



DATE ISSUED: May 31, 1989

CASE NO. 88-INA-25

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

PPX ENTERPRISES, INC.,
Employer

on behalf of

VICENTE JOSE SCARPITTA
Alien

Frank J. Alban, Esq.
Nora Lee
For the Employer

Darryl A. Stewart, Esq.
For the Certifying Officer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Brenner, Guill, Tureck, and
Williams, Administrative Law Judges

NAHUM LITT
Chief Judge

DECISION AND ORDER

This matter arose from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1976). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).¹

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

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 there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. 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 the Appeal File (A1-A155), and any written arguments of the parties. See §656.27(c).

Statement of the Case

The Employer, PPX Enterprises, Inc., filed an application for alien labor certification to enable the Alien to fill the position of Audio Technician. (A26). The duties included performing audio techniques such as: signal processing, digital circuitry, test equipment, acoustic, power supply, tape recorders, consoles (all channels), microphones, out board equipment, mix down sessions (post-production, pre-mix, and final mix down; proficient in 24, 16, 8, 4, and 2 track), audio sweetening for video including stripping, film mix, coding and layback sessions. (A26). The Employer required an A.A.S Degree in electronics and two years experience in the job offered. (A26). The Employer also required the ability to speak Spanish. (A26). The wage offer for the position was \$275.00 per week.

On May 18, 1987, the CO issued a Notice of Findings stating that the Employer's wage offer is below the prevailing wage of \$20.33 per hour [\$813.00 per week], as determined by a local job office survey. (A62). The CO stated that the "Employer may rebut this finding by increasing the salary offer to equal or exceed the prevailing rate of pay, or he may submit countervailing evidence that the prevailing wage determination is in error." (A62).

The CO also found the Employer's requirements for the position to be unduly restrictive under §656.21(b)(2). First, according to the CO, the normal requirements for the position in the D.O.T. include 2-4 years combined education, training, and/or experience; however, the Employer has required an A.A.S degree plus 3 years experience. The CO found that the 5 years combined requirement is excessive, and required the Employer to amend the application and document a willingness to readvertise or justify the requirement as arising from business necessity. (A61). Second, the job opportunity contains a foreign language requirement, i.e., Spanish, which has not been supported by evidence of business necessity. The CO required the Employer to amend the application and document a willingness to readvertise or to justify the

requirement as arising from business necessity. Third, the CO found that if the Employer keeps the foreign language requirement based on duties which require the language, the Employer has combined duties and must justify the combination of duties as normal, customary, or arising from business necessity. (A61).

On June 21, 1987, the Employer submitted rebuttal. (A66-A135). The Employer stated that it contacted several recording studios to determine the prevailing wage. According to the Employer, most studios hire per diem workers at \$6.00 to \$8.00 per hour. The Employer also contacted a consultant who stated that the prevailing wage is between \$6.00 and \$10.00 per hour. (A135). The Employer submitted a list of studios contacted. (A133, A135). The Employer also stated that the prevailing wage quoted by the CO was for sound technicians working for top musicians, TV studios, or film producers. "The small studios that do commercial recordings for private enterprises or unknown singers or hands work when needed do not receive a salary of \$20.33. Any technician with steady employment receives between \$300.00 and \$350.00 per week." (A135).

With regard to unduly restrictive requirements, the Employer stated that its education, training, and experience were not unduly restrictive since it was only requiring 2 years of college and 2 years of experience. (A135). The Employer also stated that many of its recordings are in Spanish and that it reaches a significant Spanish market. (A134-A135). The Employer submitted brochures and song lists in support. (A66-A129).

On July 27, 1987, the CO issued a Final Determination denying labor certification. (A136-A137). With regard to the unduly restrictive requirements, the CO stated that "the foreign language is accepted and there no longer appears to be combination duties." (A136). The CO further stated that "although advised that the normal requirement for this job is 2-4 years combined education, training and/or experience making employer's requirements excessive, rebuttal does not address this issue at all." (A136). With regard to the prevailing wage issue, the CO stated that no countervailing evidence was presented, and that "even if we were to accept the \$300.00 to \$350.00 per week range for a technician with steady employment, which represents the job offered, employer's wage of \$275.00 [per] week is below the botto[m] \$300.00 figure of this range." (A136).

The Employer requested review on September 4, 1987. (A138-A154). In its request for review and brief on appeal, the Employer argued, inter alia, that it complied with the Notice of Findings by submitting countervailing evidence that the prevailing wage quoted by the CO was in error. The Employer also argued that if the CO considered the Employer's \$300.00 to \$350.00 wage survey to be an appropriate prevailing wage, the Employer was denied an opportunity to increase its wage offer and readvertise.

