



Issue Date: 30 June 2010

BALCA No.: 2009-JSW-00001

In the Matter of:

RP CONSULTANTS, INC.,
d/b/a
NET MATRIX SOLUTIONS,
Employer

v.

ADMINISTRATOR,
UNITED STATES DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION,
OFFICE OF FOREIGN LABOR CERTIFICATION,
Respondent.

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

PAUL C. JOHNSON, JR.
Administrative Law Judge

DECISION AND ORDER

This matter arises from the Employer's appeal of a prevailing wage determination made during the course of a compliance investigation by the United States Department of Labor, Wage and Hour Division, Houston District Office ("Wage and Hour") of RP Consultants, Inc. d/b/a Net Matrix Solutions under the Immigration and Nationality Act and the H-1B regulations at 20 C.F.R. Part 655, Subpart H.

BACKGROUND

In 2004 and 2005, the Employer submitted H-1B applications for fourteen Aliens for the position of “Systems Analyst.” For each application, the Employer completed a Labor Certification Application (LCA), with validity dates ranging from 08/22/2004 through 01/03/2009. (AF 1001-1002). Each LCA listed “030” for the occupational code and stated that its wage source was “OES wage survey.” The worksite locations varied for each Alien and included locations in eight different states. *Id.* These states were: Delaware, Texas, Massachusetts, Oregon, Georgia, Colorado, Missouri, and Pennsylvania. *Id.*

The Employer requested Prevailing Wage Determinations (PWDs) from the appropriate SWA for each worksite location for the position of “Systems Analyst.” The Employer indicated that the position would involve the following job duties:

As a Systems Analyst, the beneficiary will analyze business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company’s ability to deliver more effective and efficient technological and computer related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve the problems. As a Systems Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry’s already existing technological resources to additional operations that will streamline our client’s business processes. This process of developing new computer systems will include design or additional hardware or software applications that will better harness the power and usefulness of our client’s computer systems. In this position, the beneficiary will employ a combination of techniques including structured analysis, data modeling, information engineering, mathematical model building, sampling and cost accounting to plan systems and procedures to resolve computer problems. As part of the duties of a Systems Analyst, the beneficiary will also analyze subject matter operations to be automated, specify the number and type of records, files, and documents to be used as well as format the output to meet user’s needs. As a Systems Analyst, the beneficiary is also required to develop complete specifications and structure charts that will enable computer users to prepare required programs. Most importantly, once the systems have been instituted, the beneficiary will coordinate tests of the systems, participate in trial runs of new and revised systems and recommend computer equipment changes to obtain more effective operations.

(AF 1197). According to the Employer, the position required a minimum of “a Bachelor’s degree, or equivalent, in computers, engineering, or a related field.” *Id.* The Employer further stated that it was not uncommon for the incumbent to also possess a Master’s degree and a number of years of experience. *Id.*

The PWDs varied depending on the location and included wage ranges from 2004 through 2008. The majority of SWAs determined the position to be at level one, but there was some variation, which is indicated below. The PWDs were as follows:

- For Denver, Colorado, for a Computer Systems Analyst at level one, the wage ranged from \$42,203 to \$51,563 (AF 652-657);
- For New Castle County, Delaware for a Computer Software Engineer, Systems I, level one, the wage ranged from \$51,979 to \$59,342 (AF 658-668);
- For Atlanta, Georgia for a Computer Systems Analyst at level one, the wage ranged from \$50,045 to 52,395 (AF 670-684);
- For Boston, Massachusetts for a Computer Systems Analyst at level two for 2004 and level three for 2005 through 2008, the wage ranged from \$67,246 to \$86,278 (AF 685-693);
- For St. Louis, Missouri for a Systems Analyst for a level one position, the wage ranged from \$39,541 to \$49,837 (AF 708-709);
- For Eugene, Oregon, for a Systems Analyst, at level three, the wage ranged from \$57,262 to \$62,442 (AF 713-720);
- For Philadelphia, Pennsylvania, for a Computer Systems Analyst, level one, the wage ranged from \$42,702 to \$49,026 (AF 721-733); and
- For Houston, Texas, for a Computer Systems Analyst, the wage ranged from \$41,870 to \$81,910 for levels one through four.¹ (AF 734-744). The Texas SWA did not indicate a wage level for the position.

