U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: February 23, 1988
CASE NO. 87-INA-561

IN THE MATTER OF

TUSKEGEE UNIVERSITY
Employer

on behalf of

DR. PRAKASH SHARMA
Alien

Brij M. Kapoor, Esq.
Atlanta, Georgia
For the Employer

BEFORE: Litt, Chief Judge, Vittone, Deputy Chief Judge, and Brenner, DeGregorio, Fath, Levin and Tureck, Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge:

DECISION AND ORDER

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) (hereinafter "the Act"). The Employer requested review from a U.S. Department of Labor Certifying Officer's denial of a labor certification application pursuant to 20 C.F.R. §656.26.[1]

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.

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

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of §656.21 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 a 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 [see §656.27(c)].

Statement of the Case

On July 1, 1986, the Employer filed an application for alien employment certification (AF 20-74) to enable the Alien to fill the occupation of Associate Professor of Physics. A Ph.D. in physics was required.

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer on October 30, 1986 (AF 25-29), and the Employer's filing of its rebuttal on November 26, 1986 (AF 13-23), the Final Determination denying certification was issued on May 8, 1987 (AF 9-11).

Discussion

Employer, a small (3300 students), private black university in Alabama, seeks certification of Dr. Prakash Sharma for the position of Associate Professor of Physics. An earlier application had been filed for the same position prior to the application in this case, but was denied on May 28, 1986 on the ground that Employer's then wage offer of $23,840 for a ten-month academic year was below the prevailing wage of $28,330 (see AF 32 for Final Determination dated May 28, 1986). When Employer refiled its application on July 16, 1986, it raised the wage offer to $27,340 for the ten-month period, which was within 3.5 of the Final Determination's $28,330 figure (AF 55).

The NOF in response to Employer's July, 1986 application held that Employer's offer was below the new prevailing wage developed by the Alabama Employment Service, which was $30,670. The State office explained that its survey represented the average of Associate Professor salaries[2] at three colleges within "commuting distance" of Employer (AF 31). But it failed to specify the three colleges used in the survey, simply citing them as Colleges ""A, B, and C". The State office supported this figure by citing the 1986 Chronical of Higher Education listing of average salaries by rank in selected fields. According to this publication, the average salary for an Associate Professor of Physics at a private institution was $30,329 per academic year, based

[2] It appears that the survey conducted by the State office was of the salaries of Associate Professors generally, and was not limited to Associate Professors of Physics (see, e.g., AF 30-31).

on a study of 440 institutions nationwide (AF 31, 34). The State Employment Service knew of no qualified U.S. workers available at the $30,670 prevailing wage level developed by them (AF 31).

In rebuttal, Employer attacked the Department's wage determination as not fairly representative of the offered position (AF 16). Employer argued that a wage survey of comparable positions should have taken into account special circumstances such as Employer's being a privately funded black college, inferring that such colleges cannot afford to pay the same salaries as other institutions of higher education. To support its offerred wage, Employer enclosed a 1984-85 salary comparison of Associate Professors at 43 United Negro College Fund ("UNCF") colleges establishing an average Associate Professor salary of $19,397 (AF 19). Among the 43 colleges surveyed, Employer ranked second with an average Associate Professor salary of $23,844 (Atlanta University ranking first at $24,668).

The Final Determination again denied certification due to Employer's failure to meet the prevailing wage of $30,670. The prevailing wage survey was defended as comparable since it allegedly was based on colleges within commuting distance of Employer, which represented the comparable labor market to the Certifying Officer (AF 10). Employer's UNCF salary survey was found to be inappropriate since it was not confined to the local labor market. The Final Determination also pointed out that Employer contradicted itself in its rebuttal when it stated the salary was for 9 months, despite its advertisements stating a 10 month period (AF 10, 15).

Under the regulations, the prevailing wage is determined by averaging the wages of similarly employed workers in the area of intended employment [see §656.40(a)(2)(i)]. "Similarly employed" is defined as "having substantially comparable jobs in the occupational category in the area of intended employment . . . "; but if no such jobs exist in the area of intended employment, comparison may be made to similar jobs outside the local area [see §656.40(b)]. Thus to be "similarly employed" for purposes of a prevailing wage determination, it is not enough that the jobs being compared are in the same occupational category; they must also be "substantially comparable." Accordingly, it is wrong to focus only on the job titles or duties; the totality of the job opportunity must be examined.

