U.S. Department of Labor

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

Date: May 1, 1992

Case No: 89-INA-267
89-INA-313

In the Matter of:

JOHN LEHNE & SONS,
Employer

on behalf of

CESARIO BARRERA
JOSE MEDARDO ARIAS,
Aliens

BEFORE: Brenner, Degregorio, Glennon, Groner, Guill,
Litt and Romano
Administrative Law Judges

NAHUM LITT
Chief Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 (1991) of the 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) (1990) ("Act"). This portion of the Act was amended by section 212(a)(5)(A) of the Immigration Act of 1990, and is now codified at 8 U.S.C. §1182(a)(5)(A).

Statement of the Case

On February 1, 1991, the Board granted the Certifying Officer's Petition for En Banc Review in the above-mentioned matters. As these cases involve the same employer (but different aliens) and the same basic issue, they have been consolidated for purposes of en banc consideration. Evidence in the appeal files has been identified by "AF" and the applicable page numbers.

In summary, the Certifying Officer (CO) argues that the panel in 89-INA-313 was incorrect in remanding the matter to the CO for a different prevailing wage determination, as the

position was subject to a prevailing wage determination under the Davis-Bacon Act. See 20 C.F.R. §656.40(a)(1). Further, the CO argues that the panel in 89-INA-267 correctly determined that the position was subject of the CO's prevailing wage determination under the Davis-Bacon Act and Employer had not offered to change the wage appropriately.

1. 89-INA-267, on behalf of Cesario Barrera (John Lehne I)

On July 28, 1988, Employer, John Lehne & Son, filed an application for alien employment certification on behalf of Cesario Barrera, to fill the position of painter (AF 20). The job duties for the position include the following:

> Will be responsible in doing custom color mixing and custom painting of residence. Must be expert in custom color mixing, being familiar with types, characteristics, qualities of all types of paint used in residential decorating. Must have knowledge of painting tools and various brushes. Must be willing to work at height, weekend and evening work when required. Must have own transportation to job site and willing to wear uniform. Must prepare walls & surfaces for painting and papering.

(AF 20).

Additional requirements for the position were two years of experience in the job offered, "knowledge of spray methods both conventional and airless," and the ability "to use various pieces of spray equipment, guns, pumps and power washers" (AF 20). Employer offered $9.50 per hour as the rate of pay, with overtime at one and one-half that rate (AF 20).

On September 9, 1988, the Employment Development Department of the State of California (EDD) notified Employer that the prevailing wage for the position "is $20.67 per hour based on Davis Bacon Act" (AF-41). Employer was offered the chance to amend the wage before recruitment or to state that Employer chose not to amend the wage. Employer was also offered the opportunity to submit supporting documentation to justify the original wage offer. On September 13, 1988, Employer's attorney responded that Employer declined to amend the wage "on the ground that he is not subject to the Davis Bacon Act since none of his painting is done on new construction. John Lehne & Son provide painting services to existing structures, none of which are being newly constructed or substantially modified. Accordingly, the Davis Bacon Act is not applicable and the employer's wage of $9.50 per hour as submitted, is prevailing in the industry" (AF 22).

On October 27, 1988, the EDD sent Employer a notice to start recruitment (AF 36). This notice informed Employer that the proposed advertisement had been modified, and that Employer's 30-day recruitment period would end on November 29, 1988 (AF 36). Employer advertised the job opening in the Los Angeles Herald Examiner from November 15-17, 1988, and posted the required notice from November 14-26, 1988 (AF 27-33). Employer explained the rejection of the one U.S. applicant who applied, on the basis that he had no painting experience (AF 27).

The EDD transmitted the case to the CO on January 30, 1989. In the portion of the form which asks for the source of the prevailing wage determination, the EDD indicated "Davis Bacon LA Cty." (AF 19). The EDD directed the CO's attention to Employer's letter concerning the applicability of the Davis-Bacon wage determination (AF 19).

On February 24, 1989, the CO issued a Notice of Findings proposing to deny certification (AF 16-18). The CO found Employer in violation of 20 C.F.R. §§656.20(c)(2) and 656.40(a)(1) by refusing to pay the prevailing wage. The CO explained that "[t]he occupation of painter is one for which a prevailing wage determination has been made pursuant to the Davis-Bacon Act", and that the wage was $20.67 per hour (AF 17). The CO explained that the issue of the applicability of the Davis-Bacon wage determination "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" (AF 17). The CO required Employer to either increase the rate of pay and retest the labor market or "show that the prevailing wage finding is not accurate" (AF 18). To show that the prevailing wage finding was not accurate, the CO required a showing that "the occupation is not subject to a wage determination under the Davis-Bacon Act" (AF 18).