On October 29, 2007, the Houston District Office of the Wage and Hour Division (WHD) informed the Employer that its documentation of the prevailing wage for the Occupation Employment Survey Online Wage Library – FLC Wage Search Results failed to conform with the regulatory criteria at 20 C.F.R. § 655.731. (AF 999). As a result, WHD stated that it was submitting prevailing wage investigation requests to the Office of Foreign Labor Certification (OFLC), Employment and Training Administration (ETA) in accordance with 20 C.F.R. § 655.731(d). OFLC obtained PWDs from the eight states where the Employer listed worksite locations for the investigation. Subsequently, the SWAs forwarded their PWDs to OFLC and OFLC forwarded the PWDs to the WHD. On March 19, 2008 the WHD notified the Employer that its wage documentation failed to conform to the regulatory criteria. (AF 219).

¹ On July 20, 2007, the Texas Workforce Commission also sent PWD information for several other positions, including a Computer Software Engineer, Applications. (See AF 298-372). Additionally, in a January 3, 2008 letter from the Texas Workforce Commission, the Deputy Director noted that although the Employer requested information for a position in Austin, Texas, all documentation submitted shows the work location was for Houston, Texas. (AF 734). Thus, the Commission included information for both cities.

On April 23, 2008, the Employer submitted an appeal of a SWA Prevailing Wage Determination dated January 28, 2008, and Notice of Request for Consolidation of Appeals and Discovery. (AF 376-384). In this appeal, the Employer challenged the PWD issued by the Oregon SWA on January 28, 2008, concerning two of its H-1B employees. *Id.* The Employer asserted that in determining the prevailing wage for these applications, it relied on OES data published by the U.S. Department of Labor, Bureau of Labor Statistics, available at the FLC on-line wage library at the FLC website. (AF 376-377). The Employer stated that it challenged the PWD issued by the Oregon SWA for its two H-1B applicants, arguing that although it agrees that the job duties fall within the SOC job code 15-1051 for Computer Systems Analyst, the Oregon SWA erred in concluding that the position offered should be compensated at Wage Level 3. (AF 377-378). The Employer pointed out that this level requires experience for the position but the Employer only required a Bachelor's degree and no experience. (AF 381-382). The Employer asserted that the position should be classified at ETA Wage Level I, which was the level chosen by the SWAs in Colorado, Delaware, Georgia, Missouri, and Pennsylvania. (AF 382). In support of its position, the Employer attached an expert occupational classification analysis report prepared by William D. Winkler of HR & ADR Solutions, and an expert report and testimony of senior Consulting Industry Executive, Bruce Grant. (*See* AF 541-650).

Subsequently, the Employer filed a Motion to Consolidate Appeals of SWA Prevailing Wage Determinations issued and to Authorize a Requested Discovery. (AF 212-375). The Employer specified that it was filing appeals for PWDs issued by the Delaware, Massachusetts, Oregon and Texas SWAs at the request of ETA/WHD on the grounds that the determinations were based either on erroneous SOC job code classifications and/or erroneous wage level determinations. (AF 213-214). The Employer asserted that the proper PWD should have been derived from O*Net wage data for SOC job code classification 15-1051 – Computer Systems Analyst. (AF 214).