Consistent with these principles, the court have held that the salary offered to an alien Montessori teacher should have been compared with the salaries paid to other Montessori teachers of preschool age classes, rather than with the higher salaries of public school teachers [see Ratnayake v. Mack, 499 F.2d 1207, 1213 (8th Cir. 1974); Montessori Children's House of School, Inc. v. Secretary of Labor, 443 F. Supp. 599, 608 (N.D. Tex. 1977)]. It also has been held that the wages of an alien parochial school teacher should not have been compared to those of public school teachers [see Golabek v. Regional Manpower Administrative, 329 F. Supp. 892, 895-96 (E.D. Pa. 1971)]. It is clear that it is not only the job titles, but the nature of the business or institution where the jobs are located -- for example, public or private, secular or religious, profit or non-profit, multi-national corporation or individual proprietor-ship -- which must be evaluated in determining whether the jobs are "substantially comparable."

The job at issue here is an Associate Professorship of Physics at a small private black university. It is not enough for the Certifying Officer to state that the jobs sampled by the Alabama Employment Service in formulating its survey were within commuting distance of Tuskegee. In light of employer's challenge to the applicability of that survey to its particular situation, a challenge supported by probative documentary evidence, further explanation is needed as to how those jobs are comparable. The Certifying Officer failed to cite any basis for his conclusion of comparability other than the proximity of the schools to Tuskegee. In this regard, there is nothing in this record to indicate that the Certifying Officer had any knowledge of which schools were used in the Alabama Employment Service's prevailing wage survey or why they were selected; he appeared to accept the State's data without question (see AF 10, 28).

Since the regulations allow comparison with jobs beyond the local area in the event comparable jobs do not exist in the local area, the Certifying Officer's failure to explain the validity of the prevailing wage determination he relied upon mandates a remand of this case. On remand, the Certifying Officer must address the Employer's argument that salaries paid by UNCF colleges should be considered in arriving at the prevailing wage. He should also address the issue of whether, in this instance, it is proper to survey the salaries of associate professors of any subject other than physics. In any event, the Certifying Officer must provide a reasonable explanation of how the prevailing wage was determined and why it is an appropriate prevailing wage in this case, and should assure that any supporting data is reliable and reflects conditions contemporaneous with the recruitment period.

Even if it were found that Employer met a properly determined prevailing wage, its recruitment may nonetheless have been deficient under Section §656.21(g)(8) for advertising a wage that was less favorable than that offered the alien. Both the offered wage and the prevailing wage set by the State Office were based on a 10 month salary. In an effort to justify its position, Employer argued that the salary was for a nine-month period with an additional 20 of salary for signing a summer employment contract, all of which brought the salary up to $32,800 (AF 15).

Employer's recruitment must reflect the actual wage and compensation package as offered the Alien. If the summer job for additional wages is an integral part of the job opportunity, then the job should be so advertised.

Since the determination of the prevailing wage was deficient, and Employer's recruitment may not have reflected the actual job opportunity, this case must be remanded to the Certifying Officer. On remand, the Certifying Officer shall determine the prevailing wage in accordance with the factors cited above. Employer should then be permitted to readvertise the position, making sure that the exact terms of the job opportunity are disclosed.

ORDER

The Certifying Officer's denial of certification is vacated, and the case is remanded for further proceedings consistent with this decision.

JEFFREY TURECK
Administrative Law Judge

JT/DN/jb

Stuart A. Levin, Administrative Law Judge, concurring, in part, and dissenting, in part.

While I concur in the majority's decision to remand this matter for the purpose of permitting the employer to correct its recruitment effort, I find I am unable to join the majority in vacating the Certifyng Officer's prevailing wage survey determination. In my opinion, the survey complied with regulatory requirements and is firmly grounded in the record.

I.

Recruitment

As the employer's statement on appeal amply demonstrates, the central issue before us is the accuracy of the employer's description of its job in the application for alien employment certification.