On appeal, the CO argues that the Employer failed to demonstrate that the wage offered equals the prevailing wage.

Discussion and Conclusion

The CO denied certification on the ground that the Employer's requirements were unduly restrictive. According to the CO, the Employer's requirements of 2 years of college and 3 years experience was in excess of the 2-4 years combined education, training, and/or experience listed by the D.O.T. Contrary to the CO's conclusion, on the application for alien employment certification, the Employer required only 2 years of experience in the job offered; moreover, in the advertisements and posted notices, the Employer required only 2 years of experience in the job offered. The Employer's requirements of 2 year of college and 2 years of experience in the job offered, a combination of 4 years, are within the requirements listed by the D.O.T. Therefore, the job opportunity has been described without unduly restrictive requirements.

The CO also denied certification on the ground that the Employer has not offered the prevailing wage. Where an employer submits a prevailing wage survey in rebuttal to the local job service determination of the prevailing wage, the CO, in denying certification, must explain why he or she relies on the local job service wage determination rather than the employer's wage determination. In re Las Cazuelas Neuvas, 87 INA 646 (Dec. 29, 1988); In re Tuskegee University, 87 INA 561 (Feb. 23, 1988). In the instant case, the CO ignored the Employer's wage survey results and gave no explanation why she relied on the job office wage survey. Therefore, the CO's denial of certification cannot be affirmed on such grounds.

In general, when challenging a CO's finding of the prevailing wage, an employer 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 prevailing wage. In the instant case, the Employer's wage offer is \$275.00 per week. The results of the Employer's survey indicate that per diem workers make \$6.00 to \$10.00 per hour and that steadily employed technicians make \$300.00 to \$350.00 per week. While the Employer's wage offer does fall within the wages of the per diem workers (\$240.00 to \$400.00), the Employer's wage offer of \$275.00 does not meet its own survey of steadily employed technicians, (average \$325.00²). On this record, the Employer has failed to establish that its wage offer is at or above the prevailing wage.

The Employer after the Notice of Findings, faced with either raising its wage offer from \$275.00 to \$813.00 per week or submitting countervailing evidence in rebuttal, followed the CO's instructions. However, by only instructing the Employer to submit countervailing evidence that the prevailing wage determination was in error, and by not instructing that the Employer's countervailing evidence must establish that its wage offer is within the prevailing wage, the CO provided inadequate notice of the Employer's burden of proof on rebuttal. The Employer stated, in its request for review, that it was willing to readvertise at a wage level within its own survey; however, by not evaluating the Employer's evidence, the CO did not provide the Employer an

² Under §656.40(a)(2)(i), the wage set forth in the application shall be considered as meeting the prevailing wage if it is within 5 percent of the average rate of wages. The Employer's wage offer is 18 below the average \$325.00 wage figure indicated in its survey.

opportunity to amend the application and readvertise at a higher wage within the Employer's survey. Therefore, denial of certification cannot be affirmed on the grounds of the Employer's failure on rebuttal. Remand is appropriate where the Notice of Findings provided inadequate notice of the Employer's burden on rebuttal. See e.g., In re Downey Orthopedic Medical Group, 87 INA 674 (Mar. 16, 1988).

Accordingly, this matter is remanded for the CO to consider the Employer's evidence, and to "provide a reasonable explanation of how the prevailing wage was determined, and why it is an appropriate prevailing wage in this case." Tuskegee, supra. The Employer must also state a willingness to readvertise at the prevailing wage, and the CO must provide the Employer an opportunity to do so.

ORDER

The Final Determination of the Certifying Officer is hereby VACATED, and the matter is REMANDED for further action consistent with this opinion.

NAHUM LITT
Chief Administrative Law Judge

NL:AS

Judge Jeffrey Tureck, joined by Judge Lawrence Brenner, dissenting:

Based either on the CO's wage survey or the Employer's own wage survey, the salary set by Employer for the position did not meet the prevailing wage. Accordingly, certification was properly denied, and there is no reason to remand this case to the CO. In effect, the Board is permitting Employers to set an arbitrarily low wage rate, then re-recruit at a higher rate if they get caught. The Employer was not prejudiced by the CO's failure to evaluate its evidence since, as the CO noted, Employer's evidence, even if correct, showed that the Employer was not offering to pay the prevailing wage.

I would affirm the CO.