On May 26, 2009, the OFLC informed the Employer of its conclusions on the appeal. (AF 174-175). The OFLC stated that the Employer failed to conform to the regulatory criteria set forth in 20 C.F.R. § 655.731(b)(3) and concluded that “the correct job category and classification for the position described by the employer for all states is a Computer Software Engineer, Systems Software – Level 1.”² *Id.*

The Employer responded on June 1, 2009, stating that it had requested that OFLC vacate the inconsistent determinations rendered by the SWAs in Delaware, Massachusetts, Oregon, and Texas and the ability to review the file record of the PWDs made by each SWA and conduct additional discovery as was necessary. (AF 172-173). The Employer further stated that the OFLC's May 26, 2009 response “fail[ed] to provide any basis for the conclusion that the correct job category for the [Employer's] job description is that of Computer Software Engineer, Systems Software.” The Employer also asserted that the response failed to explain the reasons for rejecting the job

² As the parties stipulated in the February 19, 2010 letter, this determination relates solely to the job code and/or wage level determinations issued by the Delaware, Massachusetts, Oregon and Texas state workforce commissions, in response to the requests by ETA and WHD.

classifications issued by the SWAs in Colorado, Georgia, Massachusetts, Missouri, Oregon, and Pennsylvania, and its two experts or its discovery requests. The Employer argued that the failure to provide a reasoned basis for its decision constituted a denial of due process rights. Accordingly, the Employer requested an explanation for the grounds of OFLC's determination and renewed its discovery request.

On June 25, 2009, the Employer requested Administrative Review, requesting that BALCA review and vacate the job classifications issued by OFLC and determine that the SOC code 15-1051 for Computer Systems Analyst is appropriate to the Employer's job duties. (AF 1-10). In this request, the Employer asserted that seven out of the eight determinations issued in response to the December 2007 ETA request are based on the conclusion that the job description provided by ETA should be "Computer Systems Analyst" under SOC code 15-1051. (AF 4). The Employer contended that only the Delaware SWA reported a different conclusion – that "Computer Software Engineer – Systems" was appropriate, but the SWA provided no discussion of its reason for making this determination. *Id.* The Employer contended that the OFLC "violated 20 C.F.R. § 656.41 and acted in an arbitrary and capricious manner by failing to address the evidence submitted by the Employer on appeal," and "failing to state the grounds for deciding that SOC Code 15-1032, Computer Software Engineer – Systems is the correct occupational classification." (AF 8-9).

The Board issued a Notice of Docketing on July 7, 2009, directing the Administrator to assemble and transmit an Appeal File to BALCA and to the Employer. Subsequently, on July 15, 2009, the Board issued a Briefing Schedule, informing the parties that they had 30 days to submit a Statement of Position or legal brief. In the Employer's brief, it argued that the OFLC Administrator did not follow the regulation at 20 C.F.R. § 656.41(d), governing prevailing wage appeals, which dictates that the decision on appeal shall be based exclusively on the record of appeal. The Employer asserted that the Administrator instead instructed the OFLC staff to analyze the job duties *de novo* based on the O*NET Task Summary for SOC code 15-1032 (Computer Software Engineer – Systems Software) and SOC code 15-1051 (Computer Systems Analyst). The Employer contended that the Administrator then adopted their finding that the job description combined elements of both job classifications and should be classified under SOC code 15-1032, which was the higher paying classification. The Employer asserted that it did not appeal the job classifications issued by the other seven SWAs, which determined its job description to fall under SOC Code 15-1051 for a Computer Systems Analyst. The Employer argued that by vacating the occupational determinations, where the determinations had not been appealed by the Employer, the Administrator exceeded his jurisdiction, violated the cross-appeal rule and deprived the Employer of fundamental due process.³ In addition, the Employer contended that the OFLC was improperly involved in WHD's LCA Compliance investigation, which also violated its due process rights. The Employer attached a July 14, 2009 letter from the Administrator to the Employer as Exhibit I. In this letter, the Administrator made several references to the ETA's Guidance letter in explaining his basis for classifying the job duties under SOC code 15-1032 for prevailing wage purposes. The Employer contended that the letter from

³ As February 19, 2010 letter indicated, the Employer later withdrew this argument.

the Administrator reveals that the decision of the OFLC to classify the job duties under SOC code 15-1032 is inconsistent with substantial evidence and controlling law.

