

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: 29 October 2009

BALCA Case No.: 2009-PER-00221
ETA Case No.: A-07226-65735

In the Matter of:

GALAXY STUDIOS INC.,
Employer,

on behalf of

IGOR BAPTISTA LACERDA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Paul Mycka
President, Galaxy Foto
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Colwell and Johnson**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations.

STATEMENT OF THE CASE

On May 21, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of photographer. (AF 14, 17-26).¹ The position is located in Middleton, New York. The application reported that the State Workforce Agency (“SWA”) determined the prevailing wage to be \$7.31 per hour. (AF 18). In Section F-4 of the Form 9089, “Skill Level,” the Employer wrote “Professional.” (AF 18). The offered wage was stated to be to be \$14.00 an hour plus commissions. (AF 18). In the portion of the Form 9089 where newspaper or professional journal advertising is reported, the Employer indicated that a Sunday edition of the newspaper was not available, and that it ran an advertisement in The Times Herald Record on March 21, 2007. The Employer left blank the fields at Sections I.c.11 and I.c.12., which are for entering the name and date of a second newspaper or professional journal advertisement. (AF 20-21). In Section I.a.1. of the application, the Employer indicated that the job was not advertised as a professional occupation. (AF 20). The job requirements were listed as a high school education, 36 months of training in photography, and 36 months of experience in the job offered. (AF 18-19).

Attached to the Employer’s Form 9089 were various documents, including a Form 750² that apparently had been completed, but not filed; documents showing the Alien’s qualifications and visa status; a March 2007 job order placed with the New York State Department of Labor; a print out of a www.flcdatcenter.com web page showing the Occupational Employment Statistics (“OES”) wages for a photographer in the Poughkeepsie-Newburgh-Middletown, NY area; tear sheets from The Times Herald

¹ In this decision, “AF” is an abbreviation for “Appeal File.”

² Form 750 was used to file applications under the pre-PERM regulations. It has been replaced by Form 9089.

Record advertisement for the job; and resumes and interview notes for a couple of job applicants who had been rejected for the job. The SWA job order shows a salary of “\$7.31+/hr. Depending on experience.” (AF 46). The OES web wage showed a wage of \$7.31 an hour for a Level 1 wage, \$9.64 an hour for a Level 2 wage; \$11.96 an hour for a Level 3 wage; and \$14.29 an hour for a Level 4 wage. (AF 47). The newspaper advertisements showed that the wage offer was \$14 an hour. (AF 50-52).

On August 14, 2007, the CO issued a letter denying certification. (AF 14-16). The reasons stated were that the Employer had not made a selection for Section F-3 (Skill Level on which the PWD was based),³ or for Section I-11 (name of second advertisement or professional journal).

On September 6, 2007, the Employer requested reconsideration by the CO. (AF 5-13). The Employer wrote “Section F 3 Skill Level code 27-4021 – PROFESSIONAL,” and dropped a footnote stating: “ACCORDING TO THE O*NET OCCUPATIONS LIST IT CLEARLY INDICATES ‘NO LEVEL SET’. (SEE ATTACHED LIST).” (AF 5). The attachment consisted of a printout from the www.flcdatacenter.com online wage library stating wage levels for photographers in the relevant area. It includes a statement: “Education & Training Code: No Level Set.” (AF 7). However, it also stated four wage levels.

In regard to the dates of publication for Section I.11., the Employer wrote:

The Times Herald Record	dates: Sep. 01,02,03 Sat-Sun-Mon
Southern Ulster Times	dates: Aug. 29 Weekly
Mid-Hudson Times	dates: Sept. 04 Weekly
Wallkill Valley Times	dates: Aug. 29 Weekly

³ Section F-3 of the Form 9089 actually asks for the Occupation Title for the SWA prevailing wage determination. It is Section F-4 that asks for the Skill Level. (See AF 18).

(AF 5). Tear sheets from various publications were attached. They were dated in August or September 2007, and showed a wage offer of \$14 an hour. (AF 8-13). The Employer also indicated that it had opened a new job order with the SWA. (AF 5) The job order was attached. (AF 6) It showed a wage offer of \$7.58 hourly.

The Appeal File is a bit unclear as to what happened next, but on February 17, 2009, the Employer faxed to a DOL analyst a response to a phone call and e-mail from the analyst asking the Employer to submit the prevailing wage determination (“PWD”) in this matter. (AF 2-4). The Employer copied the analyst’s e-mail onto the cover sheet of its fax. In the e-mail message, the analyst directs the Employer to fax a copy of the PWD in relation to the Skill Level issue. (AF 2). What the Employer faxed in response was (1) a PWD issued by the New York State Department of Labor on February 11, 2009 for the period February 10, 2009 to June 30, 2009, showing a prevailing wage of \$12.76 for a skill level 3 photographer; and (2) a prevailing wage request form submitted by the Employer, showing that no college degree was required, that three years of experience were required, and no training was required. (AF 4). The request form is undated, but bears a fax transmission date of February 17, 2009.

On March 6, 2009, the CO issued a letter of reconsideration. (AF 1). The CO stated that it accepted the Employer’s information relating to the name of the second newspaper advertisement or professional journal, but not information relating to the skill level issue. The CO wrote:

The denial notification indicates that a selection was not made for Section F-4, Skill level as required by 656.17(a). In its request, the employer indicates the skill level is “Professional” and that they were going to request a current PWD in order to keep current with this year’s numbers. Though the employer was afforded a Request for Information, they were unable to provide a Prevailing Wage Determination which would have stated the skill level for the position listed on the 9089. Since the employer did not provide a Prevailing Wage Determination from the SWA having jurisdiction over the proposed area of intended employment, the Certifying Officer has determined this reason for denial as valid.