Arguing before the Board, the employer asserts that: "the salary of $27,340 is for the work period of nine months, and not ten months--from August 15, 1986, to May 15, 1987--though it is divided into ten paychecks." In applications filed with the Certifying Officer, however, the employer represented the term of appointment as ten months in duration. This discrepancy is not without consequences.

The Certifying Officer relied upon the employer's application when he extrapolated a prevailing wage from the data provided by the colleges in the employer's locality. (See, AF 31.) As might be expected, the extrapolated ten-month prevailing wage exceeded the pay for a nine-month appointment at the colleges surveyed.[1] Considering the application filed with him, however, it would be difficult to conclude that the Certifying Officer erred in finding the employer's recruitment disclosures deficient.

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[1] The survey revealed an average monthly wage of $3,067, which was multiplied by nine to determine the prevailing wage for a nine-month appointment and by ten to determine the prevailing wage for the ten-month appointment described by the employer in its application.

The employer acknowledges on appeal that the application was confusing and miscommunicated the fact that the job has a nine-month term, but is paid over ten months. It argues further that, upon clarification of this misunderstanding, it becomes obvious that the job offer complies with the prevailing wage. 20 CFR §656.40(a)(2) (i). The error in the application, however, is not a minor, non-substantive oversight. See, Conde, Inc., 87-INA-598.

The employer's failure to correct the term of the appointment on the application for certification, although inadvertent, nevertheless had the tendency and capacity to mislead not only the Certifying Officer, but potential applicants for the position as well. Thus, an associate professor working a ninemonth academic year may be reluctant to apply for a position at an institution working a ten-month academic calendar. If the gross pay at both institutions is similar, the applicant may reasonably view the latter position as a net pay reduction, requiring a month more work at the virtually same pay. The longer academic year may also diminish opportunities for additional summer income available to faculty members of institutions with a shorter academic schedule.[2] As college administrators are probably all too acutely aware, the duration of the academic year is a subject to which their professors may attach more than mere passing importance.

The regulations governing the certification of alien labor require the employer fairly to test the availability of a qualified U.S. worker in the domestic labor market. This entails an accurate, unambiguous disclosure of the terms and conditions of employment throughout the recruitment process. The recruitment process, in this instance, was de icient in this regard, and, therefore, failed to provide an adequate test of the domestic labor market. It must do so on remand before an alien may be certified.

II.

Prevailing Wage Surveys

The above discussion would seem sufficient to resolve this appeal. The majority, however, has determined to reopen the prevailing wage issue and remand it to the Certifying Officer to expand the prevailing wage survey beyond the local area. As such, some further observations regarding the prevailing wage survey would not seem inappropriate. Indeed, since virtually every case involves a prevailing wage, the Board's discussion of "comparability" and survey methodology constitutes a statement of policy which will potentially impact upon the administration of the INA program in a broad spectrum of cases. In summary, the Board is holding if an employer alleges "special circumstances" and contends it cannot afford to pay a prevailing wage, then the job it is offering is not "comparable" to the jobs held by similarly employed workers in the locality. As shall be demonstrated below, however, the majority's discussion of the Certifying Officer's determination is fundamentally flawed in several respects.

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[2] As the majority notes, the employer's recruitment effort should also include a disclosure that it offers 20 additional wages for summer sessions if such work is, as the appeal statement indicates, routinely available to the alien.

A.
"Comparability"

The Board's interpretation of the concept of " comparability" is a matter of considerable importance. As the majority notes, 20 CFR §656.40(a)(2)(i) requires the Certifying Officer to establish the prevailing wage by averaging the wages of similarly employed workers in the area of intended employment. The term "similarly employed" is defined twice in the regulations. Under Section 656.40(b), "similarly employed" means: "having substantially comparable jobs in the occupational category in the area of intended employment." If comparable workers in the occupational category are not employed by third party employers in the area, Section 656.40(b)(1), a provision the majority omits, states that ""similarly employed" shall mean "having jobs requiring a substantially similar level of skills in the area of intended employment."

