



**Issue Date: 07 September 2004**

**BALCA Case No.:** 2003-INA-252  
**ETA Case No.:** P2002-CA-09529645/ML

*In the Matter of:*

**BEAMCO, INC.,**  
*Employer,*

*on behalf of*

**VED GROVER,**  
*Alien.*

Appearance: Madan Ahluwalia, Esquire  
San Mateo, California  
For the Employer and the Alien

Certifying Officer: Martin Rios  
San Francisco, California

Before: Burke, Chapman and Vittone  
Administrative Law Judges

JOHN M. VITTONI  
Chief Administrative Law Judge

### **DECISION AND ORDER**

**PER CURIAM.** This case arises from Beamco Inc.'s ("the Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by § 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."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the

record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On August 2, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the position of Office Manager. The Employer required four years of college education and one year of experience. (AF 14-65). The Employer filed a request for Reduction in Recruitment ("RIR"). The rate of pay for the Office Manager position was \$44,728.00. (AF 14). On May 23, 2002, the state job service issued an assessment notice and informed the Employer that its job offer was below the prevailing wage of \$53,893.00. (AF 24). On June 10, 2002, the Employer submitted its own wage survey, which indicated that the prevailing wage for the area of intended employment was \$44,728.00. (AF 22, 42).

On February 10, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification. (AF 10-12). The CO found that the Employer's wage survey was inadequate, reasoning that it "is 'an abstract of survey results from the Employers Group' but fails to give data 'presented from the original survey source' so cannot be validated according to GAL 2-98." (AF 11).

The Employer filed a rebuttal on March 5, 2003. (AF 10-74). In response to the CO's finding, the Employer provided more detailed information from the original survey source. (AF 6-9). The Employer's survey assumed the area of intended employment was the "San Francisco Bay Area." (AF 9).

The CO issued a Final Determination ("FD") denying labor certification on April 16, 2003. The CO noted that the Employer's survey is based on the San Francisco Bay Area, which is comprised of five Metropolitan Statistical Areas (MSAs), whereas the OES determination is based on only one MSA, in which the job opportunity is located.

(AF 3). The CO concluded that the Employer's survey was not as reliable as the OES survey and denied certification.

On May 15, 2003, the Employer filed a Request for Review. (AF 1). The Employer argued that its survey complied with the requirements of GAL 2-98. The Employer contended that GAL 2-98 nowhere states that an area of intended employment must be limited to one MSA, and the CO was unreasonable in requiring the Employer's survey to be so limited.

### **DISCUSSION**

Twenty C.F.R. § 656.40(a)(2)(i) provides that if the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

the 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. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages . . .

The standard applied by BALCA has been that "[a]n employer seeking to challenge a prevailing wage determination . . . 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 (Feb.4, 2000)(*en banc*). However, the Board recognized in *El Rio Grande*, 1998-INA-133 (Feb. 4, 2000) (*en banc*) that the OES implementation described in GAL [General Administration Letter] 2-98, as a practical matter, modified the *PPX Enterprises* requirement that an employer both demonstrate a deficiency in the SESA wage survey and demonstrate the correctness of its own survey. Under the GAL 2-98 process, "[a]n employer who submits a published or private survey that meets the criteria in GAL 2-98 will be allowed to use that survey

for the application [for a non-DBA/SCA covered occupation, without having to establish that the SESA survey is invalid]." *El Rio Grande, supra*.

In the instant case, the CO initially found that the Employer's survey did not meet the requirements of GAL 2-98 because it did not "give data 'presented from the original data source.'" The Employer rebutted with a report allegedly indicating that the survey did meet those requirements. The CO then denied certification on the grounds that the Employer's survey was based on an excessive number of MSAs and that the OES survey was more accurate.

The basis for denial of labor certification must be set forth in an NOF. *Downey Orthopedic Medical Group*, 1987-INA-674 (March 16, 1988)(*en banc*); *Marathon Hosiery Co., Inc.*, 1988-INA-420 (May 4, 1989). Where a CO raises an issue for the first time in the FD, the employer is deprived of the opportunity to rebut or cure the defect and is denied due process. *Marathon Hosiery Co., supra*; *North Shore Health Plan*, 1990-INA-60 (June 30, 1992)(*en banc*).

In the instant case, the CO raised the general issue of prevailing wage in the NOF and found the Employer's survey inadequate because it lacked data from the original source. However, the CO denied certification on the grounds that the Employer's survey considered too wide a geographical area as the "area of intended employment." The NOF makes no mention of the geographical area used in the Employer's survey and this particular finding is raised for the first time in the FD. Thus, the Employer was not afforded the opportunity to rebut or cure the finding that the survey used too many MSAs. The Employer has presented argument that the survey did conform to GAL 2-98. Under the circumstances, the CO should have issued a second NOF allowing the Employer the chance to rebut the finding that the Employer's survey did not conform to GAL 2-98.

Further, the Employer filed the application and requested RIR. The CO erroneously denied certification outright, rather than denying the RIR and remanding the

case to the State agency for further recruitment. If the CO determines that the Employer's RIR should be denied, the application should be remanded to the State agency rather than denied outright.

## **ORDER**

The CO's Final Determination denying labor certification is vacated, and the case is remanded to the CO for further proceedings consistent with this opinion.

For the Panel:

**A**

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

**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 of Alien Labor Certification Appeals. 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW  
Suite 400 North  
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.