



DATE: DEC 29 1988
CASE NO. 87-INA-646

IN THE MATTER OF

LAS CAZUELAS NUEVAS,
Employer

on behalf of

SERGIO AVILA GALINDO,
Alien

William N. Siebert, Esq.
Santa Monica, CA
For the Employer

BEFORE: Litt, Chief Judge, Vittone, Deputy Chief Judge, and Brenner, DeGregorio, Tureck,
Guill and Schoenfeld, Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

¹All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On May 8, 1986, the Employer filed an application for alien employment certification to enable the Alien to fill the occupation of Mexican food cook. Two years experience and a willingness to work overtime five to eight hours a week with Monday and Tuesday off were required.

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer on November 28, 1986 (AF 6-7), and the Employer's filing of its rebuttal on December 15, 1986 (AF 4-5), the Final Determination denying certification was issued on April 17, 1987 (AF 2-3).

Discussion

Employer, a Mexican restaurant in Rancho Mirage, California, seeks certification of Sergio Avila Galindo for the position of Mexican food cook. On its application, Employer stated its wage offer of \$7.25 an hour for the position. While processing Employer's application, the State Employment Development Department ("EDD") notified Employer that its wage offer was below the prevailing hourly wage of \$9.70 as determined by the Executive Compensation Service survey for a level 1 cook (see AF 26; see also AF 3). In response, Employer submitted its own detailed survey dated July 14, 1986 of six local Mexican restaurants, which included the name, address, telephone number, manager, and wage paid by each restaurant (AF 24). The average wage obtained from this survey was \$5.67 an hour, well below the offered wage. In a July 14, 1986 cover letter attached to the survey and signed by employer's owner, employer stated to the Department of Labor that "the job description of the ETA form was read to each [employer surveyed], including the requirements for the position" (AF 23).

EDD then proceeded to approve Employer's ad for posting and placement on July 18, 1986 (AF 19-20). Employer advertised accordingly, citing \$7.25 an hour as the rate of pay (AF 12-13, 15-17). By the close of recruitment on August 19, 1986, no applicants were produced (AF 8, 12). The case was then transmitted to the Certifying Officer with the notation that Employer retained its wage offer despite it falling below EDD's prevailing wage (AF 8).

The Certifying Officer then issued his NOF, the substantive portion of which was four lines long, stating that Employer refused to meet EDD's prevailing wage of \$9.70 (AF 7). No

mention was made of Employer's wage survey, nor was Employer advised of the CO's reason for accepting the prevailing wage rate determined by EDD. In rebuttal, Employer defended its wage offer by submitting a new survey of twenty-one additional Mexican restaurants with all the wage rates being lower than Employer's. Inexplicably, this survey was of cooks with only one-half to one year of experience, whereas the position at issue requires two years of experience. The CO, in his Final Determination, continued to consider Employer's wage offer below the prevailing wage. The sole explanation offered by the CO in support of the denial of certification was that "employer's survey is not considered more comprehensive than the Executive Compensation Service survey used by the Employment Development Department in arriving at the prevailing wage." (AF 3)

Under §656.20(c)(2), the Employer is required to offer a wage that either equals or exceeds the prevailing wage determined under §656.40. As defined by §656.40(a)(2)(i), the prevailing wage is the average of wages paid to workers similarly employed in the local area of employment.

In Tuskegee University, 87-INA-561 (Feb. 23, 1988) (en banc), this Board held that, where an employer challenges the prevailing wage determination and supports that challenge with probative documentary evidence,

the Certifying Officer must provide a reasonable explanation of how the prevailing wage was determined and why it is an appropriate prevailing wage in this case, and should assure that any supporting data is reliable and reflects conditions contemporaneous with the recruitment period.

Tuskegee, supra, slip op. at 4-5. Although the most recent survey conducted by employer is inapplicable to the facts of this case, employer's initial survey appears to be highly relevant. It is up to the CO to explain why he is relying on the wage survey cited by EDD rather than on Employer's survey. The "perfunctory exercise of acquiescence in the statistical compilations of the state employment service . . ." cannot be the basis for the denial of certification. Shuk Yee Chan v. Regional Manpower Administrator, U.S. DOL, 521 F.2d 592, 595 (7th Cir. 1975).

If the Certifying Officer doubted the credibility of Employer's survey, he could easily have checked with the restaurants polled; yet he did not do so. Rather, the CO made no effort to support his conclusion that Employer's survey was insufficient. Furthermore, he did not explain why the State's survey was more comprehensive. Such bare assertions can hardly be considered to comprise the statement of reasons for the Final Determination that is required by §656.25(g)(2)(ii). The Certifying Officer's failure to explain his determination mandates a remand of this case. Therefore, this case will be remanded to the CO for consideration of the prevailing wage data in accordance with this decision.

ORDER

The Certifying Officer's denial of certification is vacated, and the case is remanded for further proceedings consistent with this decision.

JEFFREY TURECK
Administrative Law Judge

JT/DN/jb