The geographic boundaries of the survey may exceed the local area only under circumstances in which jobs in subsection 656.40(b) and 656.40(b)(1) are not available in the local area. Section 656.40(b)(2).[3] Thus, contrary to the Board's interpretation, Section 656.40 (b)(2) is expressly self limiting to circumstances in which "there are no substantially comparable jobs" as defined in Section 656.40(b) and (b)(1). In view of the express language of the regulations, the Board, incorrectly invokes Subsection 656.40 (b)(2) and permits a geographically expanded prevailing wage survey without considering Section 656.40(b)(1). Equally important, the Board misinterprets the meaning of "comparability." These regulations considered as a whole address the question of comparing worker duties, skills, functions, and wages, not the special circumstances of individual employers which offer similar or comparable jobs.[4]

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[3] Section 656.40(b)(2) addresses a type of local employer monopsony situation which has been considered by the courts in Davis Bacon Act and Service Contract Act cases. See generally, AFL-CIO v. Donovan, 757 F.2d 330 (1985). Under circumstances in which an entity is the only employer which hires the skills of a particular occupation in a given locality, the prevailing wage is determined by surveying beyond that locality. See, Mitchell v. Covington Mills, Inc., 229 F.2d 506 (D.C. Cir., 1955), cert denied, 350 U.S. 1002 (1956), interpreting the Walsh-Healey Act.

It should be noted that Davis Bacon and Service Contract Act wage determinations apply to immigration cases via Section 656.40 (a)(1). How the Board will, without creating a double standard, reconcile its interpretation of Section 656.40(b) with the requirement under Section 656.40(a)(1) that it apply Davis Bacon and Service Contract Act wage determinations to covered occupations is not readily ascertainable.

[4] The meaning of "comparability" in this regulatory scheme may be amplified from a slightly different perspective. As noted above, under Section 656.40(b) ""similarly employed", means "substantially comparable jobs." Under Section 656.40 (b)(1), "similarly employed", also means "jobs requiring substantially similar levels of skills." Consequently, it would seem entirely consistent with the regulatory framework to conclude that the two definitions of "similarly

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Now, the employer does not dispute that the survey before us was conducted in accordance with the regulations. The regulation refers to "comparable jobs," and the employer does not contend that a different position was surveyed. Section 656.40(b). Nor does the employer contend that its local area fails to encompass jobs requiring a substantially similar level of skills. Section 656.40(b)(1). Indeed, it does not contend that the job it is offering is unique in its area. Rather, the employer argues that it is a unique institution in its locality even if the position it is offering is comparable to other jobs in the local area.

Eschewing these details, the majority criticizes the Certifying Officer for failing in his burden of explaining: "how those jobs are comparable. . . and any basis for his conclusion of comparability." Yet, the Job Service and the Certifying Officer satisfy their burden when a prevailing wage is established in accordance with the regulations.

In effect, the Board is creating a "special circumstance" exception to the prevailing wage and shifting the burden of proof to the Certifying Officer. This is accomplished by redefining the terms "substantial comparability," and ""similar work," notwithstanding the context of the definitions provided in 20 CFR §656.40(b) and (b)(1). As shall be demonstrated, however, the three cases cited as precedent for this novel approach provide less than compelling support for the Board's conclusions.

For example, Ratnayake v. Mack, 499 F.2d 1207 (8th Cir., 1974) and Montessori Children's House of School, Inc. v. Secretary of Labor, 443 F.Supp. 599 (N.D. Texas, 1977), differentiated the wages of Montessori preschool teachers from those of public school teachers on the basis of skill levels and job functions. These cases did not authorize a survey beyond the local area on the ground that the employer, rather than the job, was unique. The Ratnayake court noted the ""obvious dissimilarities" and "different approaches to education" between Montessori and traditional methods, and held: "The Secretary of Labor must compare the proposed wage offer with the prevailing wage scale of other employees who perform the specific job applied for by the alien." at 1213. In this proceeding, the Certifying Officer performed the required comparison. Indeed, there is no reason on this record to suspect that "similarly employed" workers in the employer's locality are any different in type, function, or skill from the position offered the alien.[5]

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[4](...continued)
employed" are equivalent, such that "substantially comparable jobs," also means "jobs requiring substantially similar levels of skills." The Board's somewhat incongruous interpretation discusses the meaning of "comparable jobs" without considering the alternative definition in Section 656.40(b)(1). Considered as a whole, however, Section 656.40(b)(1) provides a potentially broader survey base than Section 656.40(b) by including "comparable jobs" that may not be in the "occupational category" but nevertheless require ""substantially similar levels of skills."

