U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 February 2004

BALCA Case No.: **2002-INA-266**
ETA Case No.: P1999-NJ-2427226

In the Matter of:

ST. AUGUSTINE'S SCHOOL,
Employer,

on behalf of

MARCELA ALEJANDRA CASTRO,
Alien.

Certifying Officer: Dolores DeHaan
New York, New York

Appearances: William J. Reilly, Representative
Catholic Community Services
Union City, New Jersey
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by St. Augustine's School ("Employer") on behalf of Marcela Alejandra Castro ("the Alien") for the position of Classroom Teacher. (AF 24-25).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written argument of the parties. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On January 14, 1997, Employer filed an application for alien employment certification on behalf of the Alien for the position of Classroom Teacher. The teaching position was for a primary teacher and included religious instruction. Minimum requirements for the position were listed as a Bachelor's Degree in Early Childhood Education and two years experience in the job offered. Rate of pay was initially listed as $18,000 per year and later amended to $18,115 per year. (AF 25).

Employer was notified by the State Employment Office on July 14, 1999 that its wage offer as indicated on the application was below the prevailing wage of $58,700 per year and $42.33 per hour for overtime. (AF 19-20).

By letter dated July 22, 1999, Employer amended its wage offer by $115 and asserted that its wage as amended is "the accepted salary scale for teachers in parochial schools in the Archdiocese of Newark." Employer further asserted that this is the standard as approved by the Archdiocese and the norm which is used by Catholic schools. A copy of the schedule issued by the Archdiocesan School Advisory Board was attached. (AF 21-26).

Employer was advised by the State Employment Office on July 30, 1999 that when hiring an alien, unless the job is a union job covered by a union contract, the prevailing wage is the cited $58,700 per year and that there is no separate prevailing wage for public versus private schools. (AF 27-28).

Employer responded by requesting that the application be forwarded to the CO "as the wage being offered conforms to the approved salary scale for teachers as directed by the Roman Catholic Archdiocese of Newark, Office of Education." (AF 29).

A Notice of Findings ("NOF") was issued by the CO on May 14, 2001, proposing to deny labor certification based upon a finding that Employer's wage offer was below the prevailing wage. In order to rebut this finding, Employer was instructed to increase its salary either to equal or to exceed the determined prevailing wage and to document a willingness to re-advertise, or submit a wage survey that meets the seven criteria in item J of the General Administration Letter (GAL) No. 2-98. (AF 33-34).

In rebuttal, Employer reiterated that the Archdiocesan school office publishes a "Recommended Salary Scale" for the schools of its Archdiocese and submitted a copy. Employer agreed to amend its proffered salary to meet the recent increase to $19,287 and further submitted that the fact of religious commitment and witness is an important consideration concerning its teachers. (AF 35-40).

The matter was remanded to the State Employment Office for re-evaluation. Upon review of Employer's wage data, the Office concluded in a letter dated October 19, 2001 that the submitted wage data did not meet the requirements for employer-submitted surveys (as outlined in the GAL No. 2-98, *Prevailing Wage Policy for Nonagricultural Immigration Programs,* U.S. Department of Labor Employment and Training Administration). The Office found that the suggested salary scales submitted did not constitute a wage survey, were not collected across the various industries that employ this occupation, and were not a "weighted" average. (AF 42-46).

A second NOF was issued by the CO on December 14, 2001, citing the findings of the State Employment Office, and again advising Employer that it must increase its salary offer to equal or to exceed the cited prevailing rate of pay or submit a wage survey that meets the seven criteria in item J of the GAL No. 2-98. (AF 47-49).

In rebuttal, Employer again stated that the Archdiocesan school office publishes a "Recommended Salary Scale" for the schools of its Archdiocese and submitted a copy. Employer further asserted that the wage does reflect the proposed or recommended wage for parochial school teachers sponsored by the Archdiocese of Newark and that the

"various industries that employ this occupation" are parochial schools and this is the norm. In addition, Employer asserted that the determined prevailing wage offer was incorrect. (AF 50-52).