In the government's brief, filed on behalf of the Administrator, the attorney asserted that the final determination issued by OFLC superseded the eight conflicting state SWA opinions, which formerly constituted the opinion of the OFLC. The attorney contended that by examining all of the LCAs, OFLC avoided creating an inconsistency by examining only a portion of them. In making its determination, the OFLC produced a chart comparing the Employer's job requirements with the requirements of each job classification. (*See* AF 178-181). This chart shows that OFLC found that four of the nine job duties fall within the "Computer Software Engineer, Systems Software" classification and five of the nine job duties fall in the "Computer Systems Analyst" classification. *Id.* The attorney for ETA asserted that since the job duties reflected those of two categories, the OFLC was correct in choosing the higher paying job classification, as advised by the Prevailing Wage Determination Policy Guidance letter. The attorney contended that the determination should apply to all eight prevailing wage determinations.

On August 18, 2009, OFLC withdrew its argument regarding the four SWA determinations that the Employer did not challenge, which includes: Colorado, Georgia, Missouri, and Pennsylvania. Accordingly, it asserted that the SWA determinations rendered by those states, that the position is "Computer Systems Analyst – Level I," will stand.

On February 19, 2010, the parties stipulated several points in order to clarify the issues before the Board. First, the parties agreed that the Administrator's May 26, 2009 determination relates solely to the job code and/or wage level determinations issued by the Delaware, Massachusetts, Oregon and Texas state workforce commissions, in response to the requests by ETA and WHD. Second, the parties agree that there remains a question of the Administrator's legal authority to overturn the unchallenged job code determinations – those in Colorado, Georgia, Missouri and Pennsylvania. Third, the Administrator's May 26, 2009 determination does not relate to the determinations issued by the Texas workforce Commission dated July 20, 2007, and OFLC withdrew any representation in its brief inconsistent with this stipulation.⁴ Fourth, the Employer withdrew its argument that OFLC's improper involvement in WHD's LCA compliance investigation destroyed the appearance of neutrality in its prevailing wage appeal.

DISCUSSION

In this case, both the Administrator and the Employer accepted that the correct wage level for all fourteen positions is level I.⁵ Subsequently, OFLC withdrew its

⁴ The stipulation included a footnote stating that the Employer did appeal the July 10, 2007 job code determinations, but the OFLC's May 26, 2009 letter to the Employer laying out the final determination did not reference or apply to July 10, 2007 determinations.

⁵ The Administrator conceded that wage level I was proper in his May 26, 2009 determination letter. (AF 175).

argument regarding the four SWA determinations that the employer did not challenge, which includes: Colorado, Georgia, Missouri, and Pennsylvania. Therefore, the sole issue on appeal is whether the prevailing wage determination for the four remaining states should be based on the job classification for SOC code 15-1032, Computer Software Engineer – Systems Software, or SOC code 15-1051, Computer Systems Analyst.

Procedure

Under 20 C.F.R. § 655.731(d), when, as here, Wage and Hour determines that an employer has not sufficiently documented its prevailing wage determination, Wage and Hour may contact ETA for a prevailing wage determination. When ETA does so, the employer may challenge its determination by filing a request for review under 20 C.F.R. § 656.41. Under both § 655.731(d)(2) and § 656.41(b), the first review of employer’s appeal is by the appropriate National Processing Center, whose decision may then be appealed to BALCA.

In April 2008, when the Employer requested an appeal of the various SWAs’ PWDs, the Director of the OFLC National Processing Center (NPC) was required to select which Certifying Officer would review an employer’s appeal of the SWA determination. 20 C.F.R. § 656.41(c) (2007). In December 2008, ETA published regulatory amendments that centralized the process for making PWDs. *See* 73 Fed. Reg. 77069 (Dec. 19, 2008). Those amendments provided for PWDs to be made by a Certifying Officer in a NPC rather than by a SWA. Consequently, the amendments provided for review of the CO’s PWD by the Center Director of the NPC. 20 C.F.R. § 656.41(a), (b) and (c) (2009). Clearly, the purpose of both versions of the regulations was to require the final OFLC review to be made by someone other than the official who made the initial PWD.

