



Date: January 28, 1991

In the Matters of:

KIDS "R" US,
Employer

on behalf of

LUIS ALFREDO SEVILLA,	:	89-INA-311
GERMAN ULLOA,	:	89-INA-312
MARIA NELLY LONDONO,	:	89-INA-344
JAIME CAJILEMA,	:	90-INA-20
MIRYAM OROZCO,	:	90-INA-75
VICTOR HUGO TOCA-ALVAREZ,	:	90-INA-81
ZOILA PIEDAD AGUIRRE,	:	90-INA-181
EVA GRANIZO,	:	90-INA-187
ANA YOLANDA NUNEZ,	:	90-INA-216
Alien		

BEFORE: Brenner, Glennon, Groner, Guill, Lipson, Litt, Romano Silverman, and Williams
Administrative Law Judges

ROBERT M. GLENNON
Administrative Law Judge

DECISION AND ORDER

These matters arise from requests for administrative-judicial review of United States Department of Labor Certifying Officer denials of labor certification.¹ Review of the denials of labor certification is based on the records upon which the denials were made, together with the requests for review, as contained in the Appeal Files (AF)², and written arguments of the parties. See 20 C.F.R. §656.27(c).

¹ Labor certification is governed by §212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14), and Title 20, Part 656 of the Code of Federal Regulations, 20 C.F.R. Part 656. Unless otherwise noted, all regulations cited in this Decision and Order are contained in Title 20, Part 656.

² Citations to the Appeal File (AF) are to the lead case, 89-INA-311.

Statement of the Case

Employer, Kids "R" Us, a children's clothing distributor, filed applications during 1988 for alien labor certification for the above-named aliens for a variety of positions such as "receiver," "container loader garment sorter," "material handler," "loop locator," "quality control checker," "carton sorter," "stock clerk (detailer)," and "container loader/stock clerk." In each matter, Employer offered to pay an hourly wage rate that was more than five percent below what was found to be the "prevailing rate of pay", as stated by the Certifying Officer.

Employer declined to change the job offers to reflect the prevailing rate of hourly wages, but asserted that its offered package of compensation benefits amounted to actual wages greater than the appropriate minimum wage level. In the case of the "receiver" position, for example, Employer's response to the prevailing wage determination was that it was "unable to offer within five percent of the prevailing wage" but that "our company-paid employee benefits are above average and more than make up for the difference between our starting salary of \$6.50 per hour and the \$7.15 per hour rate which is acceptable to you." Employer stated:

Our company benefits include a medical plan with HMO and Major Medical for which the employee pays only \$5.00 per week (this plan costs the company over \$500 per year, per employee). We also provide a one-week paid vacation after the first February after starting and two weeks paid vacation after the second February 1, life insurance at twice the employee's annual salary, payment for jury duty and funeral leave; a stock option program, a stock purchase program wherein the company adds ten percent to any purchase made by an employee and pays all the brokerage fees as well, a company-paid profit sharing plan where the company contributes eight percent of salary (and the employee pays nothing) into a retirement fund, a 401K plan after two years where the company matches half of the employee's contribution, and other benefits as well.

[89-INA-312 at AF 16].

The Certifying Officer issued Notices of Findings in these matters proposing to deny certification on the ground that the wage offer was below the prevailing wage, and thus would have an adverse effect on wages and/or working conditions of U. S. workers similarly employed. The NOFs indicated that the prevailing wage must be paid exclusive of the value of fringe benefits and/or other bonuses.

Employer submitted timely rebuttals in the matters arguing that fringe benefits, if far above average, are relevant in the determination of whether employment of the alien will have an adverse effect on the U.S. job market. Employer indicated a willingness to post notices and to place job orders if the total packages offered are found acceptable by the Department of Labor.

Final Determinations were issued in each of the matters denying certification on the ground that Employer failed to amend its wage offer and that Employer's rebuttal was inadequate as countervailing evidence that the prevailing wage determination is in error.

