

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 09 September 2003

BALCA Case No.: 2002-INA-234
ETA Case No.: P2000-CA-09494736/ML

In the Matter of:

V & E TREE SERVICE,
Employer,

on behalf of

BENITO SANABRIA-GARCIA,
Alien.



Appearance: Leonard W. Stitz and David W. Williams
Santa Ana, California
For Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Employer seeks permanent alien labor certification¹ for the position of "Tree Surgeon." (AF 23) In the initial application, Employer offered to pay \$10.00 per hour. The job

¹ 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.). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. §656.27(c).

duties were listed as:

Prune and treat various fruit trees to improve their health, and productivity. Cut out dead and undesirable limbs and trim trees to enhance health and growth. Scrape decayed matter from cavities in trees, filling holes with cement to help heal and prevent further decaying. Apply herbicides, pesticides, fertilizers and nutrient solutions using hand or power sprayers.

The job requirements were an 8th grade education and two years of experience in the job offered. The job was classified under Dictionary of Occupational Titles ("DOT") Code 408.181-010. That DOT classification has a Specific Vocational Preparation ("SVP") of 6 (*i.e.*, over 1 year up to and including 2 years). The job duties described in the DOT classification are very similar to the duties listed on the labor certification application.

The State of California Employment Development Department ("EDD") found that the prevailing wage was \$24.27. (AF 31-33) Employer's attorney responded by letter dated February 29, 2000 arguing that EDD had used the wrong survey title (Agricultural-Engineering Technician), and requested that a new wage determination be made. The application, however, was transmitted to the Federal Certifying Officer ("CO") without a new wage determination.

In a Notice of Findings dated November 21, 2001, the CO found that the prevailing wage was \$24.27, finding that the EDD had used the proper Occupational Employment Statistics program ("OES") classification. (AF 19-21)

In a rebuttal letter dated January 29, 2002, Employer stated the intention to amend the wage offered to \$14.70 per hour, arguing that the OES "Tree Trimmer and Pruner" classification was the closest occupation with which to set a prevailing wage for a "Tree Surgeon" – an occupation not referenced directly in the Occupational Wage Library.² (AF 14-15)

² The Occupational Wage Library is an on-line service for obtaining prevailing wage information maintained by the Employment and Training Administration, Foreign Labor Certification Data Center.

On March 18, 2002, the CO issued a second Notice of Findings. (AF 10-13) The CO reserved final evaluation of the rebuttal pending Employer's response to the CO's finding that the spraying requirement stated in the job duties exceeds the "JobZone 2" of three to twelve months,³ and therefore is a restrictive job requirement. Although the CO did not fully explain this finding, it apparently is based on the assumption that Employer's reference to the tree trimmer wage was a re-classification of the job offered, and therefore the two year experience in the job offered requirement was now excessive.

Employer submitted a rebuttal on April 19, 2002 stating emphatically that the job offered is for a tree surgeon and not a tree trimmer, and pointing out that its wage offer of \$14.70 is above the highest level stated for a tree trimmer (\$14.14) per hour "due to the fact that the occupation of Tree Surgeon requires more knowledge and experience...." (AF 7-9)

The CO issued a Final Determination denying labor certification on May 8, 2002. (AF 5-6) In regard to the prevailing wage issue, the CO stated that Employer's first rebuttal was that the job fit the category of Tree Trimmers and Prunners whereas the second rebuttal argues that the job offered does not fit that category at all. In regard to the restrictive requirements issue, the CO noted that Employer wanted to use the job classification of Tree Surgeon but was unable to match that job description to any published wage information for that specific occupation. The CO therefore concluded that the job title was apparently not common to any occupation, and consequently Employer had not justified the excessive experience requirement.

Employer requested review by this Board on May 14, 2002. (AF 1) In its appellate brief, Employer argued that the CO had misinterpreted and summarily rejected its rebuttal.

³ "Job Zone" is a concept introduced by the O*Net. A Job Zone Two is described as an occupation in which some preparation is necessary, and has an SVP range of "4.0 to < 6.0." O*Net Online at <http://online.onetcenter.org/help/online/zones> (visited July 15, 2003). Job Zones are more ambiguous than SVP's in regard to their parameters. See *Stock and Forney, Understanding the Department of Labor's Job Classification System, 2003-04 Immigration & Nationality Law Handbook*, Vol. 2, pp. 265-272 (AILA 2003-2004 Ed) (job zone 2 seems to correlate to the SVP level 5).

DISCUSSION

We concur with Employer that the CO misinterpreted Employer's rebuttal, which was simply an argument that because the OES does not have a wage determination specifically for a Tree Surgeon, the closest similar category was Tree Trimmer and Prunner. Employer in no way was suggesting that the job needed to be reclassified. It was error to raise the restrictive requirement issue and the CO cannot be affirmed on this basis.

When challenging a CO's prevailing wage determination, an employer 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*). In the instant case, Employer's contention essentially is that the original prevailing wage determination of \$24.27 was based on the wrong title "Agricultural-Engineering Technician" and that the more appropriate job title for comparison was "Tree Trimmer and Prunner" which has a wage range that tops out at \$14.14. The argument continues to the effect that Employer's amended wage offer of \$14.70 is above that top range for Tree Trimmer and Prunner in recognition of the additional knowledge and experience required of a Tree Surgeon.

Assuming arguendo that Employer established that the CO's wage determination was in error, the record does not contain convincing evidence that Employer's wage offer is at or above the correct prevailing wage. Although the positions of "Tree Trimmer and Prunner" and Tree Surgeon" are similar, Employer is requiring two years of experience in the job offered, whereas the Tree Trimmer and Prunner wage is based on an employee with only three to 12 months of experience. Although Employer's amended wage offer is higher than the top range for the Tree Trimmer and Prunner position, it is only 56 cents an hour higher. In other words, Employer found an entry level job description that sounded similar to its job position, added a few cents to the prevailing wage determination for that entry level position, and presented it as the correct wage. This is a lazy attempt at rebuttal. Employer wants it both ways – to present the job as requiring two years of experience in the job offered, but to pay at essentially the same wage as an employee with half the

experience. Without a better explanation of why this particular wage should apply – such as an actual survey of tree surgeon wages -- we are not convinced that Employer has established a reasonably credible prevailing wage for the position it is offering.

We are in sympathy with Employer that the original prevailing wage determination for the position appears to have been inflated. We are also cognizant of the difficulty of identifying prevailing wage information for occupations that were formerly distinct under the DOT, but which have been consolidated under the OES/O*Net/SOC job classification - prevailing wage determination scheme. *See generally, Stock and Forney, Understanding the Department of Labor's Job Classification System, supra*, at 270-271 (providing examples of prevailing wage imprecisions engendered by the new system). Nonetheless, the ultimate burden of proof remains on an employer challenging a prevailing wage determination to establish both that the CO's wage determination is in error, and that its wage offer is at or above the correct prevailing wage. It has not shown that Employer's suggested wage determination is any more accurate than the one presented by the CO, assuming arguendo that the CO's determination was not correct. Therefore the labor certification denial must be affirmed.

ORDER

The Certifying Officer's denial of certification in the above-captioned case 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 twenty days from the date of service a party petitions for review by the full Board. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.