



Issue Date: 03 September 2003

BALCA Case No. 2003-INA-82
ETA Case No. P2001-CA-09512670/ML

In the Matter of:

TRUE LOVE PRESBYTERIAN CHURCH,

Employer,

on behalf of

MI-NA KIM,

Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Sanford B. Reback
Los Angeles, California
For Employer and Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Mi-Na Kim (“Alien”) filed by the True Love Presbyterian Church (“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 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 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 March 16, 2001, Employer filed an application for labor certification on behalf of the Alien for the position of Music Director. (AF 15). The job requirements included two years of college with a major field of study in Music, and four years of experience in the job offered. (AF 15). A special requirement of the ability to play the piano was listed, and the job duties made it clear that proficiency in the Korean language would be necessary, although it was not listed as an express job requirement in the ETA Form 750A, Item 15 box. (AF 15). The rate of pay was listed as \$1880 per month. (AF 15). The job was categorized on the ETA 750A under the Standard Occupational Classification (“SOC”) Code 27-2041, “Music Directors and Composers.” (AF 15).

On October 10, 2001, the state employment service sent Employer an assessment notice that, *inter alia*, informed Employer that the prevailing wage had been found to be \$2890.00 per month under the Occupational Employment Statistics (“OES”) wage survey based on the SOC Code 27-2041, Music Directors. (AF 25-27). The state employment service provided information on how Employer could proceed if it chose to contest the wage determination with its own survey.

On September 19, 2001, Employer agreed to amend the wage offer to \$2750 per month, applying the five percent rule.¹ (AF 18).

On October 10, 2001, the state employment service sent Employer an assessment notice that informed Employer that, after further reflection, the prevailing wage had been found to be \$4359.16 per month under the OES wage survey based on the SOC Code 27-2041, Music Directors & Composers. (AF 23-24). The state employment service indicated that this re-assessment was based on the conclusion that the job offered required a “Level 2” wage. (AF 24). The state employment service again provided

¹ Section 656.40(a)(2)(i) provides that the wage offered only needs to be within five percent of the average rate of wages.

information on how Employer could proceed if it chose to contest the wage determination with its own survey.

On November 15, 2001, Employer responded, arguing that “[i]t is quite obvious that the title of Music Directors and Composers relate[s] to the entertainment industry which would require a much higher wage than a neighborhood church.” (AF 21).

On December 14, 2001, the state employment service referred the case to the CO, noting that the job had been assessed as Level 2 because Employer was requiring four years of experience, and therefore this was not an entry level job. (AF 14). The case was referred to the CO at this stage because Employer’s response to the prevailing wage assessment neither agreed to amend the wage to Level 2 nor provided an alternative survey. (AF 14).

The CO issued a Notice of Findings on October 15, 2002, proposing to deny certification under 20 C.F.R. § 656.20(c)(2) based on Employer’s failure to amend the wage offer. (AF 11-13). The CO noted that although Employer argued that that SOC title “Music Directors and Composers” related to the entertainment industry and not a neighborhood church, it had provided no documentation to support that claim. (AF 12). The CO provided Employer with the opportunity to either amend the wage or to document that its wage offer was within five percent of the prevailing wage for workers similarly employed in the area of intended employment. (AF 12). The CO gave no instructions on how Employer should provide such documentation.

On November 15, 2002, Employer submitted a rebuttal. (AF 4-10). Employer argued that the prevailing wage should be based on a comparison to churches rather than private sector employers, and presented its own survey of salaries of church music directors of ten other churches within the area. (AF 4). Employer’s survey found that the average salary for a person having an average experience level of two to five years is \$1310 per month – which Employer observed is much lower than its offer of \$2750 per

month. Employer provided the names and addresses of the churches contacted and the years of experience of the person presently holding the job in those churches. (AF 6-7).

The CO issued a Final Determination on December 12, 2002 denying labor certification. (AF 2-3). The CO's reasoning for denying certification was:

Your survey does not meet the survey criteria stated in the Technical Assistance Guide: you don't give the job description and requirements of each position and the survey covers three different job markets. Your wage offer is non-compliant with regulations.

(AF 3).

Employer requested review by this Board by letter dated January 6, 2003. (AF 1). Employer argued that "churches, like universities, have their own salary structures since they are non-profit organizations which do not fit the guide lines of the USDL Technical assistance guide."