In this case, ETA’s determination was reviewed by the OFLC Administrator rather than by a NPC Director or Certifying Officer. Under the unique facts of this case – where the Employer requested a consolidated review at the national headquarters – and given that the OFLC Administrator was reviewing PWDs made by SWAs – we believe it is unnecessary to return this matter for review by the appropriate Center Director.

Standard of Review

The parties disagree over the standard of review that is applicable to cases arising under 20 C.F.R. § 655.731. The Employer argues, without citation to authority, that we should engage in a *de novo* review of the PWD. The Solicitor argues that we should apply an “arbitrary and capricious” standard, citing a temporary labor certification case for that proposition. The Solicitor further argues that in applying that standard, we must determine whether there was a “clear error of judgment” on the part of the Administrator.

Very few cases have addressed the standard of review for alien certification cases, and none has addressed the standard of review to be applied to cases arising under 20 C.F.R. § 655.731. We briefly review cases arising under other regulatory provisions for guidance.

Individual judges have determined that in temporary labor certification cases arising under 20 C.F.R. § 655.115 (logging and non-H-2A agricultural employment), review of the denial of certification is for abuse of discretion. See *Blondin Enterprises, Inc.*, Case Nos. 2009-TLC-056, 2009-TLC-057, and 2009-TLC-058. (ALJ July 31, 2009); *Bolton Springs Farm*, 2008-TLC-028 (ALJ May 16, 2008). The basis for that conclusion is found in the regulation itself, which requires the ALJ “to review the record for legal sufficiency.” The regulation further provides that the ALJ “shall not receive additional evidence.” 20 C.F.R. § 655.112(a)(1). Thus, the language of the regulation itself provides a basis for determining the standard of review.

Similarly, a panel of the Board has held that prevailing wage determinations under the McNamara-O’Hara Service Contract Act (SCA) are reviewed for abuse of discretion. *El Rio Grande*, Case No. 1998-INA-133 (BALCA Feb. 4, 2000). In that case, the panel agreed with the reasoning of the Department of Labor’s Administrative Review Board in *Dep’t. of the Army*, Case Nos. 98-120, 98-121, and 98-122 (ARB Dec. 22, 1999), establishing that the SCA wage determinations will be reviewed “to determine whether they are consistent with the statute and regulations, and are reasonable exercise of the discretion delegated to the [Wage and Hour] Administrator....” *Dep’t. of the Army*, slip op. at 13. In so holding, the ARB cited federal case law holding that under the Davis-Bacon Act and the SCA, “the substantive correctness of prevailing wage determinations is not subject to judicial review.” *Id.* at 22. In so holding, the ARB noted the significant discretion that is vested in the Wage and Hour Administrator in determining the prevailing wage.

Cases arising under other parts of the labor certification process have declined to state a standard of review, but have applied an abuse-of-discretion standard, or reviewed the matters *de novo*, or both. In *Hong Video Technology*, Case No. 1988-INA-202 (BALCA Aug. 17, 2001) a BALCA panel found that the CO did not abuse his discretion in denying permanent labor certification where the employer required a higher level of education from U.S. workers than from non-U.S. workers, but also made the same findings on its own review of the evidence. In *La Salsa, Inc.*, Case No. 1987-INA-580 (BALCA Aug. 29, 1988), the panel declined to determine the standard of review for a CO’s denial of permanent labor certification; however, both the majority and the dissent engaged in *de novo* reviews of the evidence.

