



DATE: May 24, 1988
CASE NO. 88-INA-99

IN THE MATTER OF

STANDARD DRY WALL,
Employer

on behalf of

FERNANDO ALVAREZ,
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Tureck, Brenner, DeGregorio, Fath, and Levin,
Administrative Law Judges

GEORGE A. FATH
Administrative Law Judge

DECISION AND ORDER

The above named Employer requests review, pursuant to 20 C.F.R. Section 656.26, of the United States Department of Labor Certifying Officer's denial of its application for labor certification. 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].

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 labor certification 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 similarly employed United States workers.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 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 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 [hereinafter, AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On July 16, 1986, the employer filed an Application for Alien Employment Certification to enable the alien to fill the position of journeyman dry wall hanger. (AF 14) The job duties include giving instructions as to the type of wall or plaster boards to install, hanging dry wall on ceilings and walls, measuring work areas and reporting material shortages to the employer. To qualify for the position, the employer required one year experience in the job offered or 18 months experience as a dry wall assistant. The rate of pay offered was \$15.00 per hour. The alien worked for the employer from June, 1973 to November, 1975 as a dry wall assistant and from November, 1975 to the present as a journeyman dry wall hanger. (AF 43)

The position was advertised in accordance with regulation from August 28-30 and five applicants submitted resumes.

The Certifying Officer issued the Notice of Findings denying labor certification on May 13, 1987. The Certifying Officer found that the wage offer of \$15.00 per hour is below the prevailing Davis-Bacon Act wage of \$20.49 in the area of intended employment in violation of 20 C.F.R. §656.40. He also found that the Employer did not make a good faith effort to recruit U.S. workers since the job was advertised from August 28-30 and the employer first contacted the applicants on September 30. Two applicants were unavailable at the time of contact because they found other jobs and one applicant did not appear at the interview. The Certifying Officer also found that the employer unlawfully rejected qualified U.S. workers in violation of 20 C.F.R. §656.24 (b)(2)(ii).

On rebuttal, the employer alleges that the Davis-Bacon Act is inapplicable to the present case because his company has not been involved in any government contract. Regarding the recruitment effort, the employer noted that the resumes were sent on September 22 and were received in his office on September 26. He contacted the applicants on September 30, two working days after the resumes were received. Therefore, he contends that he promptly contacted the applicants and conducted a good faith recruitment effort. (AF 5-8)

The Final Determination was issued by the Certifying Officer on June 30, 1987. (AF 3-4) He noted that the prevailing wage regulation applies to all occupations covered under the Davis-Bacon Act.

Discussion and Findings

The regulations contain specific procedures for determining the prevailing wage for labor certification purposes. Section 656.40 (a)(1) provides that "if the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 20 C.F.R. Part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 C.F.R. Part 4, the prevailing wage shall be at the rate required under the statutory determination." (emphasis added)

The employer asserts that the Davis-Bacon Act does not apply because his company is not involved in contract(s) in excess of \$2,000 with the United States government or the District of Columbia. However, this argument misconstrues the prevailing wage regulation. The issue is not whether the employer is subject to the provisions of the Davis-Bacon Act, but whether the occupation is subject to a wage determination under the Davis-Bacon Act. Here, the Certifying Officer determined that the occupation of journeyman, dry wall hanger is subject to the Davis-Bacon Act and that the mandatory wage is \$20.49 per hour. This finding was not challenged by the employer. The Certifying Officer's method of computing the prevailing wage was correct under the circumstances and is affirmed.

ORDER

It is adjudged and ordered that the Final Determination of the Certifying Officer denying labor certification be, and is hereby, affirmed.

For the Board:

GEORGE A. FATH
Administrative Law Judge

Stuart A. Levin, Administrative Law Judge, Concurring.

I fully agree with the Board's decision in this proceeding and would comment no further were it not for the dichotomy between the provisions of 20 CFR §656.40(a)(1) and the recent prevailing wage holding in Tuskegee University, 87-INA-561 (February 23, 1988). This employer, it would seem, deserves an explanation of the Board's rationale for denying it the same opportunity afforded to the employer in Tuskegee to challenge the prevailing wage and offer a lower wage based upon the "nature of its business." See, Tuskegee at 4, and Tuskegee dissent at 7.

As the Board emphasizes, the prevailing wage for labor certification purposes under Section 656.40(a)(1) is the Davis-Bacon or Service Contract Act wage assigned to each covered occupation in a particular locality. According to Tuskegee, however, "it is not enough that the jobs being compared are in the same occupational category." Tuskegee, supra, at 4. In fact,

Tuskegee teaches that it is "wrong to focus" on occupations. *Id.* Consequently, it would appear that the thrust of Tuskegee is not in keeping with the clear focus of Section 656.40(a)(1).