Employer submitted a brief to the Board, which was received on April 1, 2003. Employer observed that the Final Determination was based on Employer's purported failure to give the job description of the persons from the other churches surveyed, but that, in fact, it had clearly stated that "the employer has contacted 10 other churches within the area and has come up with the following statistics, regarding the salary of church music directors." (Employer's brief at 1, emphasis as in original). In regard to the finding in the Final Determination that the survey improperly covered three different job markets, Employer observed that not every church has a music director and it is difficult to find ten churches large enough to conduct such a survey. Employer also observed that eight of the ten churches surveyed were within Los Angeles County, one church was in Orange County, and one within Riverside County, both of which adjoin Los Angeles County. Employer again argued that non-profit churches' salary structures are not comparable to union or industry norms, and observed that none of the churches

surveyed paid the wage proffered by DOL, as it is an unrealistic wage. Employer asserted the wage quoted by the state employment office was a “Hollywood” wage.

The CO did not file a brief on appeal.

DISCUSSION

Under § 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under § 656.40. Section 656.40 directs that where the occupation is not subject to a wage determination under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage determination is governed by § 656.40(a)(2)(i). That section provides that 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

See Seibel & Stern, 1990-INA-86, 116 to 129, 144 to 168 (Apr. 26, 1990).

The longstanding standard applied by BALCA is that “[a]n employer seeking to challenge a prevailing wage determination...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.*, [19]88-INA-25 (May 31, 1989) (*en banc*). The Board recognized in *El Rio Grande*, 1998-INA-133 (Feb. 4, 2000) (*en banc*), that the OES implementation described in GAL [General Administration Letter] 2-98, as a practical matter, modified the *PPX Enterprises* requirement that an employer both demonstrate a deficiency in the SESA wage survey and demonstrate the correctness of its own survey. Under the GAL 2-98 process, “[a]n employer who submits a published or private survey that meets the criteria in GAL 2-98 will be allowed to use that survey for

the application [for a non-DBA/SCA covered occupation, without having to establish that the SESA survey is invalid]." *El Rio Grande*, 1998-INA-133, slip op. at n.6, quoting Sheinfeld, *Prevailing Wage Determinations Under GAL 2-98*, 1080 PLI/Corp 9 at n.3 (AILA 1998).

Validity of Employer's Survey

We find, as a matter of law, that Employer's survey was deficient under the Board's *en banc* holding in *Hathaway Childrens Services*, 1991-INA-388 (Feb. 4, 1994)(*en banc*). In *Hathaway*, the Board held that a non-profit agency must pay the prevailing wage rate for all maintenance workers in the area of intended employment rather than the prevailing rate offered only by other non-profit organizations. The Board found that:

[t]he underlying purpose of establishing a prevailing wage rate is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality. It follows that the term "similarly employed" does not refer to the nature of the Employer's business as such; on the contrary, it must be determined on the basis of similarity of the skills and knowledge required for performance of the job offered.

In *Hathaway*, the Board expressly reversed the Board's prior holding in *Tuskegee University*, 1987-INA-561 (Feb. 23, 1988)(*en banc*), which permitted the nature of the business or institution as, *inter alia*, secular or religious to be taken in consideration as factors to be evaluated in determining whether the job are substantially comparable.² Thus, we hold that Employer's survey, being limited to other churches, is not sufficient to

² The Department of Labor issued a regulatory change by Notice and Comment rulemaking, expressly addressing the impact of the *Hathaway* decision on researchers employed by colleges and universities, college and university operated federally funded research and development centers, and certain federal agencies. 63 Fed. Reg. 13756 (1998). Those regulatory changes permit prevailing wages for such entities to be assessed under a separate system. No regulatory changes have been implemented, however, for other occupations or for religious or non-profit organizations.

rebut the CO's prevailing wage determination as a matter of law, and we reject Employer's argument that music directors in the private sector cannot be compared to church music directors to the extent that the argument is based solely on a secular versus non-secular distinction.

Because the survey was deficient *ab initio* under *Hathaway*, and because we find below that Employer was entitled to use the Music Director Level 1 wage determination, it is not necessary to review the precise grounds stated in the Final Determination for rejection of Employer's rebuttal survey.

Level 1 v. Level 2 Music Director

Because of the way the issues were framed below, the central issue in this case has become obscured. However, we view the problem as this. Employer was willing to accept a Level 1 prevailing wage determination under the OES-SOC Music Director classification. When the prevailing wage determination was bumped up to OES-SOC Music Director & Composers Level 2, however, Employer objected. In essence, its objection is that the OES-SOC Music Director & Composer Level 2 wage is lumping together church music directors with Hollywood conductors, music directors, and composers, which is an irrational comparison.

