U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, D.C. 20001-8002

Date: FEB 4 1994

Case No.: **91-INA-388**

In the Matter of

HATHAWAY CHILDRENS SERVICES,
Employer

on behalf of

JOSE SALVADOR PLACENCIA,
Alien

William N. Siebert, Esquire
Los Angeles, California
For the Employer

Before: *Brenner, Clarke, Glennon, Groner, Guill, Huddleston, and Litt*
Administrative Law Judges, *En Banc*

Samuel B. Groner
Administrative Law Judge

DECISION AND ORDER

Introductory Statement

The Employer named above requests review, pursuant to 20 C.F.R. 656.26 (1991), of the Certifying Officer's denial of an application for labor certification. This application was submitted by the Employer on behalf of the above-named Alien, under Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. sec. 1182(a) (1990). 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).

The provision referred to allows employers in this country to obtain admission to the United States of an alien worker to take a specific job, if the Secretary of Labor certifies (1) that there are not enough United States workers at that time who are able, willing, qualified, and available for that job in the place where the work is to be done, and (2) that employment of the alien will not adversely affect the wages and working conditions of United States workers

similarly employed. The regulations published by the Secretary in Part 656 of 20 C.F.R. set forth the requirements for such certification.[1]

An employer seeking to take advantage of this special provision of the Act is required to comply strictly with those requirements, and of course bears the burden of proof to document that he has done so. Thus an employer must show that he has fairly and by reasonable means made a good faith effort to test the availability of qualified U.S. workers, and to recruit such workers who are willing to work at the prevailing wages and under the working conditions of the proposed job opportunity.

The Issue And The Regulatory Provision Involved

Our decision in this case turns on the meaning of the term "similarly employed," as that term is used in Section 656.40 of Title 20, in the calculation of the "prevailing wage" that an employer seeking alien labor certification must offer for the job opportunity in question. For positions not covered under the Davis-Bacon Act, 40 U.S.C. §§ 376a et seq., as is the case here, section 656.40(a)(2)(i) of Title 20 provides that that wage is equal to

> [t]he average rate of wages, that is, the rate of wages to be determined to the extent feasible, 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.

Section 656.40(b) further provides that

> "[S]imilarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment, "

The Employer here, "a non-profit, United Way affiliated agency which provides board and care for multiple handicapped children," with "operating revenue limited to State funding grants, contracts with Los Angeles City schools and private charity donations," in "southern California" (AF 17), contends that the "prevailing wage" it must pay to an alien it wishes to hire as a maintenance repairer cannot properly be determined by considering the wages paid to such workers by business enterprises conducted for profit. Only employees of organizations like itself, this Employer argues, may be considered as "similarly employed" for that purpose.

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[1] The following abbreviations are used in this Decision and Order:

The Act, for the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*;

AF, for the Appeal File, assembled by the Certifying Officer, which, with the petitioner's request for review and supporting brief, constitutes the record upon which this review is based;

CO, for the Certifying Officer;

NOF, for the Certifying Officer's Notice of Findings, preliminary to a Final Determination; and

FD, for the Certifying Officer's Final Determination, for which this appeal is taken.

The Facts

On September 13, 1990 Hathaway Childrens Services, a residential treatment center for emotionally disturbed children and the Employer in this case, filed an application for Jose Salvador Placencia, to fill the position of Maintenance Repairer. The duties of that job were as follows:

> Do all cleaning of facility. Repair any minor electrical, plumbing, carpentry that may arise in such building. Also, replace door locks & doorknobs, fixtures, etc. Paint as needed. Use various hand/power tools, such as: Drills, saw, hammer, etc..

AF 13. No particular formal education was required of applicants, but they did have to have six months of experience in the job itself, and had to have employment references that could be verified. A wage of $6.05 per hour was offered, on the basis of a forty-hour week. At the time this application for certification was filed, the Alien had occupied the job with this Employer for more than four years. AF 13, 50.

The Certifying Officer filed a Notice of Findings on April 9, 1991, proposing to deny the application on the ground that the wage of $6.05 per hour offered was below the prevailing wage of $10.96. The CO noted that the State Job Service had pointed out that Employer's wage offer was below the prevailing wage (AF 20), and that instead of conforming its offer to the wage prescribed "you chose to rebut the wage finding" by offering Employer's own wage survey, of nine "similar non-profit child care agencies in Southern California," which supported its proposed wage rate. AF 17-18. However, the CO found Employer's said rebuttal (Employer's letter of February 26, 1991, AF 17-18) unsatisfactory, because the employers this Employer had contacted included some outside the local labor market (Los Angeles County), the survey did not define the term "maintenance" that it used, and the sample size was much smaller than that of the survey used by the Job Service (6 employers as against 83, and 28 employees as against 303). AF 8-11.

There then followed an exchange of correspondence between the Employer's attorney and the CO. On April 12 counsel wrote the CO reminding him that in its wage survey letter of February 26 the Employer had requested "that this case be given special consideration, and be accepted based upon the Tuskegee University case decision of February 23, 1988" (AF 18). The attorney, noting that the NOF was "silent on that issue," asked that the CO "Please reconsider the employer's request for "Tuskegee' treatment and advise us further." AF 7.

