Employer was informed by the agency of this deficiency, and Employer challenged the prevailing wage finding, but did so with a wage survey that did not satisfy the established wage survey criteria. The CO also noted that Employer's survey included employers outside Employer's geographical area and did not distinguish between experienced and entry level employees. The CO advised Employer that it could cure the deficiency by increasing the wage offer to at least 95% of the prevailing wage and re-test the labor market, or it could contest the prevailing wage determination.

On February 12, 2002, Employer submitted its Rebuttal (AF 5-6) where it stated disagreement with the prevailing wage determination. Employer asserted that its wage offer of \$10.00 an hour was within 5% of the prevailing wage of its geographical area. Employer also asserted that the survey Employer submitted to the state agency was valid because it surveyed the majority, if not all the farmers of the area, as the other concerns in the area are cattle ranchers, not farmers.

On March 19, 2002, the CO issued a Final Determination (FD) denying certification. (AF 3-4). The CO was unconvinced by Employer's rebuttal argument indicating that it could not find additional employers to survey. The CO noted that the state agency followed the Technical Assistance Guide in reaching the prevailing wage to gain an adequate sample. The CO concluded that Employer did not successfully rebut the state agency's wage determination and denied the application.

On April 5, 2002 Employer filed its Request for Review. (AF 1-2). Employer alleged that the CO did not overcome Employer's survey by any logical formula. Employer asserted that there are only five farms besides Employer in its geographical area. Since Employer surveyed all of the five farms, it surveyed 100% of the farms. Consequently, its sample survey could not be too small. Therefore, the CO erred in finding that Employer's wage offer was under the prevailing wage for Employer's area of employment.

The AF does not reflect that a brief was filed.

DISCUSSION

Under 20 C.F.R. § 656.20(c)(2), the employer is required to offer a wage that equals or exceeds the prevailing wage determined under 20 C.F.R. § 656.40. That regulation states that the prevailing wage for occupations not subject to the Davis-Bacon Act, as in the instant case, must be determined by the average wage paid to workers similarly employed in the area of intended employment. The purpose of establishing a prevailing wage is to keep wages for U.S. workers from being depressed by alien labor in a particular geographic area. *Hathaway Children's Services*, 1991-INA-388 (Feb. 4, 1994) (*en banc*).

Employer was notified by the state agency that its wage offer was below the prevailing wage, and instead of raising its wage offer, Employer challenged the prevailing wage determination with its own survey. When challenging the CO's

prevailing wage determination, the employer's burden is to establish both (1) that the CO's determination is in error and (2) 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*).

What constitutes a persuasive survey depends on many facts. For example, a survey which relies on salaries paid by competitors, but does not provide documentation by the competitors, may not be persuasive. *Crest Aviation*, 1988-INA-365 (Jun. 23, 1989). The rejection of an employer's survey was affirmed where the state agency's survey was much larger and was a more statistically valid determination of the prevailing wage for workers similarly employed in the area of intended employment. *Victoria Mihich*, 1992-INA-200 (Apr. 12, 1993). The employer must provide sufficient background information about its survey to allow a test of adequacy of the sample. A survey that is too narrow or provides insufficient information is not persuasive. *Zaith Manufacturing and Chemical Corp.*, 1990-INA-211 (May 31, 1991).

Employer's survey consists of eight boilerplate letters from competitors indicating a range of hourly wages that do not exceed \$ 11.00 an hour. (AF 16-23). Although the state agency advised Employer of the essential components of a survey (*see* AF 28), Employer's survey is missing critical information. Four of the elements required by the state agency were not included in Employer's survey. Specifically, the survey did not include a clear definition of the experience levels. The survey did not indicate the exact wage for each employee at each experience level. In fact, the salary ranges did not specify any experience level. The survey did not reflect the number of employees at each experience level for each employer, and the survey did not include a job description. The job description provided in the letters was "must be qualified in all aspects of equipment repair from the smallest farm machines to the largest Harvesting Combines". That definition is too broad and general to be helpful.

Additionally, the CO noted that Employer's survey was flawed because it only included five employers in Employer's geographical area. Employer countered that there

were only five other farms in the area, and the other concerns were cattle ranches.¹ However, Employer's assertions are unsupported by the documents in the Appeal File. Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988).

An employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). If an employer limits its advocacy to making unsupported assertions, it does a disservice to its cause, as it fails to meet its burden of proof.²

Where the employer is notified that its job offer is below the prevailing wage, but fails to either raise the wage to the prevailing wage or to justify the lower wage it is offering, certification is properly denied. *Editions Erebouni*, 1990-INA-283 (Dec. 20, 1991). Since the Employer did not raise its wage offer and failed to establish that the CO's determination is in error, it has failed to sustain its burden of proof. Accordingly, the record is sufficient to support the CO's denial of alien labor.

¹ Although some of the machinery used by the farmers is unique to the farmers, some equipment used by the cattle ranchers requires similar mechanical knowledge. Therefore, Employer should have included those cattle ranchers in its survey. If the cattle ranchers never use a Farm Equipment Mechanic, then Employer should have documented that fact. It is Employer's burden to demonstrate that the application should be granted.

² The regulation at 20 C.F.R § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the Notice of Findings and that all findings not rebutted shall be deemed admitted. On this basis, this Board has held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Further, failure to address a deficiency noted in the Notice of Findings supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993); *Ray Department Stores, Inc.*, 1993-INA-183 (Sept. 23, 1994). This failure alone fully justifies a CO's Final Determination of denial. The CO in the NOF found that the survey was flawed because it failed to distinguish between entry level mechanics and experienced mechanics. Employer's failure to address that issue in its Rebuttal is another ground for denial.

ORDER

The CO's denial of labor certification in this matter 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 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, NW, 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.