Hathaway establishes that wage surveys may not be limited to non-secular or non-profit or educational systems merely because of the nature of the employer's organization. *Hathaway*, however, provides that surveys must be based on similarity of the skills and knowledge required for performance of the job offered and the surveyed positions. The job description stated in the ETA 750A for the instant application is:

Will teach Korean music and song to individuals and choir group in order that they may retain or be instructed as to their cultural heritage. Church has over 130 members all of whom are Korean and most of whom do not speak English. All instruction will be given in the Korean Language.

Will direct choral group to achieve desired efforts, such as tonal and harmonic balance, dynamics, rhythm [sic], tempo and shading utilizing knowledge of music theory. Preschool children will be given instructions from 11AM to 3PM. School age children will be given instruction from 4PM to 8PM. It is also estimated occupant will spend 85% of the time utilizing the Korean language. Translation is not part of the occupation.

(AF 15). This job description is close to the Dictionary of Occupational Titles (“DOT”) job description of “Choral Director,” which under the SOC/DOT Crosswalk is now categorized under the SOC designation of “27-2041 Music directors and composers.”³

The SOC compressed many of the job titles that were formerly set out in the DOT. Thus, also included in the SOC “Music directors and composers” job title are job titles that under the DOT were designated as, for example, orchestra and band conductors; music director for motion pictures, radio and television; and composers. To compare the salary of a church music director with that of orchestra conductors, entertainment industry music directors and composers borders on the ridiculous, especially in this case given that the relevant locality includes the Hollywood entertainment community. Undoubtedly some churches may have quite sophisticated requirements for music directors, but common sense suggests that the skills and knowledge required to teach music and song to church members (most of whom in Employer’s case would be children) cannot be compared to the skills and knowledge required in the sophisticated professions which the SOC-OES survey system has lumped together for wage survey purposes. The local employment service, and evidently the CO, have taken the position that because Employer is requiring four years of experience, this is a Level 2 position. We conclude, however, that the instant application is more akin to the situation recognized in GAL 2-98 relating to advanced degrees required for entry into an occupation, which are slotted at Level 1 unless there are other requirements in the job offer which require Level 2 skills. GAL 2-98 at ¶ II. H. Here, the skills required for a

³ A discussion of the use of DOT occupational codes and the OES/SOC crosswalk system may be found in GAL 2-98 at ¶ II. D.

church choir director are simply not comparable to the skills required for an orchestra conductor, studio music director, or soundtrack composer. Thus, we find that the prevailing wage for Music Director, Level 1 is appropriate under the circumstances of this case.

Potentially, an alternative OES-SOC survey title might be even more appropriate under the facts of the instant application. For example, we note that the DOT title “152.021-010 TEACHER, MUSIC (education) alternate titles: music instructor” would rationally fit Employer’s job description, and that the crosswalk for this title is to “SOC 25-3021 Self enrichment education teachers,” which might provide a more sensible wage rate for Employer’s position. However, Employer clearly stated its willingness to accept the Music Director, Level 1 wage, which we have found is appropriate under the circumstances of this case. This application has been pending since March of 2001 without the supervised state level recruitment having even begun. Thus, we decline to remand this case for any additional findings on the correct prevailing wage, and rather find that Employer in this case will be permitted to use the Music Director, Level 1 wage rate it already accepted.

Prevailing wage determinations are sometimes more of an art than a science. In this case we have determined not to remand for a more precise wage determination because it is not clear that one would be available under the OES-SOC system and because the equities of this case indicate that the matter needs to proceed without additional delay.⁴ The facts of this case are unusual and the issues were poorly defined. Thus, we wish to emphasize that decision in this matter is limited to the precise circumstances of this particular case. No broad legal principles should be inferred from this decision.

⁴ Compare *Millershor, Inc.*, 2000-INA-288 (Jan. 8, 2002) (remand based, *inter alia*, on the circumstance that the CO never provided notice to the Employer that it could dispute a Level 2 classification by submitting evidence to show the skill level of its job opening).

ORDER

The CO's denial of labor certification in this matter is hereby **REVERSED** and this matter **REMANDED** for further processing consistent with the above.

For the Panel

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JOHN M. VITTON
Chief 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, 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.