In addition, it may be noted that the prevailing wage under Section 656.40(a)(1) is not dependent upon the nature of the employer's business. In opposing fashion, Tuskegee holds that a prevailing wage under Section 656.40(b) is dependent upon, "the nature of the business or institution where the jobs are located. . . ." Like Section 656.40(a)(1), however, Section 656.40(b) lacks any express direction to inquire into the "nature of the business." Indeed, it was the Tuskegee decision which added the "nature of the business" criteria in Section 40(b) cases. The language of Section 40(a)(1) obviously does not lend itself to such interpretative flexibility.

Section 656.40(a)(1) contemplates one prevailing wage at a time for each covered occupation in a locality. In this way, it fosters wage uniformity among similarly employed workers including aliens. Tuskegee contemplates no comparable limitation. It envisions, and potentially authorizes, as many wage rates as there are employers offering comparable jobs. Consequently, it may now be recognized that the Tuskegee interpretation of Section 40(b) creates a double standard both as it applies to Section 656.40(b) and as it interrelates with Section 656.40 (a)(1).¹

The decision in this proceeding, however, comports with the underlying intent of the enabling legislation and the express provisions of the implementing regulations. Through the use of the prevailing wage concept adopted from the Davis-Bacon and Service Contract Act contexts, the Department has sought to mitigate the enormous downward wage pressure foreign workers might otherwise exert on the domestic labor market while ensuring that employers offer wages likely to recruit rather than discourage U.S. workers. The Department has, therefore, insisted that employers, to fairly test the availability of qualified U.S. workers, peg their recruitment wages to the local prevailing wage for the job. Viewed in perspective then, the Davis-Bacon type prevailing wage concept may be recognized as the mechanism traditionally employed by the Department of Labor under circumstances in which the protection of U.S. wage earners is a matter of public policy. As such, the Board must, perforce, fence in the "nature of the business" test of Tuskegee as a doctrine which is basically inconsistent with the plain language of Section 656.40(a)(1).

STUART A. LEVIN
Administrative Law Judge and
Member of the Board

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¹ See, Tuskegee, supra, dissent at fn. 3.

In the Matter of Standard Dry Wall, 88-INA-99
Judge LAWRENCE BRENNER, joined by Judge JEFFREY TURECK, concurring:

I concur in the decision of the Board because I agree that the clear words of 20 C.F.R. §656.40(a)(1) apply the Davis-Bacon prevailing wage rate for the occupation for which alien labor certification is sought when there is a Davis-Bacon wage determination for that occupation in the geographic area of employment. Had this regulation been worded so as to apply the Davis-Bacon determination of prevailing wage only if the particular job opportunity was subject to the Davis-Bacon Act, then the result would be different.¹

The section of the regulation governing this case is in marked contrast with the other sections of the same regulation relied upon in Tuskegee University, 87-INA-561 (February 23, 1988). Those other sections are applicable when the special cases of the Davis-Bacon and Service Contract Acts do not apply. Normally, the determination of the prevailing wage based on "similarly employed" workers expressly is not limited to simply calculating the average wage in the same occupation; the jobs comprising the wage survey must also be "substantially comparable". 20 C.F.R. §656.40(a)(2)(i) and (b). It is the instant case which represents the exception to the normal rules for determining the prevailing wage for a job in an alien labor certification case.

LAWRENCE BRENNER
Administrative Law Judge

LB/gaf

¹ I have reviewed the Federal Register notices accompanying the proposed and adopted alien labor certification rules which included 20 C.F.R. §656.40(a)(1) as it is presently worded. 41 Fed. Reg. 48938 et seq. (1976) and 42 Fed. Reg. 3440 et seq. (1977). There is no explanation of the provision, and therefore no reason to believe the section's focus on the occupation rather than the job opportunity does not mean what it clearly says. I have also reviewed the Federal Register notices accompanying the proposed and adopted predecessor regulation, 29 C.F.R. §60.6. 35 Fed. Reg. 17665 et seq. (1970) and 36 Fed. Reg. 2462 et seq. (1971). 29 C.F.R. §60.6(a), like the present regulation, applied the Davis-Bacon wage determination if one existed for the occupation. There is not explanation of 29 C.F.R. §60.6(a) in the notices proposing and promulgating it.