Employer timely requested review in each of the matters, and submitted timely briefs in most of the matters (no brief was received in 89-INA-344).

Discussion

As noted by the Certifying Officer in these applications, the governing regulations require an employer seeking alien labor certification to demonstrate, among other things, that the wage offer presented:

. . . equals or exceeds the prevailing wage determined pursuant to Section 656.40 .
..

[20 CFR 656.20(c)(2)]

Section 656.40 of the Regulations governs the process of determining whether a job offer equals the prevailing wage. That regulation provides that if the job opportunity is covered by a prevailing wage determination required by the Davis-Bacon Act, 40 U.S.C. 276a, et seq, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351, et seq, that specific wage determination shall be controlling. 20 CFR 656.40(a)(1) For jobs not so covered, more flexible considerations govern the determination. For example, if the job is covered by an arms-length union contract, the negotiated wage rate:

. . . shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the "prevailing wage" for labor certification purposes.

[20 CFR 656.40(a)(2)(ii)]³

Where the job opportunity is covered neither by the statutory prevailing wage determinations nor a union contract, §656.40(a)(2)(i) is controlling. That subparagraph provides for a wage determination:

³ This subsection of the 20 CFR Part 656 Regulations was added to the Regulations as an amendment by the Secretary of Labor in response to the holding of the United States Court of Appeals for the Third Circuit in Naporano Metal & Iron Co. v. Secretary of Labor, 529 F.2d 537 (3rd Cir. 1976). In that case, certification had been denied administratively because the wage offered, although paid under a collective bargaining agreement, was below the relevant "prevailing wage". The Third Circuit held that payment of a union wage negotiated to cover both alien and United States workers could not, as a matter of law, adversely affect the wages and conditions of similarly employed American workers. Compare Industrial Holographics, Inc. v. Donovan, 722 F.2d 1362 (7th Cir. 1983). See 42 Fed.Reg. 3450 (1977).

. . . by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers.

[20 CFR 656.40(a)(2)(i)]

That subparagraph further provides that since exactness in such a calculation is not always feasible, a wage offer within 5 percent of that prevailing wage standard will be acceptable.

Although on its face the language of §656.40(a)(2)(i) could be read to mean that the pertinent "average rate of wages" must be only a simple average of basic hourly rates of pay, excluding consideration of fringe benefits, we do not read the regulation so narrowly. As noted by the Third Circuit in Industrial Holographics, *supra*, the Secretary's regulatory prescription of a "prevailing wage" requirement simply gives operational content to the language of §212(a)(14) of the Act. The regulatory prescription of the "prevailing wage" standard provides a practical test for whether employment of an alien at the compensation offered would tend, in the language of the statute, to adversely affect the wages and working conditions of U.S. workers. It can be seen, then, that the process of calculating a "prevailing wage" or "average rate of wages" is a process for meeting the statutory standard, the "adverse effect" standard of §212(a)(14) of the Act.

The provisions of subparagraph (2)(i) of §656.40(a) of the Regulations must be read in their full statutory and regulatory context. Both of the other two "prevailing wage" determination processes of §656.40(a), those dealing with Davis-Bacon types of jobs and with union contract jobs, allow for consideration of fringe benefits. Compensation for union jobs, of course, is dealt with in collective bargaining that may include consideration of fringe benefits. For Davis-Bacon types of jobs, compensation, including fringe benefits, is governed by specific legislation. The Congress expressly amended the Davis-Bacon Act in 1964 to mandate consideration of fringe benefits in determining prevailing wages. That amendment, now §276a of the Davis-Bacon Act, specifies, in pertinent part, that the terms "wages", "wage rates", and "prevailing wages" shall include both (1) the basic hourly rate of pay and (2) the amount of employer contribution for such things as medical insurance, pensions, etc. 40 U.S.C. 276a, July 2, 1964, P.L. 88-349, 78 Stat 238 In its report recommending passage of the amendment, a majority of the Senate Committee on Labor and Public Welfare stated:

[The proposed amendment] which was passed by the House on January 28, 1964, is designed to modernize the Davis-Bacon Act by bringing its standards into conformity with modern wage payment practices. It recognizes that fringe benefits which were unknown when this act became law a third of a century ago now constitute an integral part of the wages of millions of workers. It further recognizes that these fringe benefits must be reflected in prevailing wage determinations under the act . . .

