



DATE: JAN 13 1989

CASE NO. 88-INA-63

IN THE MATTER OF

WIRTZ MANUFACTURING COMPANY  
Employer

on behalf of

MAHMOUD ZANDIEH  
Alien

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

NICODEMO DeGREGORIO  
Administrative Law Judge

### DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. 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) (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 a visa 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 United States workers similarly employed.

The procedures governing labor certifications 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. Part 656 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 ("AF") and written arguments of the parties. 20 C.F.R. §656.27(c).

### Statement of the Case

Wirtz Manufacturing Company, Employer, is a producer of rubber molds and is located in Port Huron, Michigan. On December 15, 1986 Employer filed an application for labor certification on behalf of Mahmoud Zandieh, the Alien, to fill the position of Design Engineer. (AF 39-40).

On July 13, 1987 the Certifying Officer issued his Notice of Findings (AF 19-22), and on September 29, 1987 Employer submitted its rebuttal. (AF 13-15) On October 13, 1987 the Certifying Officer issued his Final Determination denying labor certification because Employer offered a wage of \$10.26 per hour (AF 39), while the Certifying Officer found the prevailing wage to be \$11.54 per hour (AF 26), based upon a survey conducted by the Michigan Employment Security Commission. (AF 41).

On November 12, 1987 and November 23, 1987 Employer filed Requests for Review of the Certifying Officer's denial and brief. These have been duly considered. On January 26, 1988 the Solicitor of Labor informed this Board that he would not be filing any legal argument in support of the Certifying Officer's decision.

### DISCUSSION

The procedures for determining a prevailing wage are set forth in 20 C.F.R. 656.40. This section provides, in pertinent part, that the prevailing wage shall be the average rate of wages paid to workers similarly employed in the area of intended employment. Section 656.21(e) provides that the local Job Service office shall calculate the prevailing wage for a job opportunity, using wage information available to it. In this case, the Certifying Officer adopted the prevailing wage determined by the Michigan Employment Security Commission, which was represented to be based on a survey of three local area employers with three employees doing the same or similar work as that offered to the Alien. Because Employer's hourly rate was below the prevailing hourly rate, the Certifying Officer in his Notice of Findings directed Employer to raise its wage offer to the prevailing level.

In rebuttal, Employer attempted to discredit the prevailing wage determination with the results of a survey of its own. Based on wage information obtained from one employer in Wisconsin, another in Ohio, and another in Pennsylvania, Employer contended that the prevailing wage for the job at issue is \$9.80 per hour, lower than the hourly rate offered by Employer. The Certifying Officer rejected the Employer's survey as irrelevant, and denied certification.

Employer did not challenge directly either the methodology or the applicability of the prevailing wage determination made by the State Commission. Rather, Employer attempted to impeach the validity of the prevailing wage with contradictory evidence obtained from its own survey. Because the regulation requires, at least in the first instance, that the prevailing wage must be based on the wages of similarly employed workers in the area of intended employment, which in this case is Port Huron, Michigan, the Certifying Officer was correct in rejecting the results of Employer's survey as irrelevant. Thus, the prevailing wage determination on which the Certifying Officer relied in denying certification stands unimpeached.

In its brief, Employer attempts to cure the deficiency in its case by presenting new evidence e.g., the results of another wage survey made in the Port Huron Area. However, 20 C.F.R. 656.26(b)(4) states that the request for review and briefs shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based. Because the evidence provided in the brief was not in the record upon which the denial of labor certification was based, we do not consider it. See, In the Matter of University of Texas at San Antonio, 88-INA-71 (May 9, 1988).

Therefore, based upon the evidence that we may consider, we conclude that the Certifying Officer's prevailing wage determination stands unrebutted by Employer, and the denial of labor certification is affirmed. We also point out that this conclusion is not in conflict with our holding in In the Matter of Tuskegee University, 87-INA-561 (February 23, 1988). In Tuskegee the employer attacked the applicability of the Certifying Officer's prevailing wage determination to its case, with specific allegations of error supported by probative documentary evidence. Such specific allegations of error are not present in this case.

#### ORDER

The decision of the Certifying Officer to deny labor certification is affirmed.

NICODEMO DeGREGORIO  
Administrative Law Judge

ND/KS/tjp

Washington, D.C.