



Issue Date: 21 July 2015

BALCA No.: 2011-JSW-00001

In the Matter of:

THE MUDLOGGING COMPANY,
Appellant/Employer

v.

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

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

This matter arises from the Mudlogging Company's ("Employer") appeal of a prevailing wage determination made during the course of a compliance investigation by the United States Department of Labor ("DOL"), Wage and Hour Division ("WHD"), Houston District Office ("Wage and Hour") of Employer under the Immigration and Nationality Act ("INA") and the H-1B regulations at 20 C.F.R. Part 655, Subpart H.

On August 29, 2012, the Certifying Officer of the Employment and Training Administration ("ETA") DOL, transmitted an authenticated copy of the Employer's Request for Review consisting of an index of 13 attached exhibits, Bates-paginated as pages 1-423, herein referred to as the appeal file (AF).

INTRODUCTION

Statutory and Regulatory Background

The INA's H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized jobs in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). In order to protect U.S. workers and their wages from an influx of foreign workers and lowered wages, an employer must file a labor condition application ("LCA") with DOL before a nonimmigrant alien will be admitted to the United States as an H-1B nonimmigrant worker. 8 U.S.C. § 1182(n)(1). As part of that LCA, the employer must attest that it:

(i) Is offering and will offer during the period of authorized employment to [H-1B employees] wages that are at least –

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application.

Id. at §§ 1182(n)(1)(A)(i)(I)&(II). This wage requirement restricts American employers from paying foreign workers less than their American counterparts. The requirement thus acts as a disincentive to hiring nonimmigrant workers over equally qualified American workers in specific occupations.

When preparing an LCA, the employer must identify the occupational classification for which the LCA is sought and the employer's own title for the job. 20 C.F.R. § 655.730(c). The employer must also attest that it will pay the H-1B nonimmigrant the wage rate required under §§ 1182(n)(1)(A)(i)(I)&(II). The required wage rate is the greater of the actual wage rate or the prevailing wage rate and includes the employer's obligation to offer benefits and eligibility for benefits in accordance with the same criteria as the employer offers to U.S. workers. 20 C.F.R. § 655.731(a). The actual wage is defined as the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. 20 C.F.R. § 655.731(a)(1). The prevailing wage is the average rate of wages paid to workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(iii).

In the event of an investigation concerning a failure to meet the prevailing wage requirement, the Employment Standards Administration ("ESA") WHD, shall determine whether the employer has the required documentation to support the wage set by the employer. 20 C.F.R. § 655.731(d)(1). Where the documentation is either nonexistent or insufficient to determine the prevailing wage, ESA may contact ETA to provide a prevailing wage determination. *Id.*

Moreover, Section 655.731(d) provides with respect to Board of Alien Labor Certification Appeals (“BALCA”) review of an employer’s disagreement with a prevailing wage determination (“PWD”) by the Director of a National Processing Center:

“If the employer desires review, including judicial review, of the decision of the NPC Center Director, 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.¹

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.² Accordingly, we look to 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) 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.

¹ 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.

² 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.

BACKGROUND AND PROCEDURAL HISTORY

On July 10, 1997, the Texas Workforce Commission (“TWC”) determined that Employer would pay a prevailing wage for Employer’s Petroleum Engineer position at \$36,200.00 (AF 211, 375-76, 415). On July 17, 1997, Employer filed a new H-1B visa application with Immigration and Naturalization Service (“INS”) and submitted a new LCA to DOL for the Petroleum Engineer position in 1997 for Mr. Herman Cruz-Ospina for a period of three years from August 25, 1997 to August 25, 2000. (AF 218-20, 372-74; 415-16, 422). In 2000, Employer filed an extension to an expiring H-1B visa for Mr. Cruz-Ospina with the INS. (AF 406-07). For the extension, Employer submitted a new LCA to DOL for the Petroleum Engineer position for the period of July 29, 2000 to July 29, 2003. (AF 412-13). The prevailing wage identified on the LCA that Employer would pay is \$58,739.20. (AF 413). Employer noted on the LCA that its source of the wage determination came from State Employment Service Agency (“SESA”). *Id.* In 2003, Employer sought an extension of Mr. Cruz-Ospina’s H-1B visa with the INS and submitted a new LCA to DOL for the period of July 29, 2003 to July 2004 which identified the prevailing rate to be paid as \$42,349.00. (AF 391-92, 396-99). DOL certified the LCA for the prevailing wage rate of \$42,349.00 on May 21, 2003 for a period of one year from July 29, 2003 to July 24, 2004.