The CO then forwarded an Appeal File to the Board, which issued a Notice of Docketing on March 16, 2009.

The Employer filed a Statement of Position arguing that the DOL web site failed to show a “O*Net Code Level” for photographers, and that the CO should have been aware of that fact. The Employer observed that when it requested a new PWD, Level 3 was assigned. To the Employer, this evidenced inconsistency and an error in issuance of the PWD. The Employer argued that the DOL (evidently meaning the New York DOL) had just guessed at a skill level. The Employer argued that, regardless of the level set by the prevailing wage determination, “the wages paid to our employee is more than what is required for even higher levels than we are applying for.”

The CO filed a letter brief requesting that BALCA affirm the denial, or in the alternative remand for further processing because the CO conceded that the Employer may not have been adequately informed of why the CO was seeking the original PWD.⁴

DISCUSSION

The PERM regulations in effect at the time that the Employer filed the application in this matter provided that “[t]he employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer.” 20 C.F.R. § 656.24(a) (2006).⁵ The regulations provided that the employer had to maintain the SWA PWD in its files and be prepared to submit it

⁴ The CO’s brief also contained the observation that although the CO had accepted the Employer’s information regarding Section I-11 in the letter on reconsideration, that information had not actually addressed the deficiency – essentially because the tear sheets submitted with the motion for reconsideration documented advertising performed *after* the Form 9089 had been filed. Thus, the tear sheets did not document that advertising had been done correctly prior to the filing of the application. The CO stated that it would not now repudiate the mistaken finding in this case, but would not accord this finding precedential value in future cases.

⁵ Amendments to this provision made in 2008 would not change the analysis of this case. *See* 73 Fed. Reg. 78068 (Dec. 19, 2008). The regulation still requires an employer to obtain a PWD from the appropriate SWA, to retain it, and to produce it if requested by the CO. 20 C.F.R. § 656.24(a) (2009).

if requested in the course of an audit. *Id.* The PERM regulations require applicants to retain documentation supporting its application for 5 years from the date of the filing of the application. 20 C.F.R. § 656.10(f).

Thus, in the instant case, the Employer should have obtained a PWD from the SWA prior to filing the Form 9089, and entered the skill level assigned by the SWA for the wage determination into Section F 4 of the Form 9089. It seems unlikely that the SWA determination would have stated that the skill level was “professional.” Skill levels are normally stated in the form of a number. The PWD provided by the Employer in 2009 in response to the analyst’s document request, for example, listed the skill level as “3.” Moreover, we note that when the analyst directed the Employer to submit its PWD, it did not produce a 2007 determination, but instead a new 2009 determination. This suggests that the Employer does not, in fact, have documentation of a prevailing wage determination from the SWA obtained prior to filing the Form 9089.⁶

The Employer has argued that the prevailing wage determination is of little consequence because “the wages paid to our employee is more than what is required for even higher levels than we are applying for.” This argument is untenable for two reasons. First, the documentation of record clearly shows that the SWA job order was run using “\$7.31 +/-hr. Depending on experience” as the wage offer. (AF 46). Thus, the Employer clearly did not offer \$14 an hour to applicants who might have used the SWA job bank. *See* 20 C.F.R. § 656.17(f)(1) (advertisements supporting a labor certification application may not contain wages or terms and conditions of employment that are less favorable than those offered to the alien). Second, it cannot be assumed that \$7.31 an hour was the PWD of the SWA since the Employer did not produce a PWD issued prior to submission of the Form 9089 when requested by the analyst.

⁶ As noted above, the Employer included with its application a print out of a www.flcdatcenter.com web page showing the OES wages for a photographer. The level 1 wage shown on that print-out matches the wage listed as the prevailing wage on the Form 9089. Thus, possibly, the Employer mistakenly believed that information from the web page online library substituted for a prevailing wage determination made by the appropriate SWA.

As the CO conceded in his appellate brief, however, the analyst's request for a copy of the SWA prevailing wage determination apparently did not explain why the analyst was seeking this document (*i.e.*, to verify that the information in Section F of the submitted Form 9089 came from a SWA PWD). Thus, it may be possible that the Employer did not understand that what the CO was asking for was the 2007 PWD that the Employer should have obtained prior to filing the application and not a new PWD. Thus, fundamental fairness requires that the Employer be given a second opportunity to produce the relevant PWD.

Thus, we remand this matter to the CO for further processing.⁷

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and that this matter is returned to the CO for further processing consistent with the above.

For the panel:

A

WILLIAM S. COLWELL

Associate 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. 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

⁷ We are not certain that the Employer has correctly interpreted the meaning of the "No Level Set" statement on the www.flcdatcenter.com wage library for photographers. Although there is no level set for the O*Net Education and Training Code, there are clearly four wage levels shown on the report. (AF 47). Moreover, the Form 9089 asks for the Skill Level set by the SWA, not the from the OES wage library. The wage levels are set by SWAs based on a step-by-step, standardized approach provided by ETA to SWAS in a guidance letter. *See* Employment and Training Administration, Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs (2005) (available at, www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.) We will leave it to the CO on remand, however, to consider the Employer's arguments in this regard.

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, NW Suite 400
Washington, DC 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.