[Senate Report No. 963, March 17, 1964; 1964 U.S. Code Cong. & Ad. News 2339.]

Upon review of the matter, we conclude that a fair reading of both §212(a)(14) of the Act and the Secretary's regulations implementing the Act requires consideration of an employer's

proffered fringe benefit compensation in determining the relevant prevailing wage for purposes of 20 CFR 656.20(c)(2) and 656.40.

In the cases before us, Employer categorically states that the specific costs and benefits can accurately be calculated; that, unlike qualitative factors such as workplace danger or extreme heat or cold, "fringe benefits" have a definite cost and a definite value. We agree with Employer here that it should have the opportunity to have its evidence of fringe benefits considered by the Certifying Officer in the determination whether the wage offered equals or exceeds the pertinent prevailing wage within the meaning of §656.20(c)(2) and § 656.40 of the Regulations. We conclude that the Act mandates that the Certifying Officer permit an employer to submit evidence of fringe benefits if it wishes to show that its offer of a basic hourly rate of pay is significantly enhanced by fringe benefits available to its workers at the time of hire. However, we realize that it may be difficult to quantify precisely the value of fringe benefits in particular cases. Accordingly, when an Employer relies on fringe benefits in its wage offer, it bears a heavy burden to demonstrate to the Certifying Officer the fairness and bona fides of its proposal. As was stated by a panel of this Board in Peddinghaus Corp., 88-INA-79 (July 6, 1988):

. . . at a minimum the Employer must establish the value of its fringe benefits and show that its fringe benefits are not common to the comparable jobs upon which the prevailing wage rate is based. Moreover, if the Employer is relying on unique fringe benefits, then these fringe benefits must be disclosed in its advertisements and posted notices.

We conclude that these applications for alien labor certification must be remanded to the Certifying Officer for consideration in light of this Decision and Order.

ORDER

The Final Determinations denying labor certification are hereby VACATED and these matters REMANDED for further proceedings consistent with the above.

At Washington, D.C.

Entered:

by:

Robert M. Glennon

Administrative Law Judge

JOEL R. WILLIAMS, Administrative Law Judge, dissenting:

I can not agree that the monetary value of fringe benefits may be included in the calculation of the prevailing wage for labor certification purposes.

Section 212(a)(14) of the Immigration and Nationality Act provides, in pertinent part, that employment of the alien shall not adversely effect "the wages and working conditions" of United States workers similarly employed. Regulations promulgated under the Act on February 4, 1971, 29 C.F.R. §60.6, provided in this regard:

Prospective employment offered in accordance with §60.3(c) will be deemed to adversely effect "wages" or "working conditions" of American workers within the meaning of section 212(a) (14) of the Act unless it appears:

(a) That such employment will be for wage rates no less than those prevailing for U.S. workers similarly employed. . .

(b) That such employment will include the furnishing of fringe benefits that prevail for U.S. workers similarly employed in the area of employment.

...

The "wage rates" were to be those already established under the Davis-Bacon and related Acts or those set forth on Wage Board rate schedules applicable to Federal installations in the area. In the absence of current determinations under these laws, wages were to be determined in accordance with the current regulatory criteria established pursuant to the Davis-Bacon Act.

