



Date: JUL 9 1991

Case No.: 90-INA-392

In the Matter of:

BUENA VISTA LANDSCAPE,
Employer

on behalf of

FRANCISCO ESPINOZA,
Alien

Before: Brenner, Glennon, Groner, Guill, Litt, Silverman,
Romano and Williams
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter has been considered en banc. In view of the circumstances—Employer's timely rebuttal to the first Notice of Findings; the obscurity of the supplemental Notice of Findings in regard to the nature of Employer's error; the de minimis nature of the error (miscalculation of the overtime rate by approximately three cents); the high probability that certification would have been granted had the overtime rate been properly calculated; Employer's evident good faith in recruitment shown by offering a wage significantly higher than the prevailing wage; the fact that there were no U.S. applicants for the job despite the high wage offer—we hold that Employer's failure to rebut the supplementary Notice of Findings was excusable. The Solicitor's argument that, unlike Madeleine S. Bloom, 88-INA-152 (Oct. 13, 1989) (en banc), this matter involves a failure to rebut rather than merely an untimely rebuttal is a distinction without a difference. The fact remains that it would be manifestly unjust to deny certification on the ground of failure to rebut under the existing circumstances. The Certifying Officer, however, must be given the opportunity to consider whether further recruitment is necessary. Hence this matter will be remanded for further consideration.

ORDER

The panel decision of March 5, 1991 is VACATED, and this matter is hereby REMANDED to permit Employer to amend its application to offer the correct overtime rate of \$15.23. Should the Certifying Officer determine that a new recruitment effort is needed, he should thoroughly explain the reasoning for that determination. If new recruitment is waived by

the CO and Employer makes the appropriate amendment to the application, certification shall be granted.

At Washington, D.C.

Entered at the direction of the Board by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

J. Guill, with whom J. Groner joins, concurring.

Although the technical ground for denial by the CO was failure to respond to the NOF, the underlying substantive ground was Employer's calculation of the overtime rate as \$15.20 instead of \$15.225. There were no U.S. applicants for the job despite a base wage offer of 149.75% of the prevailing wage.

The points made by the Solicitor in the petition for review are:

(1) Madeleine S. Bloom, 88-INA-152 (Oct. 13, 1989) (en banc), is not precisely on point because it dealt with tolling the deadline for filing a rebuttal, while this matter deals with failure to rebut.

I note that Employer did file a timely rebuttal to the first NOF. Moreover, the supplemental NOF did not specify what was wrong with Employer's overtime offer other than it did not constitute time and one half. Rather, it constituted a perfunctory denial without any regard for Employer's needs. This is especially so since Employer had offered a wage that standing alone showed good faith in recruitment, and there was not one U.S. applicant. Given this bureaucratically obscure notice of the problem with the overtime offer, Employer may well have not recognized its mathematical error: its' offer was deficient by .0016 of the mathematical overtime wage requirement. I note that like Bloom, had Employer timely submitted the correct rebuttal (offering to correct the mathematical error) certification would have been granted;

(2) The fact that the wage offered was in excess of the prevailing wage is not determinative of whether the employer offered the legally required overtime wage rate, and the fact that the wage offered exceeded the prevailing wage overtime rate by \$4.95 or 148% is not directly relevant to whether Employer guaranteed overtime pay for work over 40 hours per week.

I consider these factors as simply illustrating the absurdity of the situation.

It is my opinion that the CO's denial of certification where the results are so disproportionate with Employer's technical and de minimis omission, especially in light of the

minimally informative supplementary NOF, constituted nothing less than a bureaucratic abuse of discretion. However, to be in technical compliance with the regulations, I concur in the vacating of the panel's decision and the remanding of the matter to permit Employer to amend the overtime rate from \$15.20 per hour to \$15.23 per hour.

J.R. Williams, dissenting.

I agree with Judge Guill that, in light of the Employer's technical and de minimis omission and its otherwise demonstrated good faith recruitment, the CO's denial of certification constitutes an abuse of discretion. However, instead of remanding this case for the correction of the error and rerecruitment, I believe that, in the interest of expeditious justice, the mere technicality should be brushed aside and certification granted.