On October 14, 2003, Employer submitted a letter to the INS describing the job duties of the “Night Tour Muddlogger.” (AF 381-82). The description included is as follows:

“Performing Geochemical and Geophysical analysis and evaluation onsite for oil and gas wells while the wells are being drilled. Requires practical Geology, Petroleum Engineering and Geophysical skills as well as operation of specialized Data Acquisition Computer Systems, knowledge of specific programs and ability to operate Analytical Laboratory Instrumentation.”

On November 11, 2003, Employer submitted an H-1B visa application to the INS with a wage of \$35,000.00 for Mr. Kiran Mehendale (AF 363-71). Furthermore, on November 11, 2003, Employer submitted an LCA to DOL for Mr. Mehendale for the position of “Night Tour Logger” for Employment beginning on May 1, 2004 to April 30, 2007 with a prevailing wage of \$19,870.00. (AF 363-71, 384-87). Employer noted on the LCA that its source of the wage determination came from Occupational Employment Statistics (“OES”). *Id.* DOL certified Employer’s LCA on November 7, 2003. (AF 384-87). Employer’s H-1B visa application was accompanied by another letter to the INS in support of its application of an H-1B visa for Mr. Mehendale as a “Night Tour Logger,” stating that “he would be responsible for performing Geochemical and Geophysical analysis and evaluation.” (AF 369-70).

On June 1, 2005, Rebecca Hanks at ESA WHD, notified Employer of ETA’s PWDs for the positions of “Petroleum Engineer” and “Geophysicist.” (AF 330). On June 1, 2005, ETA’s Center Director (“CD”) in Dallas John Bartlett provided a PWD to Rebecca Hanks. (AF 332-336). Wages were determined for the positions of “Petroleum

Engineer,” \$63,793.60 (Herman Cruz-Ospina) and “Geophysicist,” \$43,035.00 (Kiran Mukun Mehendale), using data from the OES database. *Id.*

On June 13, 2005, the Employer’s attorney appealed the PWDs and sent its appeal to ETA in Dallas. (AF 200-30). The Employer argued that it received a PWD from the Texas Workforce Commission (“TWC”) in 1997 for the position of “Petroleum Engineer” for \$36,000/year and therefore is protected by the safe harbor provision at 20 C.F.R. § 655.731. (AF 201-02). Regarding the “Night Tour Logger” position, the Employer disputes ETA’s classification of the position as “Geophysicist,” and argues that the job duties are more aligned with the occupational title of “Service Unit Operator of Oil, Gas and Mining.” (AF 80). Therefore, the Employer argues that the “Geophysicist” salary of \$43,035.00 is incorrect, and that the correct prevailing wage is \$18,970.00. *Id.*

On July 22, 2005, ETA Dallas CD affirmed both PWDs and notified the Employer that the decision was the final action through the Employment Service complaint process under 20 C.F.R. § 658.412(d). (AF 62-65). The CD found that the \$36,000.00 PWD for the “Petroleum Engineer” was only valid for three years and expired on July 29, 2000. (AF 63). The CD found that when the Employer filed for its H-1B visa extension in 2000, it certified that it would pay \$58,739.00 for the Petroleum Engineer position. *Id.* While the Employer is seeking to avail itself of the safe harbor provision at § 655.731, the CD found that TWC has no record of the Employer requesting a new PWD in 2000. *Id.* Accordingly, the CD found that the Employer may not avail itself of the safe harbor provision at § 655.731 and affirmed its PWD for the Petroleum Engineer position. *Id.*

The CD also affirmed its classification of the “Geophysicist” position, rejecting the Employer’s argument that the job opportunity should be classified as “Service Unit Operator of Oil, Gas and Mining.” (AF 64). The CD found that the job duties and skills described in two letters to the INS are substantially more complex than the job duties and skills required for the “Service Unit Operator position.” Accordingly, the CD denied the Employer’s appeal to change the job classification and resulting prevailing wage of the “Night Tour Logger” from “Geophysicist” to “Service Unit Operator.” (AF 64-65). The CD stated that “in accordance with 20 C.F.R. 658.421(d), this decision is the final action of your appeal through the Employment Service complaint process provided in 20 CFR 655.731(d). No further appeal may be exercised through the Employment Service Complaint system.” (AF 65).