In *Solectron Corp.*, Case No. 2003-INA-144 (BALCA Aug. 12, 2004), we held that a CO’s denial of an employer’s request for reduction in recruitment (RIR) is reviewed for abuse of discretion. In so holding, we determined that the regulation allowing RIR, 20 C.F.R. § 656.21(i), provides that the CO “may” reduce the Employer’s

effort. We interpreted that provision to mean that whether to grant a request for RIR was left to the CO's discretion, and the denial would be reviewed for abuse of that discretion.

Taken together, the cases described above show that we must first determine whether the substantive or procedural statutes or regulations applicable to this matter establish a standard of review. If not, we must determine whether the PWD is committed to the CO's discretion.

The statutory basis for this matter is found in the Immigration and Nationality Act, specifically 8 U.S.C. §§ 1101(a)(15)(H)(i)(b1) and 1182(t). Neither statute requires BALCA review; thus, neither statute establishes a standard of review. Section 1182(t) requires the Secretary of Labor to establish a process for "receipt, investigation, and disposition of complaints respecting the failure of an employer to meet a condition specified in an attestation submitted under [§ 1182(t)]." The Secretary has done so in 20 C.F.R. § 655.731. Section 655.731(d) provides with respect to BALCA review of an employer's disagreement with a PWD by the Director of a National Processing Center:

If the employer desires review, including judicial review, of the decision of the NPC Center Director⁶, the employer shall make a request for review of the determination by [BALCA] under § 656.41(e) of this chapter...."

20 C.F.R. § 655.731(d)(2).

Section 656.41, incorporated by § 655.731(d)(2), provides in pertinent part that BALCA "handles the appeals in accordance with § 656.26 and § 656.27 of this part." Section 656.26 sets forth procedural requirements for requesting review and assembling the file to be forwarded to BALCA. Section 656.27(c) sets forth BALCA's role as follows:

(c) *Review on the record.* [BALCA] must review ... a prevailing wage determination under § 656.41 on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted and must:

- (1) Affirm...the PWD; or
- (2) ...overrule the affirmation of the PWD; or
- (3) Direct that a hearing on the case be held under subsection (e) of this section.⁷

As was the case with the statutes, none of the applicable regulations specifies the standard of review that we should apply to cases such as this.⁸ Accordingly, we look to

⁶ In this case, the OFLC Administrator.

⁷ No party has requested a hearing in this matter, and we decline to order one. Arguably, a hearing is only authorized in cases in which remedies are sought under 8 U.S.C. § 1182(t)(3)(C)(ii) or (iii) for "willful" violations of the prevailing-wage requirements.

the substantive provisions of 20 C.F.R. § 656.41 to determine the extent to which the PWD is committed to the Administrator's discretion. Section 656.41(c) (2009)⁹ provides in pertinent part:

(c) *Review on the record.* The [Administrator] will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.

Clearly, the Administrator is vested with significant discretion in reviewing a PWD made by a SWA. As was noted by the *El Rio Grande* panel, perhaps nowhere is there more significant discretion vested in the Administrator than in making prevailing wage determinations. The PWD regulations are complex and require special expertise in application. Accordingly, and in light of the principles set forth in *El Rio Grande, Dep't. of the Army*, and *Solectron Corp., supra*, we hold that our standard of review of the Center Director/Administrator's decision on an employer's appeal of the PWD made by a SWA, arising under the provisions of 20 C.F.R. § 655.731, is for abuse of discretion. We will review the decision to determine whether it was consistent with the statute and regulations, and is a reasonable exercise of that discretion.

Consistency with Statute and Regulations

The Administrator was required to make his decision on the record, and to determine the prevailing wage only "solely on the basis upon which the PWD was made" by ETA. Employer's argument that the Administrator wrongly ignored information provided by the Employer in the course of his review is therefore without merit; that information was not part of the basis upon which the PWD was made by ETA. The Employer further argues that the Administrator exceeded his review authority by conducting an internal analysis of the correct SOC code and job description.