[5] The Board's contention that the Certifying Officer's argument is no more than a concern about "job titles" is an oversimplification. A prevailing wage survey focuses not only on job categories, but upon the actual work performed, the function and skills required to perform
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The third case, Golabek v. Regional Manpower Administration, 329 F. Supp. (E.D. Pa., 1971), is equally inapposite. In Golabek, the court agreed with the employer that the wages paid to parochial and public school teachers could be differentiated. The court noted, however, that the alien was offered precisely the same wage as her colleagues: "lay teachers employed by the Archdiocese of Philadelphia . . . pursuant to a contract duly bargained and agreed to by the Archdiocese and the Association of Catholic Teachers, Local 1776 of the American Federation of Teachers, AFL-CIO." at 895. Since no union contract is involved in this proceeding, it would not seem inappropriate to distinguish Golabek and similar cases which might arise under 20 CFR §656.40(a)(2)(ii).

The Board here is, in effect, inviting applications for waivers to prevailing wages by employers with "special circumstances," rather than unique jobs. Redefining terms such as "similar work" or "comparable jobs," however, injects uncertainty and confusion into the process of determining prevailing wages. Consequently, to educate both the Certifying Officers and Employers in their attempts to apply the Board's interpretation, it might have been helpful if the Board had specified the criteria it wants considered upon review of a "special circumstance" situation. An indication of what is meant by the term "the nature of the business," would help clarify an aspect of the prevailing wage determination which the Board now considers crucial. Employers and Certifying Officers would benefit from a discussion by the Board concerning whether this term is an economic standard involving the definition of relevant product or service markets or submarkets, profitability, economies of scale, firm size, market structure, conduct, and performance, inter alia, or whether the Board wishes more subjective "nature-of-the-business" criteria to be taken into account.[6]

While I share the concern of my colleagues in this proceeding, it would seem that the question of granting what, in effect, are "special circumstance" waivers is a question appropriately addressed, not in case-by-case adjudication by this Board, but by means of rulemaking undertaken by a policymaking agency. The Certifying Officer correctly determined that the local area is the relevant geographic scope of the prevailing wage survey in this proceeding and that the appropriate position was surveyed within that geographic area. 20 CFR §§656.40(a)(2) (ii), 656.40(b), b(1), and (b)(2). His determination should be affirmed.

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[5](...continued)
the job, and the geographic locality within which the work is performed.

[6] Where the line will eventually be drawn on the expanded use of ""comparability" as a means of addressing "special circumstance" employer cases is unclear. Presumably, though, schools, churches, nonprofit hospitals, charitable organizations and other eleemosynary institutions, public interest organizations, small businesses, struggling new firms, unprofitable firms, failing firms, and individual households may be among the first to claim they are unique or "special circumstance" employers.

B.

Survey Data
Scope and Relevance

On appeal, the Board is critical of the Certifying Officer for rejecting the survey of UNCF colleges in determining the prevailing wage. The UNCF data included the following, as set forth in the majority decision:

> To support its offered wage, Employer enclosed a salary comparison of Associate Professors at 43 United Negro College Fund("UNCF") Colleges establishing an average Associate Professor salary of $19,397 (AF 19). Among the 43 colleges surveyed, Employer ranked second with an average Associate Professor salary of $23,844. . . .

A brief comment regarding these data seems warranted. The record clearly reveals that the UNCF data represents wages paid during the year 1984-85.[7] The data was at least a year old when the Certifying Officer was first asked to consider it. The UNCF survey results, therefore, are neither contemporaneous with prevailing wages in subsequent years nor co-extensive with the relevant geographic locality.[8]

Now the Board is aware of these factors, and nevertheless finds it prudent to use the survey, without a cautionary caveat, to set aside the wage determination. As such, it conveys a message that a prevailing wage finding may be defeated with out-of-date, geographically limitless surveys. Consequently, to the extent that a Certifying Officer must evaluate not only current wage data in establishing a prevailing wage, but historic wage data as well, the Board should not recoil from the opportunity to guide him in his deliberations concerning the relative weight he should accord each type of data, when and under what circumstances vintage wage data need be considered, and what, if any, economically relevant factors might be worth considering when old data is excavated in future prevailing wage determinations.