The matter was referred to the local office again and the prevailing wage determination was amended to $32,950 per year. A NOF was then issued by the CO on March 14, 2002, advising of the amended wage and again directing Employer to either increase its salary offer to equal or exceed the cited prevailing rate of pay or submit a wage survey that meets the seven criteria in item J of the GAL No. 2-98. (AF 8-14).

In rebuttal, Employer stressed that the CO's finding relative to wages is based on norms in Jersey City, not Union City, and that they are for elementary school teachers in the public sector, not those operated in the private or parochial sector. Employer, in addition to the previously submitted Archdiocesan suggested salary guideline, submitted a comparative study of the wages offered in the Roman Catholic parochial elementary schools in the area of proposed employment, as well as additional schools in the area. Employer stressed the "special element in the religious witness and commitment of teachers in the Roman Catholic Parochial elementary schools" as a justification for its salary offer. (AF 54-58).

A Final Determination ("FD") denying labor certification was issued by the CO on June 7, 2002, based upon a finding that Employer had failed to show that the prevailing wage determination was in error and had not amended its wage offer to reflect the prevailing wage. (AF 64-65). In denying certification, the CO noted that the petitioned position was for a teacher and that factors going to the nature of the employer, such as Roman Catholic Parochial elementary schools, do not bear in a significant way on the skills and knowledge levels required, and therefore, are not relevant to determining the prevailing wage. Finding Employer's countervailing evidence still failed to meet the seven criteria in Item J of GAL 2-98, as cited in the NOF, the CO denied labor certification.

Employer filed a Request for Review by letter dated June 30, 2002 and the matter was docketed in this Office on September 5, 2002. (AF 66-67).

DISCUSSION

Pursuant to 20 C.F.R. § 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage as determined under 20 C.F.R. § 656.40. Twenty C.F.R. § 656.40 provides that, with the exception of occupations subject to the Davis-Bacon Act or the Service Contract Act, the prevailing wage is to be determined by the average wage paid to workers similarly employed in the area of intended employment. The term "similarly employed" is defined as "having substantially comparable jobs in the occupational category in the area of intended employment." 20 C.F.R. § 656.40(b)(2). The "area of intended employment" is defined as "the area within normal commuting distance of the place (address) of intended employment." 20 C.F.R. § 656.50. Where the employer is notified that its job offer is below the prevailing wage, but fails either to raise the wage to the prevailing wage or to justify the lower wage it is offering, certification is properly denied. *Ozu Mariko Corp*., 1994-INA-523 (Jan. 13, 1997); *Columbus Hosp.,* 1995-INA-282 (Apr. 16, 1996); *Trilectron Industries, Inc.,* 1990-INA-1988 (Dec. 19, 1991); *Editions Erebouni*, 1990-INA-283 (Dec. 20, 1991).

When challenging a CO's prevailing wage determination, an employer bears the burden of establishing both 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*). As stated in *Hathaway Childrens Serv.,* 1991-INA-388 (Feb. 4, 1994)(*en banc*):

> [t]he 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 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.

In the instant case, Employer maintained that because its job offer was for an elementary school teacher in the parochial sector as opposed to the public sector, its lower salary, outside the accepted range of deviation from the determined prevailing wage, was appropriate and justified. To the contrary however, we find, similar to the facts in *Mt. Gilead Bible Conference, Inc.,* 1992-INA-75 (May 12, 1994) and *Javad Berenji,* 1993-INA-90 (Oct. 27, 1994), the nature of Employer's business is irrelevant and other than the additional element of the religious instruction, there is nothing in the record suggesting that the skills and knowledge required for the petitioned position are any different than those of a public sector elementary school teacher. Only to the extent that it bears on the knowledge and skills required to perform the job duties will the nature of Employer's business be considered for purposes of determining "similarly employed." *Hathaway, supra.*

Consequently, Employer, having failed to submit countervailing evidence that the prevailing wage determination is in error, and having failed to increase the wage offer to the corresponding prevailing rate, did not adequately rebut the CO's finding that the wage offered was below the prevailing wage. Therefore, we conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 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 its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions 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
Washington, D.C. 20001-8002

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