Clearly then, prior regulations treated "wage rates" and "fringe benefits" separately with employers' being required to meet prevailing standards as to both. However, in Ozbirman v. Regional Manpower Adm'r, 335 F.Supp. 467 (S.D.N.Y.1971) the Court considered that this approach improperly construed the term "adverse effect" and did not "properly and realistically implement the statutory purpose." The Court stated in this regard:

"The approach of the regulations and of the Secretary of Labor in this case equates a wage below the prevailing rate with an adverse effect on wages. But the interrelationship between one's pay rate and other fringe benefits indicates that such an adverse effect would not necessarily occur. The term 'adverse effect' is necessarily a box of variables. Shorter hours, unique vacation periods or working conditions, proximity to home and family, and exceptional fringe benefits are all factors which influence the labor market and have an effect on wages in this country. The above list doubtless could be expanded, but the point should be clear that an employee can receive exceptional benefits which are not in the form of money and which prevent any adverse effect notwithstanding a deficiency in wages. Any determination of an adverse effect on wages should be scrutinized and balanced in light of the variables which enter into a job offer."

Although the Court remanded the case to the Department of Labor to exercise its discretion in the light of these principles, it also ruled alternatively that it was an abuse of discretion for the Secretary of Labor to deny the application as the wage offered was union negotiated and equivalent to the salary paid to the employer's other workers. See to the same effect regarding union negotiated wages: Naporano Metal and Iron Company v. Secretary of Labor, 529 F.2d 537 (3d Cir. 1976).

Effective February 18, 1977, the regulations covering the labor certification process were revised substantially and designated as 20 CFR Part 656. Section 656.40 of the new regulations cover the provisions for the "[d]etermination of prevailing wage for labor certification purposes." An existing "wage determination" under the Davis-Bacon or Service Contract Acts again became the prevailing wage for work certification purposes. If no such applicable determination exists in a given case, the prevailing wage shall be either the average rate of wages paid to workers similarly employed in the area of intended employment or the wage rate set forth in any applicable union contract negotiated at arms-length.

Section 656.40 makes no mention of including or deleting "fringe benefits" in the prevailing wage determination. The term "fringe benefits" appears nowhere else in the new regulations. The deletion of the "fringe benefit" proviso of the former 29 CFR §60.6 was not noted to be one of the substantive changes to the present regulations when the proposed 20 CFR Part 656 was published in the Federal Register on November 5, 1976, 41 Fed. Reg. 48938 (1976). No mention of the deletion was included with the comments which accompanied publication of the final rule in the Federal Register on January 18, 1987. 42 Fed. Reg. 3440-41 (1978).

From the forgoing history it can be seen that the prior regulations treated "fringe benefits" as an element of "working conditions." Thus, there is no inconsistency between the prior, specific regulatory requirement that an employer's job offer meet area averages as to both "wage rates" and "fringe benefits" and the Act's requirement that the employment will not adversely effect "wages and working conditions" of U.S. workers.

As previously noted, the current regulations adopt any existing "wage determination" under either the Davis-Bacon or the Service Contract Act as the prevailing wage for labor certification purposes. Section 2 (a)(1) of the latter act requires contractors to pay service employees prevailing "monetary wages" while Section 2 (a)(2) requires that they furnish prevailing "fringe benefits." Likewise, regulations interpreting the Service Contract Act, 29 CFR, Part 4, treat wage and fringe benefit payments as separate elements and require that Federal contractors meet prevailing standards as to both. Section 4.167 provides specifically in this regard that an employer may not include the cost of fringe benefits or equivalents as required under § 2 (a)(2) of the Act, as a credit toward the monetary wages it is required to pay under § 2 (a)(1).

Regulations interpreting the Davis-Bacon Act, 29 CFR, Part 5, do not contain a proviso identical to 29 CFR § 4.167. Nevertheless, after noting in §5.24 that the "basic hourly rate of pay" is that part of the wages which would have been found and included in the wage determinations prior to the 1964 amendments, the regulations proceed to specify in §5.31 that a contractor may discharge its obligations under the Act by "paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for "bona fide" fringe benefits in a total amount not less than the total of the fringe benefits required by the wage determination."