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[7] Like the Job Service study, the UNCF surveys the wages of Associate Professors.

[8] As the Wage Appeals Board observed more than two decades ago, a prevailing wage is a "mirror" of locality wages. "It reflects existing rates, and this is done on a locality by locality basis." See, Griffith Co., WAB Case No. 64-3 (1965). Accepting the average derived from a geographically expansive UNCF survey would seem to permit the employer to reduce the alien's wages below not only the locality prevailing wage but below the wages the employer paid its own "comparable" workers in 1984-85. Yet, a prevailing wage should not introduce new rates from other areas, as the majority's formula would seem to invite. See, Associated General Contractors, 23 WH 646.

C.

Survey Data
Disclosure of Sources

The Board's decision also emphasizes that the three colleges within commuting distance of the employer which participated in the prevailing wage survey were not named. Rather their identity was coded alphabetically and the wages of each school were specifically set forth. The Board, however, is critical of the Certifying Officer and questions whether he "had any knowledge of which schools were used. . . and he appeared to accept the State's data without question." Yet, the Certifying Officer does not err in accepting the Job Service's data. Section 656.21(e). Unlike the situation in PCM Corp, 85-INA-005, 6 ILCR 1-1197; and Joseph's Inc., 82-INA-170, 5 ILCR 1-540; the employer here never questioned the accuracy of the data, nor did it allege that it requested and was denied access to the identity of the survey participants. In the context of this appeal, the identity of the survey participants is not crucial. Indeed none of the key facts relating to the employer's "special circumstances" were contested by either party.

Consequently, the Board raises this issue sua sponte, and I am unable to agree with its conclusion, under the circumstances before us, that the Certifying Officer erred either in his consideration of the Job Service survey data or by according limited confidential treatment to the third party survey participants.

III.

The Board was created nine months ago, with a mandate to promote consistency and uniformity in the labor certification decision-making process. 52 FR 11217, April 8, 1987. In respect to questions relating to "job comparability" and prevailing wage survey methodology, it is difficult to perceive the manner in which that mandate is fostered in this proceeding. For all of the foregoing reasons, I respectfully dissent from the majority's decision to vacate the Certifying Officer's prevailing wage determination.

STUART A. LEVIN
Administrative Law Judge

Member of the Board

I concur:

JOHN VITTONE
Deputy Chief Judge
Member of the Board

SAL:jeh

I join Judge Levin in dissenting , and adopt his reasoning in my disagreement with the Board. However, rather than remanding, I would affirm the Certifying Officer's denial of the labor certification.

The majority misconstrues the regulations. The burden of proof under the Act rests on the alien/employer to establish eligibility for labor certification. 20 CFR 656.2(b). In my view, this means that the applicants for a labor certification must present a persuasive case clearly establishing the criteria: that there are not sufficient United States workers, who are able, willing, qualified and available at the time of the application to perform the work; and, that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. The Board inverts the posture of the parties and places the burden on the Certifying Officer to defend his adherence to the regulations. And more, it directs the Certifying Officer to go outside the regulations to formulate criteria to meet the special needs of the employer. But, given a proper performance in this case, how is the Certifying Officer going to manage the next case of special consideration? Will there be another standard?

The real shortcoming in the Board's decision is in its subjectivity. Ignored are: the deficiencies in the employer's application; the strong inference that the employer will hire no one but the alien; and, the adverse effects of its decision on the United States workers. (In fairness, it must be said that all of this is covered in the Board's concession that the employer's recruitment ""may" have been deficient.) Instead, the Board focuses on granting the perceived need of the employer. Against, this methodology, no Final Determination can stand. Moreover, this system is violative of the fairness and objectiveness promoted by the regulations for United States workers as well as aliens.

Where it is so obvious that the employer has no job for a United States worker, I see no reason to remand.

GEORGE A. FATH
Administrative Law Judge