

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, D.C. 20001-8002



Date: October 7, 1996

Case No.: 94-INA-210

In the Matter of:

HUNTER HOLMES McGUIRE VETERANS AFFAIRS MEDICAL CENTER,
Employer

On Behalf Of:

THOMAS MENDEL ROSENTHAL,
Alien

BEFORE: Guill, Huddleston, Jarvis, and Vittone¹
Administrative Law Judges

APPEARANCES:

James W. Dudley, Director
For the Employer

Kevin Cook, Esquire
For the Employer²

Vincent C. Costantino, Esquire
For the Certifying Officer

Leslie Delton, Esquire, Josie Gonzalez, Esquire, and David Stanton, Esquire
For the American Immigration Lawyers Association as *Amicus Curiae*

¹ Administrative Law Judge Pamela Lakes Wood recused herself from consideration of this matter.

² Mr. Cook did not submit an *en banc* brief.

DECISION AND ORDER

En Banc. This alien labor certification proceeding arises under the Immigration and Nationality Act of 1990 at 8 U.S.C. § 1182, and the regulations promulgated at 20 C.F.R. Part 656, and concerns the denial of a Department of Veterans Affairs hospital's application for permanent alien labor certification of an anesthesiologist. Pursuant to Federal law, the hospital is limited to offering a salary that is approximately 20 percent lower than the prevailing wage for anesthesiologists. See 39 U.S.C. §§ 7431, 7433, 7437; E.O. 12826 (Dec. 30, 1992).

Federal Wage Schedule That Prevents Payment of Prevailing Wage:

The regulation governing prevailing wage determinations for permanent alien labor certification applications provides, in pertinent part, that the wage is equal to

[t]he 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.

20 C.F.R. § 656.40(a)(2)(i). Section 656.40(b) further provides that:

‘[S]imilarly employed’ shall mean ‘having substantially comparable jobs in the occupational category in the area of intended employment, . . .’

In *Hathaway Children's Services*, 91-INA-388 (Feb. 4, 1994) (*en banc*), the Board held 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 the performance of the job offered.” The Board also held that the lack of financial ability of a charitable non-profit institution to pay the prevailing wage was not a ground to permit an employer to pay substandard wages. Likewise, we find that the labor certification regulations do not provide an exception, either express or implied, for a Federal wage schedule and therefore, the logic of *Hathaway Children's Services*, is also applicable to the case *sub judice*. Moreover, this Board is not authorized to rewrite or invalidate a regulation, even assuming, *arguendo*, that there is a direct conflict with another federal law. See *Dearborn Public Schools*, 91-INA-222 (Dec. 7, 1993) (*en banc*).

It is noteworthy that the Employment and Training Administration of the Department of Labor recently published in the Federal Register a proposed amendment to the labor certification regulations excepting positions for researchers employed by colleges and universities from the standard method for determining prevailing wages. See 61 Fed. Reg. 17610 (Apr. 22, 1996). The Employment and Training Administration’s use of notice and comment rule making to carve out an exception to the ruling of *Hathaway Children's Services* based on policy considerations is the appropriate method for an agency to change the language, scope, or application of a regulation. In addition, we note that the statute implementing special rates of pay for physicians and dentists employed by the Department of Veterans Affairs provides a mechanism for seeking to modify the special pay rates when the Department is unable to recruit well-qualified physicians

because current rates are not competitive with rates of pay for physicians outside of the Department of Veterans Affairs. 38 U.S.C. § 7439.

The *amicus*' brief suggests that separate wage systems are a "special circumstance" that must be taken into consideration when making an "adverse impact" determination. *See* 20 C.F.R. § 656.24(b)(3). The present regulatory scheme, however, simply does not address the problem of a Federal wage schedule that is below the prevailing wage rates, and the Board declines to find that § 656.24(b)(3) permits consideration of a separate federal wage system when the prevailing wage regulation at § 656.40 clearly does not.

Moreover, the language cited by *amicus*, "separate wage systems," does not appear anywhere in the regulations, the Act, or the legislative history. The words "separate wage systems" do appear twice in DOL's *Technical Assistance Guide* (TAG) on pages 122 and 123. However, the TAG does not have the force of law and is a DOL internally developed resource to assist DOL employees in the application of the Act. Moreover, it is unclear when reviewing the TAG whether the language "separate wage systems" is used only in referring to wages set under the Davis-Bacon Act, the McNamara-O'Hara Service Contract Act, or an arms-length collectively bargained wage; *i.e.*, the only exceptions carved out by the specific language of the Act and regulations.

Adequacy of Prevailing Wage Survey:

Although the Employer challenges the CO's wage survey because it did not specify such matters as experience level, qualifications, number of years worked, and rank, it also concedes that "[w]e cannot rebut the findings of the survey conducted by the Virginia Employment Commission. We also found the average salary for Anesthesiologists in this area to be in that range . . ." (AF 8). Moreover, the Employer's wage survey is simply the statutory rate paid to Anesthesiologists at 12 VA hospitals. We agree with the CO that this survey is inadequate because these are not 12 separate employers, but are the same employer paying the same wage.

The Employer also challenges the CO's wage survey as skewed, because one of the five hospitals surveyed had 11 of the 30 Anesthesiologists paid at the highest rate in the survey. We agree with the CO that the prevailing wage is the average rate paid to workers similarly employed in the area of intended employment. Section 656.40(a)(2)(i). We also agree that employers are looked at as a whole, and that to throw out wages that are high or low would not arrive at a true arithmetic mean. *See Hathaway, supra*.

For the foregoing reasons, we find that the Employer has failed to establish that the CO's wage survey is in error, or that it is offering the appropriate prevailing wage. The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the 7th day of October, 1996, for the Board:

Richard E. Huddleston
Administrative Law Judge