Significantly, §656.40 (a)(2), which covers the method for establishing the prevailing wage in the absence of a determination under either of the aforementioned acts, speaks only in

terms of averaging the rate of wages paid to similarly employed workers. Supplemental guidelines for accomplishing such averaging are contained in Section O of Technical Assistance Guide No. 656 (TAG). No mention is made in these rather elaborate instructions and accompanying examples of including fringe benefits in any such averaging. Furthermore, the instructions permit reliance on various surveys conducted by the Bureau of Labor Statistics including the Area Wage Survey (AWS). In fact, the prevailing wages for two of the positions in the instant cases, Londono and Toca-Alvarez, are based on an AWS. It is officially noted that "fringe benefits" are excluded from the payroll data gathered by the Bureau for compilation of these surveys.

Obviously the Employer herein is not the only one in the retail business to offer fringe benefits to its employees. Thus, in order to accurately compare its package of hourly wage and fringe benefits with that of similar employers, the State agency would have to gather area industry data as to both factors. Setting such a precedent would have the effect of scrapping the current TAG methodology as State agencies would no longer be able to rely on a readily available AWS or similar survey. Although the TAG is not in itself regulatory, it does represent the Department of Labor's interpretation of its regulations. As noted in Udall v. Tallman, 380 U.S. 1, 16; 85 S.Ct. 792, 801 (1965):

When faced with a problem of statutory construction this Court shows great deference to its construction by the officers or agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."

For reasons already stated, it can not be said that the TAG's interpretation is plainly erroneous or inconsistent with the regulations. It follows that this Board has no cause to rewrite the TAG.

This same view was taken in substance by the United States Court of Appeals for the Seventh Circuit in Industrial Holographics, Inc. v. Donovan, 722 F.2d 1362 (1983). There the employer had initially offered a wage of \$1,000 per month for the position of export manager. However, based strictly on its survey of the "salary" paid to their export managers by five other employers, the State agency determined that the "prevailing wage" for the position was \$1,666 per month. Although the employer amended its application to reflect its willingness to pay this prevailing wage, it declined to readvertise the position at this rate. Consequently, its application for alien labor certification was denied. In its appeal to the Seventh Circuit, the employer argued, *inter alia*, that based on Naporano Metal & Iron, *supra*, and Ozbirman, *supra*, the Secretary's use of the prevailing wage standard was improper. In rejecting this contention, the Court noted:

"Each year the Department of Labor receives a large number of applications for permanent labor certification. [33,000 in fiscal year 1981]. A complete and thorough analysis of all relevant factors involving the impact of each individual alien's employment on the labor market is clearly out of the question. Sound administration and concern for consistency and fairness require simplified rules of general application for imposing the statutory standards.

"The regulations here assume, as a general proposition, that the employment of an alien at wages below the prevailing wage will tend to affect adversely the wages and working conditions of American workers. Appellants have provided no evidence to persuade us that this general assumption is arbitrary or capricious. While it may be possible to conceive of cases in which the prevailing wage standard would be inconsistent with the statute's purpose, that is not the case here." (Footnotes omitted)

In regard to Naporano Metal & Iron, the Court noted that although the Third Circuit had decided the case on a distinguishable issue, i.e., union wages, it had described the "adverse effect" standard of the statute as "substantially different" from the "prevailing wage" requirement of the regulation. However, while the Seventh Circuit agreed that the statutory standard differs from the regulation's standards, it found that the standards are not necessarily inconsistent. Rather, "[t]he regulation simply gives operational meaning to the statute's expression of congressional purpose" and is clearly within the Secretary's authority to issue.

After noting agreement with the Ozbirman court that a truly thorough analysis of adverse effects involves factors other than wages, e.g. other benefits, the Seventh Circuit went on to state:

"However, we do not agree that the Secretary of Labor is without authority to issue regulations simplifying the inquiry so that decisions will be less arbitrary and more consistent."