Under 20 C.F.R. § 655.731(a)(2), "the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an OFLC NPC (OES), an independent authoritative source, or other legitimate sources of wage data." It further explains "Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests." Regarding the appeal process, 20 C.F.R. § 655.731(a)(2)(A)(1) states "Any employer desiring review of an NPC PWD, including judicial review, shall follow the appeal procedures at 20 C.F.R. § 656.41."

⁸ Likewise, the regulatory provisions establishing BALCA do not prescribe a standard of review. BALCA was established in 1987 as part of an internal departmental reorganization in order to establish uniformity in the permanent alien labor certification process. *See* 52 Fed. Reg. 11217 (April 8, 1987). No standard of review was defined at the time that BALCA was established.

⁹ This was the regulatory provision in effect at the time that the OFLC Administrator made his decision. The provision in effect at the time the Employer requested review also provided for review on the record made before the SWA, but went on to expressly authorize the reviewer to affirm or modify the PWD, or to remand for further action. 20 C.F.R. § 656.41(d) (2007).

The appeal procedures at 20 C.F.R. § 656.41(c) (2009) provide “The director will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.” The regulations state that BALCA’s review is limited to “[t]he request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the director made his/her affirmation of the PWD.” 20 C.F.R. § 656.41(d)(1).

Where the regulations are silent on a matter, the Department may issue guidance to fill in the gaps. In this case, both the Employer and the Administrator refer to the May 9, 2005, Guidance Letter in discussing the correct prevailing wage determination.¹⁰ The Guidance Letter, issued by the ETA, is made available to the public to clarify policy and to specify the procedures COs and SWAs are to employ when making those determinations. The Guidance Letter outlines a step-by-step, standardized approach for determining the appropriate wage level of an O*Net occupation. (*See Guidance Letter* at 10-14).

In discussing which code a SWA should chose, the Guidance letter states “The selection of the O*NET-SOC code should not be based solely on the title of the employer’s job offer. The SWA should consider the particulars of the employer’s job offer and compare the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected.” *Guidance Letter* at 6-7. Where there are two occupations which fit the job duties, the letter states “If the Employer’s job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation.” *Guidance Letter* at 4.

Although we are only considering the determinations in the four SWAs where the PWDs were appealed, it is relevant here to consider the determinations made by all eight SWAs. The fact that seven out of eight SWAs decided that the correct job classification was SOC code 15-1051, Computer Systems Analyst, while only one SWA selected SOC code 15-1032, Computer Software Engineer – Systems Software, as the correct job classification is persuasive evidence in the Employer’s favor. However, as the Administrator pointed out, the job duties represent a combination of both O*NET occupations, as is shown by the OFLC’s chart. (*see* AF 180). As the Guidance Letter suggests, where this occurs, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation, which in this case is Computer Software Engineer – Systems Software.

We find that the Administrator did not exceed his authority in ordering the preparation of a chart to compare the duties of the positions to the O*NET-SOC

¹⁰ Although both parties refer to the process outlined in the Guidance Letter, the document was not included in the Administrative File. Therefore, we take administrative notice of the Guidance Letter’s contents, and we note that the document is publically available online. *See* Employment and Training Administration, Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs (2005), http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

classifications. He did not consider evidence beyond what was considered at the SWA level; he merely prepared an aid to assist him in **analyzing** that evidence.

Accordingly, we hereby **AFFIRM** the prevailing wage determination for the four appealed determinations to conform to the O*Net annual base pay for SOC code 15-1032, Computer Software Engineer – Systems Software – level one.

Because the regulatory validity period for the original prevailing wage determination has now lapsed, the Employer may be required to seek a new prevailing wage determination for this position. *See* 20 C.F.R. 656.40(c). Assuming no material change in the Employer’s job description or positional requirements, we would anticipate that Employer’s subsequent prevailing wage request will be determined consistent with this opinion.

SO ORDERED.

For the panel:

A

PAUL C. JOHNSON, JR.
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 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.