DATE: MAY 31, 1989
CASE NO. 88-INA-332

IN THE MATTER OF

BRAD BARTHOLOMAY JR. LANDSCAPE
DESIGN & CONSULTATION
Employer

on behalf of

RAMON LAZCANO
Alien

Appearance: Abbe Allen Kingston, Esquire
For the Employer

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

LAWRENCE BRENNER
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 labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, 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: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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 any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, Brad Bartholomay Jr. Landscape Design & Consultation, a masonry and landscape business located in Santa Barbara, California, filed the application for labor certification on behalf of the Alien, Ramon Lazcano, for the position of mason. The job duties of the position, as described by the Employer in the ETA 750A, are "installation work, all phases from mixing cement, to laying and leveling of various types of brick for masonry patios, retaining walls, entry columns, gates, fireplace and Bar-B-Ques, flagstone, brick fountains and ponds, cut stone veneer foundations and block work" (AF 23). The Employer's initial rate of pay, contained in the application for labor certification, was $8.00 per hour (AF 23).

California's Employment Development Department, on September 31, 1986, issued a statement to the Employer that the Employer's wage offer has been found to be below the prevailing wage (AF 29). Referencing the Davis-Bacon Act, the state job service stated that the prevailing wage is $17.40 per hour. The Employer responded in an undated letter to the state job service stating that it would not amend the wage rate as the job offered, laying brick for walkways and patios, was not one encompassed by the Davis-Bacon Act (AF 25).

The C.O. issued a Notice of Findings (NOF) on September 11, 1987, in which he proposed to deny the application for labor certification (AF 19-21). The C.O., citing section 656.40, found that the occupation was one in which a prevailing wage determination has been made pursuant to the Davis-Bacon Act. The prevailing wage for masons in the Santa Barbara labor market area, according to the C.O., was $17.40 per hour. The C.O. required the Employer to either show that the prevailing wage finding was not accurate or increase the rate of pay to the C.O.'s prevailing wage.

In its undated rebuttal the Employer disputed the applicability of the Davis-Bacon Act to the job offered for labor certification (AF 5-16). At the same time, however, the Employer stated that it readvertised the position at the amended wage rate of $12.00 per hour (AF 12-15). The C.O. denied the application for labor certification in a Final Determination dated December 24, 1987 (AF 3-4), and the Employer filed a timely Request for Review (AF 1-2). Subsequently, the Employer filed a brief before this office dated August 11, 1988. The C.O. did not file a brief.
Discussion

The sole issue presented before this Board is whether the Employer violated section 656.40(a)(1) by failing to offer a wage rate for the position of mason in conformity with the wage rate determination for masons under the Davis-Bacon Act.\(^1\)

The Employer, in its rebuttal and in its Request for Review, argues that the C.O. erroneously applied a Davis-Bacon Act wage determination to the job offered by the Employer (AF 1, 5-6). Specifically, the Employer states that the Davis-Bacon Act encompasses occupations in the construction trades and crafts, and is not applicable to occupations within landscaping, the Employer's field. Moreover, the Employer states that under the Department of Labor's Technical Assistance Guide (TAG) No. 656, Davis-Bacon Act wage determinations are only applicable where the occupation involves construction of residential living space; construction of highways, bridges, roads; heavy construction - dams, railroads, airports, etc.; or construction of large buildings. As the Employer is not involved in any of the above enumerated activities, the Employer argues that the position offered is not subject to a Davis-Bacon wage determination.

The Employer, in essence, asserts that its job offer is exempt from a Davis-Bacon wage determination because the Employer's business is landscaping, not construction. We reject the Employer's assertion. In the first place, landscaping work is included under the ambit of the Davis-Bacon regulations. 29 C.F.R. §5.2 (i). In any event, this Board previously has held that pursuant to the clear language of section 656.40(a)(1), "[t]he issue is not whether the employer is subject to the provisions of the Davis-Bacon Act, but whether the occupation is subject to a wage determination under the Davis-Bacon Act." Standard Dry Wall, 88-INA-99, slip op. at 3, (May 24, 1988) (en banc) (emphasis in original) (Board rejected Employer's argument that its job offer for a journeyman dry wall hanger was not subject to a Davis-Bacon Act wage determination because the Employer was not involved in any government contract.) See also Id., slip op. at 6 n.1 (Brenner, J., concurring). Thus, our focus is not on the nature of the Employer's business, but rather whether the job offered, that of a mason, is an occupation subject to a Davis-Bacon wage determination.\(^2\) The Employer has not established that its job duties are different from those

\(^1\) Section 656.40(a)(1) states: "If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1 . . . the prevailing wage shall be at the rate required under the statutory determination." (emphasis added)

\(^2\) The Employer also argues that its job offer is exempt from a Davis-Bacon Act wage determination because the job does not fall within TAG guidelines. This Board, however, has consistently held that it is not bound by TAG guidelines. See e.g. Roger and Denny Phelps, 88-INA-214 (May 31, 1989). To the extent that the TAG implies that an employer must be engaged in the enumerated activities (e.g. construction of dams, bridges or apartment buildings), as opposed to the requirement that the job offered for certification be an occupation which generally contributes to these activities, we expressly reject the TAG and the Employer's reliance (continued...)
included in the description of a brick and block mason's job in the Dictionary of Occupational Titles, which is the classification assigned to this job by the C.O.

In the present case, the C.O. determined that the occupation of mason is subject to the Davis-Bacon Act and that the prevailing wage for a mason in the Employer's geographical area is $17.40. The Employer failed to challenge the C.O.'s finding that the job itself, that of a mason, is subject to a Davis-Bacon Act wage determination but rather disputed solely the application of a Davis-Bacon Act wage determination to a masonry position where the Employer is involved in landscaping, not construction. As discussed above, we have rejected this argument. Likewise, the Employer failed to challenge the C.O.'s determination that the prevailing wage for masons in the Employer's geographical area is $17.40 per hour. Thus, we hold that the job offered by the Employer, mason, is subject to a Davis-Bacon wage determination and the Employer violated section 656.40(a)(1) by failing to offer the prevailing wage of $17.40 per hour.

ORDER

The Certifying Officer's Final Determination denying the application for labor certification is AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

\(^2\)\text{(continued)}