The case referred to, of course, is the decision in *Tuskegee University*, 87-INA-561 (February 23, 1988, *en banc*). In that case the University, as Employer, established to the Board's satisfaction that the 43 United Negro College Fund privately funded historically black colleges, of which it is one, constitute a distinct class of establishments, from a salary level point of view, such that employment with other institutions of higher learning not among those 43 is not "similar" in relation to a prevailing wage (in the application of the "similarly employed" requirement contained in 20 CFR 656.40(a)(2)) in the determination of a prevailing wage.

The CO replied to the lawyer's letter on April 18. He referred counsel to the deficiencies in the Employer's wage survey as related in the NOF. AF 6.

On May 1, 1991 the Employer responded with its rebuttal. AF 3-8. Arguing from the *Tuskegee* decision, it contended that the Employer's survey, of "similar non-profit child care agencies in Southern California" (AF 17), did properly determine the prevailing wage "for similarly situated employers." AF 5.

The CO denied the application on May 22, 1991, on the basis of failure to offer the prevailing wage. AF 2-3.

Employer on May 30, 1991 requested our review of this denial (AF 1), and it and the Certifying Officer have submitted helpful briefs in support of their respective positions. In view of the potential importance of the question involved, we decided *sua sponte* to consider the case *en banc*, and to invite the submission of briefs by interested parties. We found useful the briefs submitted in response to this invitation by *amici curiae* American Immigration Law Foundation, American Immigration Lawyers Association, and the Fred Hutchinson Cancer Research Center.

Analysis and Decision

It is well settled that Employer, seeking the benefit of a special provision of the Immigration and Nationality Act under which a foreign worker is to be certified to take a job within the United States, has the burden of proof on an appeal from a Certifying Officer's denial of certification. *Cathay Carpet Mill, Inc.*, 87-INA-161 (December 7, 1988, *en banc*).

In its brief, Employer raises the objection that the CO did not provide the Employer with the information upon which his determination of the applicable prevailing wage was based. Indeed, an employer contesting the amount of such a wage determination is entitled to that information. This Board has held that an employer challenging a CO's determination of prevailing wage "bears the burden of establishing both that the Certifying Officer's wage determination is in error, and that the Employer's wage offer equals or exceeds the correct prevailing wage." *William Flint Painting & Cleaning Co.*, 90-INA-250 (December 9, 1992), slip op. at 4; *PPX Enterprises, Inc.*, 88-INA-25 (May 31, 1989, *en banc*). However, this obligation is based on the premise that the Employer, upon its request, has been made aware of the source for and basis of the CO's determination. *John Lehne & Sons*, 89-INA-267 (May 1, 1992, *en banc*); *William Flint*, op. cit. That condition was satisfied in the present case; this Employer was not confronted with the task of rebutting a wage rate "of ambiguous origin, or one which is not easily accessible," as was the case in *John Lehne*. *See William Flint*, op. cit. On the contrary, the Employer here was informed early in the proceeding, by the State Job Service letter of January 28, 1991, that "the prevailing wage [of $10.96 per hour] for similar workers located in the same labor market" was based on the Merchants and Manufacturers survey, under the title "General Maintenance." AF 20. Employer could have obtained this survey on its own, or asked the Job Service or the CO for a copy.

But in fact this is not Employer's real point of argument. It is basically contending that its case is analogous to that of Tuskegee University, which demonstrated to a majority of the Board that in construing the requirement "similarly employed" as applied to its case the determining authority had to go beyond the usual consideration of the duties to be performed by the employee in question, and consider rather only jobholders performing those duties for the United Negro College Fund universities as an isolated class separate from all other such jobholders. *Tuskegee University*, op. cit. Employer contends that it is appropriate for us here to recognize as a separate class of maintenance repairers those who work for agencies that are, like Employer itself, "a non-profit, United Way affiliated agency which provides board and care for multiple handicapped children", with "operating revenue . . . limited to State funding grants, contracts with Los Angeles City schools and private charity donations," in "southern California." AF 17. Employer argues that, for such organizations, a survey based on wages paid by merchants and manufacturers, organizations conducted for profit, is not reasonably applicable.

Thus this Employer is urging us to establish an exception to the traditional application of "similarly employed" under our regulations. Exceptions should be inaugurated only with reluctance; they erode clarity in interpretation. Yet recognition of the unique nature of charitable institutions -- and of their all-too-frequent condition of poverty -- is well established in the law. They have long received special treatment; particular provisions with respect to the laws of taxation and the Rule against Perpetuities come readily to mind.

