

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 10 December 2007**

**BALCA Case No.: 2007-INA-00008**  
ETA Case No.: P-05112-68558

*In the Matter of:*

**PLAZA EXPRESS CAR & LIMO SERVICE,**  
*Employer,*

*on behalf of*

**ESSAM HUSSEIN SOLTAN,**  
*Alien.*

Certifying Officer: Barbara Shelly  
Philadelphia Backlog Elimination Center

Appearance: Mohamed Algendi  
President, *pro se* for the Employer

Before: **Chapman, Wood and Vittone**  
Administrative Law Judges

**JOHN M. VITTON**  
Chief Administrative Law Judge

**DECISION AND ORDER**

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. 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.”).<sup>1</sup>

### **STATEMENT OF THE CASE**

The Employer is a car and limousine service. On April 30, 2001, it filed an application for labor certification to fill the position of “Manager.” (AF 30-31). The application stated a salary of \$24,000.00 per year. Two years of experience in the job offered was required. The job duties were stated to be:

HANDLE ACCOUNTS; CREATE/MAINTAIN WORK SCHEDULES;  
HANDLE EMPLOYEE PROBLEMS; HANDLE MAIL, INSURANCE  
AND PHONE CALLS.

The application indicated that the Manager would supervise 75 employees.

On August 2, 2006, the CO issued a Notice of Findings, (“NOF”), proposing to deny certification.<sup>2</sup> (AF 24). The CO found that the job should have been classified for a Level Two Manager, Office in New York, New York, which had a prevailing wage of \$108,306.00 per year, under the 2002 Occupational Employment Statistics (OES) Wage Survey. The Employer was advised that, as rebuttal, it could increase the salary offer to equal at least 95% of the prevailing rate and offer to re-advertise, or it could submit alternative wage data to establish that the wage offered was the prevailing wage.

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<sup>1</sup> This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

<sup>2</sup> The NOF raised an additional issue which was successfully rebutted and, therefore, will not be detailed herein.

The Employer submitted rebuttal dated September 1, 2006. (AF 22). The Employer argued that the annual salary of \$108,306.00 did not correspond to the position of “Manager” for the application at issue. Rather, the Employer utilized O\*Net Code 53-1031.00 and OES/SOC Code 53-1031, for First-Line Supervisors/Managers for Transportation, Level 1, to set the wage. The Employer contended that the salary should be for a Level 1 position because it did not have any educational requirements and the duties were very basic managerial duties, not requiring the employee to hold any special expertise or skills. The Employer stated it was attaching a copy of the OES/SOC wage survey and argued that this wage survey accurately described the duties involved in its application and should apply. The Appeal File contains a print out of an all-industry OES/SOC Wage Survey for O\*Net Code 53-1031, First Line Supervisor/Managers of Transportation and Material Moving Machines and Vehicle Operations. This survey shows a wage rate of \$25,210 annually for a Level I position, and \$43,992 for a Level 2 position. (AF 35).

The CO issued a Final Determination denying certification on October 4, 2006. (AF 19). The CO rejected the Employer’s rebuttal because it had not offered to increase the salary offer or submitted an alternative wage survey. The CO noted that the Employer had argued that the wages being offered were appropriate in light of its job opportunity as a Level I position and not a Level II position. The CO found no information in Employer’s rebuttal which would justify labeling the position a Level I position. The CO noted that the job description required the responsibility of supervising 75 employees. The CO found that this fact, coupled with the job duties, raised the position to a Level II and best fit the duties of a Manager, Office 169.167-034.

The Employer filed a request for review dated November 5, 2006. (AF 8). The Employer attached an OES Industry-Specific Occupational Employment and Wage Estimate, indicating that “I now realize from the notice of final determination...that the category of office manager in NY, NY...is vastly different...[c]ompared to the offered

position....” The Employer also stated that its attorney had made many errors and was no longer representing the Alien. The Employer’s request was treated as a request for reconsideration and denied by the CO on November 14, 2006, on the basis that it did not raise any issues which could not have been addressed in the rebuttal. (AF 9).

On December 10, 2006, the Employer requested review of the reconsideration denial, and this matter was then forwarded to the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). (AF 1). In its December 10, 2006 Request for Review, the Employer argued that it requested a prevailing wage determination from the New York State Department of Labor on November 1, 2006 and that that information was received on December 7, 2006. The Employer attached the survey to its Request for Review. Also attached was the Alien’s 2005 tax return. The Employer requested that the documentation be reviewed.

In its Statement of Position, submitted on March 17, 2007, the Employer argued that it had done its best to clarify the confusion over the description of the category in which the title of “Manager” was based by the Department of Labor in the National Survey OES 2002. The Employer argued that this job description did not apply to it, as it was a local car service engaging only about 40 independent drivers rather than 75 employees.