Employer filed rebuttal on March 29, 1988 (AF 5). Employer's attorney argued: (1) that Davis-Bacon Act applies only to public buildings or public works, and not private housing; (2) that the prevailing wage determination made by the California Director of Industrial Relations (DIR survey), for "brush painter" on commercial building projects, is $20.67, but that this determination "by reference to commercial buildings only" does not include the painting of residential homes; (3) that the Department of Labor's Occupational Outlook Handbook states lower rates of pay for painters; (4) that the Local Painters and Drywall Finishers Union, upon contact by Employer's attorney, made a distinction between painters working on public/commercial works and those working on residential buildings, and that the quoted rate for residential painters was $17.00 per hour, while the rate for public/commercial painters was $20.67; and (5) that the hourly rate for a maintenance painter, according to the Merchants and Manufacturers Survey, is $15.00 per hour (AF 5-7). Employer's attorney concluded that "these amounts are more in keeping with the kind of work that this employer will be doing" and that "one of the prevailing wage determinations cited above should apply" (AF 7). In support of the attorney's allegations, the attorney submitted a copy of the DIR survey, a copy of the cited Occupational Outlook Handbook pages, and a copy of the M & M Association survey (AF 11-15). Employer's attorney did not submit supporting information concerning the alleged contact with the local union.

On April 20, 1989, the CO issued his Final Determination (AF 2-4). The CO reviewed Employer's evidence, and concluded that Employer had not proven that the occupation was not subject to a Davis-Bacon wage determination. At no point in the proceedings did the CO or the EDD provide Employer with notice of what the actual source of the prevailing wage determination was (such as the citation for the wage decision or a copy of only the relevant pages of such decision).

Employer requested review of the Final Determination on May 15, 1989 (AF 1). Employer's attorney again argued, by a brief filed on February 20, 1990, that the Davis-Bacon Act determination did not apply since that Act applied only to newly constructed or substantially modified commercial structures, while Employer's workers painted residential homes. Employer's attorney repeated the arguments he had made in rebuttal. Employer's attorney argues that the occupation of "residential painter" is excluded from the Davis-Bacon calculation, and that the mandatory wage is not $20.67, due to the failure of the Department of Labor to "make a distinction between commercial painting and residential painting."

A three-judge panel of this Board issued a Decision and Order on December 18, 1990, affirming the CO's conclusion denying certification because the Employer had failed to offer the prevailing wage. The panel found no merit in Employer's argument that the painting of public buildings and public works implicitly excludes residential homes upon noting that Employer's brief admits that the Wage and Hour Division issues determinations in public works projects included "residential construction--structure less than four stories tall designed for living space." In the alternative, the panel found that Employer's wage offer of $9.50 was well below any alterative prevailing wage rate submitted.

2. 89-INA-313, on behalf on Jose Medardo Arias (John Lehne II)

On June 15, 1988, Employer, John Lehne & Son, filed an application for alien employment certification on behalf of Jose Medardo Arias, to fill the position of painter (AF 22). The job duties for the position were the same as in the previously discussed application (AF 22).

Additional requirements for the position were two years of experience in the job offered, "knowledge of spray methods both conventional and airless," and the ability "to use various pieces of spray equipment, guns, pumps and power washers" (AF 22). Employer offered $9.50 per hour as the rate of pay, with overtime at one and one-half times that rate (AF 22).

On August 1, 1988, the Employment Development Department of the State of California (EDD) notified Employer that the prevailing wage for the position "is $20.67 per hour[,] Davis Bacon--5% rule does not apply." (AF-39). Employer was offered the chance to amend the wage before recruitment or to state that Employer chose not to amend the wage. Employer was also offered the opportunity to submit supporting documentation to justify the original wage offer. On August 16, 1988, Employer's attorney responded that Employer declined to amend the wage "on the ground that he is not subject to the Davis Bacon Act since none of his painting is done on new construction. John Lehne & Son provide painting services to existing structures, none of which are being newly constructed or substantially modified. Accordingly, the Davis Bacon Act is not applicable and the employer's wage of $9.50 per hour as submitted, is prevailing in the industry" (AF 24).

