U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 September 2003

BALCA Case No. 2002-INA-260
ETA Case No. P2000-NJ-02460686

In the Matter of:

MARCZAK'S INC.,
Employer,

on behalf of

IWAN SATYARWAN,
Alien.

Certifying Officer: Dolores Dehaan
New York, NY

Appearance: Douglas B. Payne, Esquire
New York, NY
For Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Iwan Satyarwan ("Alien") filed by Marczak's Inc. ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the "Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On December 16, 1997, Employer filed an application for labor certification on behalf of the Alien for the position of Automobile Mechanic. (AF 9-10).

On January 29, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that Employer's wage offer was below the prevailing wage determination for the occupation. (AF 28-27). The CO found that Employer's wage offer of $12.00 per hour was below the prevailing wage of $ 24.16 per hour for the position of Automobile Mechanic as determined pursuant to the McNamara-O'Hara Service Contract Act. The CO advised Employer that it had to cure the deficiency by either increasing the wage offer to meet 100% of the prevailing wage determination and re-testing the labor market, or by submitting countervailing evidence showing that the SCA prevailing wage determination was in error.

On March 1, 2002, Employer submitted its Rebuttal (AF 29-31) where it stated disagreement with the prevailing wage determination. To support its position, Employer listed the hourly wage for mechanics at a few locations in the area. Employer asserted that its payment of income and employment taxes brought the Alien's hourly salary well above the prevailing wage offer.

On April 30, 2002, the CO issued a Final Determination (FD) denying certification. (AF 32-33). The CO found that Employer's rebuttal did not prove that the SCA prevailing wage determination was erroneous.

On June 3, 2002, Employer filed its Request for Review asserting that the prevailing wage determination was erroneous for the geographic area of employment and for the type of employer. (AF 34).

DISCUSSION

Under 20 C.F.R. § 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under 20 C.F.R. § 656.40. In determining the prevailing wage under § 656.40(a)(1), if the job opportunity is in an occupation which is subject to a wage determination under the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 351 *et seq.*, 29 C.F.R. Part 4, the prevailing wage is the rate required under the SCA. *Standard Dry Wall*, 1988-INA-99 (May 24, 1988) (*en banc*). When challenging the CO's prevailing wage determination the employer's burden is to establish both (1) that the CO's determination is in error and (2) that the employer's wage offer is at or above the correct prevailing wage. *PPX Enterprises, Inc.*, 1988-INA-025 (May 31, 1989)(*en banc*).

In the instant case, Employer merely provided its own *ad hoc* survey listing six hourly rates, ranging from $9.00 per hour to $25.00 per hour. The survey identifies two jobs in the post office – "vehicle mechanic" with an hourly rate of $18.04 and "mechanic helper" with a wage of $ 14.57 per hour. Employer also listed other three employers[1], each reflecting an hourly rate of pay, but excluding vital information such as the job title, job description and level of experience. The sixth hourly rate of $25.00 per hour is apparently for a Nursing position. Employer's purpose for including a Nurses' salary in its survey is unclear.

The limited information regarding the survey provides insufficient details to determine if the salaries are for similar responsibilities and for the same level of experience. Moreover, a survey of only four employers is so limited in number that it cannot be construed as statistically significant. Therefore, the survey is not persuasive either to establish that the SCA wage was in error or that Employer's own survey is valid.

[1] The three Employer were: Tom's Auto Repair ($10.00 per hour), Metuchen Auto Repair ($9.00 per hour) and Pep Boys ($9.00 per hour)

Employer in its brief argued that as in *El Rio Grande*, 1998-INA-133 (Feb 4, 2000) (*en banc*) and *John Lehne & Sons*, 1989-INA-267 (May 1, 1992) (*en banc*), the prevailing wage determination in this case was in dispute, and accordingly, the CO was obliged to provide a reasonable explanation of how the determination was made. In the instant case, however, there is no evidence that Employer requested that the CO provide information on how the SCA wage determination was made. A request for a remand for such information in the appellate brief comes too late. Moreover, we take judicial notice that since the time of the *El Rio Grande* decision, an SCA wage lookup system has been placed on the Employment and Training Administration's web site at http://www.flcdatacenter.com/. Thus, the SCA wage can now be easily checked by anyone with Internet access.

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the
Board of Alien Labor Certification
Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 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 its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.