U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 March 2008

BALCA Case No.: 2008-INA-00099
ETA Case No.: D-05189-05250

In the Matter of:

APOSTOLIC ASSEMBLY OF THE FAITH IN CHRIST JESUS,
Employer,

on behalf of

GILBERTO CHAVEZ,
Alien.

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center[1]

Appearance: Eusebio A. Castillo, Pastor
For the Employer

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

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

OF REMAND

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification.

[1] The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[2]

STATEMENT OF THE CASE

On July 21, 2004, the Employer filed an application with the Texas Workforce Commission for labor certification to enable the Alien to fill the position of Reverend. (AF 51). On April 13, 2006, the federal CO at the Dallas Backlog Elimination Center (BEC) notified the Employer that the application had been forwarded to her. (AF 44-46). The CO notified the Employer that it needed to state the basic rate of pay for the position. (AF 46). Evidently in response to this notice the Employer stated a rate of pay at $8.00 per hour. (AF 43, 51).

On March 29, 2007, the CO sent the Employer a document entitled "Recruitment Instructions." The instructions informed the Employer that the prevailing wage was $11.79 according to the Occupational Employment Statistics survey, and that the Employer should advertise the job at that rate of pay. (AF 33; *see also* AF 37-41). The letter informed the Employer that if it advertised at a lower rate of pay it must provide documentation that supported that rate. (AF 33).

The Employer placed newspaper advertisements for the position stating a rate of pay of $8.00 per hour. (AF 24-25). One U.S. applicant was referred to the Employer, but he was rejected for lacking the job requirement of fluency in Spanish. (AF 18). When

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.\

the Employer submitted its recruitment report to the CO, it did not explain why it had used the $8.00 rate of pay issue. (AF 17).

On August 20, 2007, the CO issued a Notice of Findings (NOF) proposing to deny certification because the $11.79 wage rate had not been used in the Employer's advertisement. (AF 14-16). The CO informed the Employer that to rebut the NOF it must provide a copy of an advertisement and an internal posting from during the 30-day recruitment period. The CO stated that the advertisement "must reflect the prevailing wage provided in the Recruitment Instructions letter." (AF 16) (emphasis as in original).

In an undated letter, the Employer responded to the NOF by re-submitting its earlier advertisement. (AF 7). The Employer did not discuss the reason it used the $8.00 rate of pay.

On October 9, 2007, the CO issued a Final Determination denying certification because the Employer's advertisement had stated a wage rate of $8.00 an hour. (AF 3-5).

On November 13, 2007, the Employer requested review by BALCA. (AF 1-2). In the request, the Employer argued that it had complied with the CO's instructions for advertising the job, but did not explain why its advertisements were run at the $8.00 an hour rate instead of the $11.79 rate instructed by the CO. (AF 1).

The Board docketed the appeal on December 13, 2007, and issued a Notice of Docketing on January 10, 2008. The Employer filed a letter dated January 23, 2008 in which the duties of the position were recited, but in which the prevailing wage issue was not addressed.

DISCUSSION

The regulation at 20 C.F.R. § 656.20(c)(2) requires an employer to offer a wage that equals or exceeds the prevailing wage determined under section 656.40. Section 656.40. Where an employer is notified that its wage offer is below the prevailing wage, but fails to either raise the wage to the prevailing wage or justify the lower wage it is offering, certification is properly denied. *Editions Erebouni*, 90-INA-283 (Dec. 20, 1991). Generally, an employer seeking to challenge a prevailing wage determination 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.*, 1988-INA-25 (May 31, 1989) (en banc).[3] The CO, however, must provide the Employer with adequate notice of its burden on rebuttal. *Id.*[4]

In the instant case the Employer ignored the CO's recruitment instruction to advertise the job with a prevailing wage rate of $11.79 or to provide documentation that supported a lower rate. The Employer's rebuttal to the NOF, request for review and statement of position on appeal all failed to address the issue of why it chose to advertise at $8.00 per hour rather than $11.79 as instructed.

We find, however, that the Employer – who is pro se – was not given adequate notice of its burden on rebuttal. We recognize that the CO had informed the Employer in the Recruitment Instructions letter of the option to use a lower wage if it could document that the lower wage rate was appropriate. The NOF, however, only gave the Employer the option to produce an advertisement and posting from the original recruitment period establishing that the $11.79 rate was used. It did not give the Employer the option of

[3] *See also El Rio Grande*, 1998-INA-133 (Feb. 4, 2000)(en banc), slip op. at n.6, regarding the impact of General Administration Letter 2-98 on an employer's burden of proof regarding prevailing wage surveys.

rebutting by documenting that a lower prevailing wage rate was appropriate. This failure to correctly state the Employer's burden of proof in the Notice of Findings necessitates a remand for issuance of a new NOF that provides the Employer an option to establish through credible documentation that its wage offer was appropriate for the job offered.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **VACATED** and this matter **REMANDED** for further proceedings consistent with the above.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

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

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[4] *See also Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996) (en banc) (NOF does not need to be a roadmap to how to obtain certification, but must provide notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects).

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