On October 3, 1988, the EDD sent Employer a notice to start recruitment (AF 35). This notice informed Employer that the proposed advertisement had been approved, and that Employer's 30-day recruitment period would end on November 6, 1988 (AF 36). Employer advertised the job opening in the Los Angeles Herald Examiner from October 14-16, 1988, and

posted the required notice from October 19 to November 1, 1988 (AF 27-33). Employer explained that there were no referrals from the EDD office or any other source (AF 29).

The EDD transmitted the case to the CO on January 12, 1989. In the portion of the form which asks for the source of the prevailing wage determination, the EDD indicated "Davis Bacon LA Co. pg 79 Painter" (AF 21). The EDD directed the CO's attention to Employer's letter concerning the applicability of the Davis-Bacon wage determination (AF 21).

On February 7, 1988, the CO issued a Notice of Findings proposing to deny certification (AF 16-18). The CO found Employer in violation of 20 C.F.R. §§656.20(c)(2) and 656.40(a)(1) by refusing to pay the prevailing wage. The CO explained that "[t]he occupation of painter is one for which a prevailing wage determination has been made pursuant to the Davis-Bacon Act", and that the wage was $20.67 per hour (AF 18). The CO explained that the issue of the applicability of the Davis-Bacon wage determination "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" (AF 18). The CO required Employer to either increase the rate of pay and retest the labor market or "show that the prevailing wage finding is not accurate" (AF 18). To show that the prevailing wage finding was not accurate, the CO required a showing that "the occupation is not subject to a wage determination under the Davis-Bacon Act" (AF 19).

Employer filed rebuttal on March 14, 1988, making the same arguments and submitting the same evidence which was again submitted in the case described above (AF 5-16). On March 31, 1989, the CO issued his Final Determination (AF 2-4). The CO reviewed Employer's evidence, and concluded that Employer had not proven that the occupation was not subject to a Davis-Bacon wage determination. The CO noted that the attorney was incorrect in inferring that Davis-Bacon wage rates are not established for residential construction, alteration or repair. The CO explained: "According to an Employment Services Administration official consulted by the [sic] this office on March 22, 1989, residential construction, alteration, or repair is included in calculating the Davis-Bacon wage rate because of the numerous residential housing public works projects funded by the United States Housing and Urban Development Department. The wage cited in the Notice is based on the United States Department of Labor General Wage decision CA89-2 which states the following under the category "Construction Description': Residential construction" (AF 3-4). This was the first time that Employer had been put on notice as to the source of the Davis-Bacon wage determination, notably only in the Final Determination of this case and on the rebuttal deadline for the previously discussed case.

Employer requested review of the Final Determination on May 4, 1989 (AF 1). Employer's attorney again argued, by a brief filed on March 7, 1990, that the Davis-Bacon Act determination did not apply since that Act applied only to newly constructed or substantially modified commercial structures, while Employer's workers painted residential homes. Employer's attorney repeated the arguments he had made in rebuttal. Employer's attorney argues that the occupation of "residential painter" is excluded from the Davis-Bacon calculation, and that the mandatory wage is not $20.67, due to the failure of the Department of Labor to "make a distinction between commercial painting and residential painting." As an additional

argument in this case, Employer's attorney notes that the CO never provided a copy of the wage decision to Employer and challenges any wage determination made by reference to that decision without first having an opportunity to examine and rebut the findings made therein.

A different three-judge panel of this Board issued a Decision and Order on December 12, 1990, remanding the case for a determination of the proper prevailing wage rate. The panel found that the CO improperly assessed a prevailing wage rate by not distinguishing between commercial building painters and residential, single family housing painters. As such, the panel found that the CO failed to establish that the prevailing wage suggested by the CO was based on reasonable and reliable data. The panel accordingly remanded the case for a prevailing wage determination in accordance with its opinion. The panel did not rule on Employer's failure to offer any of the other suggested wage rates, apparently because no prevailing wage rate had yet been established.

Discussion and Conclusions

Section 656.20(c)(2) of the regulations requires that the Employer offer a wage which equals or exceeds the prevailing wage rate as determined pursuant to section 656.40. 20 C.F.R. § 656.20(c)(2). If a job opportunity involves an occupation which is covered by the Davis-Bacon Act at 40 U.S.C. § 276a et seq., then section 656.40(a)(1) requires that the prevailing wage rate be assessed in accordance with the statutory determination. Standard Dry Wall, 88-INA-99 (May 24, 1988) (en banc).