## **DISCUSSION**

Pursuant to 20 C.F.R. § 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under Section 656.40. Section 656.40 provides that, with the exception of occupations subject to the Davis Bacon or Service Contract Act, the prevailing wage is to be determined by the average wage paid to workers similarly employed in the area of intended employment. Generally, 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*).

In the instant case, however, the Employer's rebuttal was not based on a challenge to the accuracy of the calculation of the wage determination, but rather the CO's decision to categorize the position as a Office, Manager, DOT Code 169.167-034, rather than First-Line Supervisors/Managers for Transportation, Level 1, under O\*Net Code 53-1031.00.

Although the CO addressed in the Final Determination the issue of whether the position should have been categorized as a Level 1 or a Level 2 position, she did not address the question of whether the proper classification of the position was as an "Office, Manager" or as a "First Line Supervisor/Manager for Transportation." Given the great difference in prevailing wages for these job classifications, the classification issue was potentially significant. Nonetheless, we find that the CO was on the right track in questioning the Employer's contention that the position was only a Level 1 rather than a Level 2 position.

For purposes of deciding this appeal, we will assume *arguendo* that the Employer's prevailing wage determination for a "First-Line Supervisor/Manager for Transportation" was the correct classification of the position.<sup>3</sup> However, we cannot agree that the position should have been classified as a Level 1 position. Rather, the Employer required two years of experience in the job offered, suggesting that this is not an entry

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<sup>3</sup> Technically, the pre-PERMS regulations contemplate job classifications under the Dictionary of Occupational Titles rather than O\*Net. Based on our disposition of this matter, however, it is not necessary to determine which DOT equivalent job description would fit the Employer's O\*Net slotting. Rather, we are giving the Employer the benefit of a doubt that the O\*Net classification led to the correct prevailing wage determination for the job offered.

level position.<sup>4</sup> Moreover, regardless of whether the manager will supervise 75 or 40 employees, the level of supervision also suggests that the position is properly classified as a Level 2 position. Thus, even if we found that the CO improperly reclassified the position as an "Office, Manager," we nonetheless agree with the CO that the job is a Level 2 rather than Level 1 position, and therefore should have, at the minimum, used the Level 2 wage determination for a "First-Line Supervisor/Manager" job offer (\$43,992). The Employer's \$24,000 wage offer was well below that amount. Accordingly, we find that labor certification was properly denied.

On appeal, the Employer argues, in essence, that its attorney mishandled the application, and that the actual classification should have been for a Dispatcher, O\*Net Code 43-5032.00, which has a prevailing wage of \$34,614.00 as of November 1, 2006. (*See* AF 6). The Board's review, however, is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or

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<sup>4</sup> See the definitions for Level 1 and Level 2 positions found in General Administration Letter No. 02-098 ("GAL 2-98"), to wit:

1. Level I

Beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgement and provide experience and familiarization with the employer's methods, practices and programs. They may assist staff performing tasks requiring skills equivalent to a level II and may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Work is closely monitored and reviewed for accuracy.

2. Level II

Fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgement and independent evaluation, selection, modification and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They may supervise or provide direction to staff performing tasks requiring skills equivalent to a level 1. These employees receive only technical guidance and their work is reviewed for the application of sound judgement and effectiveness in meeting the establishment's procedures and expectations.

legal briefs. 20 C.F.R. § 656.27(c). *See also* 20 C.F.R. § 656.26(b)(4). Thus, evidence or argument first submitted with the request for review will not be considered by the Board. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Furthermore, even if this new information was considered, it only further supports the denial of labor certification because it indicates that the job was for a dispatcher rather than a manager. Moreover, even if we accepted the contention that the dispatcher classification should have been used, the Employer's documentation fails to show that the prevailing wage offer of \$24,000 was correct.

The Employer failed to establish that the wage it is offering meets or exceeds the prevailing wage for the position at issue. Accordingly, we find that certification was properly denied.

### **ORDER**

The Final Determination of the Certifying Officer denying labor certification is hereby **AFFIRMED**.

For the panel:

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

**PAMELA LAKES WOOD, Administrative Law Judge, dissenting.**

Although I agree with much of the panel's analysis, and specifically the notion that the job involved here was appropriately classified as Level 2, it is clear that the job is not an office manager position commanding a salary of \$108,206, as maintained by the CO. Rather, it would be more appropriately classified either as "First-Line Supervisor/Manager for Transportation" or "Dispatcher," for which the salaries ranged from the mid 20's for Level 1 to mid 40's for Level 2 during the pertinent period. The

misclassification of the job, in my view, warrants a remand to the CO for a determination of the appropriate job title and salary, after which the Employer should be given the opportunity to readvertise. As I would therefore remand this case for further proceedings, I respectfully dissent.

**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, NW Suite 400  
Washington, DC 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.