Nevertheless, the Certifying Officer argues strongly that "the totality of the job opportunity" standard that we enunciated in *Tuskegee*, if based "on any aspect of the employer's business, non-profit or otherwise, cannot be reconciled with the regulations as written." CO's Bf. at 8 (underscoring in original)

The Employer and the *amici curiae*, on the other hand, urge us to recognize this applicant as a member of a special class, on the basis of its non-profit and charitable status. In doing so, they rely on several U.S. District Court cases, and on our own decisions in *Tuskegee* and in *Talladega College*, 89-INA-209 (Apr. 19, 1990). Three of the cases cited involved school teachers, and were also relied on by the Board's majority in *Tuskegee*. On reflection, we conclude that the cases do not support the holding in *Tuskegee*.

Two of the teacher cases dealt with Montessori pre-school-age-school teachers, and resulted in decisions that the appropriate comparison in determining the proper "prevailing wage" for them was with other Montessori method teachers as a separate class, and not with teachers in general. *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.Tex1977). The other case held that the prevailing wage scale for lay teachers in Catholic parochial schools could be different from the scale for public school teachers. *Golabek v. Regional Manpower Administration*, 329 F.Supp. 892, 895-6 (E.D.Pa.1971). But these cases are not a valid precedent for Employer's argument, for the Montessori cases turned expressly on the point that teaching by that method involved different duties and constituted a different job than conventional teaching, and *Golabek* simply relied on the accepted principle that a "prevailing wage" for our purposes may be established by a union contract.

A fourth case cited to support Employer's position is *First Girl, Inc. v. Regional Manpower Administration*, 361 F.Supp. 1339 (N. D. Ill.1973), which held that a different wage scale applies to secretaries employed by a temporary employment agency than to conventional full-time employees. But here, again, the rationale for the decision was that the two jobs were not the same.

In *Talladega*, dealing with a college that, like Tuskegee University, is one of the 43 United Negro College Fund privately funded historically black colleges, we relied on our decision in *Tuskegee*. We also applied a principle, accepted by both sides in that case and reasonable on its face, that salaries paid faculty members in one field of learning may appropriately be different from those paid in another. *Talladega*, op. cit., slip op. at 5.

Hathaway here is competing in the same pool of maintenance repairers as all other charitable institutions -- even including, if they should happen to be located geographically near by, modestly funded UNCF schools and heavily endowed members of the Ivy League -- and all other employers, both charitable and profit-seeking, as well. The hiring of this Alien as maintenance repair man, at a rate of pay below the prevailing wage, will depress the wage level of U.S. workers who are looking for such a job; they are in the same market.

Non-profit organizations, as the Certifying Officer reminds us, "must pay the minimum wage under the Fair Labor Standards Act. They must comply with the Occupational Safety and Health Act. Their workers are covered by the unemployment insurance laws." CO Bf. at 15. And so are they also subject to the Immigration and Nationality Act.

With these considerations in mind, further reflection on the matter persuades us that Judges Levin, Fath, and Vittone were prescient in their dissent in *Tuskegee*, and that our holdings in that case and in *Talladega* were ill-advised and should be explicitly overruled. The underlying purpose of establishing a prevailing wage rate is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality. It follows that the term "similarly employed" does not refer to the nature of the Employer's business as such; on the contrary, it must be determined on the basis of similarity of the skills and knowledge required for performance of the job offered. Of course the nature of the Employer's business may be reflected in that determination, to the extent that it bears on the knowledge and skills required to perform the duties of the job; e.g., evidence could reasonably be adduced, for purposes of arriving at the correct prevailing wage rate, to show that the skills and knowledge needed to perform the duties of a mechanic for an airline are or are not similar to those pertaining to the job of automobile mechanic. But neither the record in *Tuskegee*, nor the record before us today, suggests that the skills and knowledge required to perform the duties of the job opportunity being offered are any different depending on the employer's financial ability to pay the going rate. Specifically, there is no evidence to suggest that the duties of the job offered, either as an associate professor of physics in *Tuskegee* or as a maintenance repairman in the present case, differed as between charitable non-profit institutions and businesses operated for a profit. We find no basis, under the Act or under its implementing regulations, for allowing this Employer to hire an alien so that it can pay sub-standard wages to its maintenance repair or other workers, on the ground that it cannot pay the prevailing wage, while we tell the

Mom-and-Pop shop next door or around the corner that "There is no provision in the law or regulations which allows for waiver of the prevailing wage requirement on the basis of an Employer's financial hardship." *Norberto La Rosa,* 89-INA-287 (March 27, 1991), slip op. at 4.

Accordingly, we overrule our conclusion of law to the contrary in *Tuskegee* and *Talladega*, and will confirm the Certifying Officer's denial of certification in this case.

ORDER

For the reasons stated, the Certifying Officer's **denial** of certification is **affirmed**.

For the Board, *en banc*:

Samuel B. Groner
Administrative Law Judge

SBG:gbs
Washington, D.C.

Chief Judge Litt, concurring;

The *Tuskegee* case provides a reasonable and legitimate response to a plea by the United Negro College Fund's educational institutions which argue they need relief from the wage scales in place at other institutions. I would prefer to limit the exception contained in Tuskegee to the facts of that decision.