The CO's Burden

Under the facts of the present cases, the CO properly placed the Employer on notice that it was required to either increase the rate of pay and retest the labor market or to establish that the prevailing wage determination was in error. The burden of persuasion rests with the Employer seeking to challenge the CO's prevailing wage determination. However, placement of this burden on the Employer presumes that the Employer knows the source and basis for the CO's determination.

In John Lehne I and John Lehne II, the CO did not provide the source of the prevailing wage determination to the Employer with the issuance of the NOF, other than to note that the occupation of painter was covered by the Davis-Bacon Act. It is unreasonable to require that an employer rebut a wage rate of ambiguous or unknown origin, or one which is not easily accessible. This is particularly true where, as in John Lehne II, the CO cited reliance upon the Department of Labor General Wage Decision CA89-2, yet failed to provide a copy of the relevant portions of this Decision to the Employer. Consequently, in those cases where the wage rate is in dispute, it is incumbent upon the CO to provide a copy of the relevant portions of his or her source for the prevailing wage determination with the NOF.

In addition, if an employer challenges the CO's Davis-Bacon wage determination in rebuttal, then the CO must provide a reasonable explanation of how the prevailing wage was determined from the Davis-Bacon schedule, and why it was appropriate under the circumstances.

It is unclear under the circumstances of the present cases whether the CO's wage determinations were appropriate. Although it is agreed that the occupation of painter is covered by the Davis-Bacon Act, the listing in the Davis-Bacon schedule CA89-2 sets forth a number of categories for painters. In John Lehne I and II, the CO determined that the prevailing wage rate was $20.67 per hour.

The Employer argued that the CO's wage rate did not apply to residential construction. The CO countered this assertion to state that "an Employment Services Administration official consulted by this office on March 22, 1989 [affirmed that] residential construction, alteration, or repair is included in calculating the Davis-Bacon wage rate because of the numerous residential housing public works projects funded by the United States Housing and Urban Development Department." Moreover, the General Wage Decision CA89-2 states that it is applicable to residential construction. Thus, the CO has offered adequate support for his conclusion that the Davis-Bacon wage listing includes painters of residential homes as he has set forth the source and rationale for such a finding.

It is important to note, however, that the category of painter contains several subclassifications for wage rates in Los Angeles County under Areas 1, 2, and 3 of General Wage Decision CA89-2. The subclassification which most closely approximates the job offered is controlling. See e.g., South Gate Engineering, Inc., 89-INA-215 (June 20, 1991). It is therefore incumbent upon the CO, in the present cases, to cite the subclassification upon which his wage rate is based and to assure that the wage rate is appropriate for a brush painter of residential homes in Los Angeles County.

The Employer's Burden

An employer seeking to challenge a prevailing wage determination generally 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 correct prevailing wage. PPX Enterprises, Inc., 88-INA-25 (May 31, 1989) (en banc). Because the occupation of painter is covered by the Davis-Bacon schedule, the prevailing wage rate must be derived from that schedule and cannot be assessed from an independent wage survey conducted by the Employer.

However, the Employer is not precluded from conducting a survey which may indicate an error in the classification used by the CO in the Davis-Bacon wage assessment. In the present case, the Employer's wage survey yields a rate which is $3.00 to $4.00 less per hour than that assessed by the CO. It is noted that the General Wage Decision CA89-2 reports a wage rate for painters in Area 2 on "[c]onstruction up to and including 3 stories in height" as $17.50 per hour, which is commensurate with the Employer's survey results. Although we do not address the applicability of this rate in these cases, the CO is obliged to consider such distinctions between classifications for painters on the Davis-Bacon schedule.

Finally, in addition to demonstrating that the CO's wage determination is in error, the Board in PPX Enterprises requires that the Employer establish that its wage offer is at or above the correct prevailing wage. The Employer has failed to do so in these cases where the wage it

offered was $9.50 per hour which meets neither the CO's assessment of $20.67 per hour nor any other rate set forth for painters in General Wage Decision CA89-2. Generally, labor certification would properly be denied for failure to pay the prevailing wage or offer to advertise at the correct wage rate. However, under the circumstances presented here, the cases are remanded for proceedings consistent with this opinion. In particular, the CO is required to state in a new NOF which Davis-Bacon classification he finds applicable to the job at issue in these cases, and the reasons supporting his finding.

ORDER

The Certifying Officer's denial of labor certification in these cases is VACATED and the cases are REMANDED for proceedings consistent with this opinion.

For the Board:

Nahum Litt
Chief Administrative Law Judge