On August 20, 2005, the Employer requested review pursuant to 20 C.F.R. § 656.41. (AF 8-12). The Employer argued that the “Night Tour Logger” position is more appropriately classified as a “Mudlogger” rather than a “Geophysicist,” as the geophysicist position usually requires five years of experience, while the Mudlogger position and the Night Tour Logger position do not require experience. *Id.* The Employer also argued for the first time that DOL also misclassified Mr. Mehendale’s position as “Petroleum Engineer” position, and that position is better classified as a “Service Unit Operator for Oil, Gas and Mining.” (AF 12).

On December 2, 2005, ETA Dallas CD R.L. Souder again affirmed the classification of the “Night Tour Logger” position as Geophysicist/Geoscientist. (AF 6-7). The CD noted that in the Employer’s October 14, 2003 letter to INS, the Employer described the Night Tour Logger as “performing geochemical and geophysical analysis” and indicated that the job required knowledge of geology, petroleum engineering and geophysical skills.” *Id.* Additionally, the CD noted that the Employer stated a major function of a mudlogger is the analysis of drill cuttings, and this duty which is included in the Geophysicist/Geoscientist classification, but not the Service Unit Operator classification. (AF 7). The CD affirmed the PWDs, and stated that its decision was “the final review by this office of this prevailing wage decision.” (AF 7).

As a result of the foregoing, on December 30, 2005, the Employer sent a request for BALCA to review CD Souder’s determination, arguing that the CD misclassified the mudlogger position to that of a Petroleum Engineer and a Geophysicist.

On September 18, 2009, the Employer sent a 102-page facsimile to Sheryl Vieyra at the Solicitor’s Office in Dallas. The fax included a copy of the “requested” FedEx delivery confirmation slip to demonstrate that the Employer’s request for BALCA review was received by CD Souder on January 3, 2006. On March 2, 2011, BALCA received the 102-page fax from Christine Schott, Regional Immigration Coordinator of the WHD Southwest Regional Office. The documents did not include any explanation, but provided Ms. Schott’s telephone number.

On October 5, 2011, the undersigned, held a conference call with counsel for the CO and counsel for the Employer. Counsel for the Employer requested a copy of the 102-page fax, a copy of which had already been provided to counsel for the CO, and the undersigned asked the parties to confer after reviewing the document. On February 27, 2012, the Employer submitted supplemental documentation to BALCA.

On February 27, 2012, Employer provided supplemental documentation including two affidavits from Mr. William E. Ellington, Jr., and Mr. Richard Hamrick. Mr. Ellington’s credentials state that he is a Petroleum Engineer with 30 years of experience. The affidavit from Mr. Ellington states:

“Petroleum Engineers conduct feasibility assessment studies for developing new oil and gas fields, and also perform engineering tasks relating to the planning, execution, and strategic direction of oil and gas drilling operations. A petroleum engineer may be called on to do any or all of the following: develop drilling programs, select sites and specify drilling fluids, bit selection, drill stem testing procedures and equipment; direct and select machinery production equipment and well and surface production equipment and systems and specify programs for performance and recommend oil recovery techniques which extend the economic life of wells.”

Mr. Hamrick's credentials state that he is a certified Petroleum Geologist and Licensed Professional Geoscientist. The affidavit from Mr. Hamrick states:

“Geophysicists study the physical properties of the earth and apply measurements to geological problems. In the oil and gas industry, geophysicists provide geophysical technical support for development and exploration decision-making in order to enable sound technical evaluations of known assets and new opportunities. A geophysicist's professional skills should include seismic interpretations, subsurface mapping, seismic attribute/rock properties analysis, and 2-D and 3-D reprocessing of data sets. Geophysicists typically are expected to have experience with and functional understanding of AVO and quantitative interpretation, and competency of Geoscience Advanced seismic interpretation in both 2-D and 3-D, seismic inversion and amplitude interpretation. . .”

On April 20, 2012, BALCA issued a Notice of Docketing in this matter and directed the CO to assemble and transmit an Appeal File to the Board and the Employer, pursuant to 20 C.F.R. § 656.41(e) and § 656.26(b), as made applicable by 20 C.F.R. § 655.731(d)(2). The Board received the Appeal File on August 30, 2012. On April 12, 2013, an Order was issued that the parties had 30 days from the date of the Order to submit a Statement of Position or Legal Brief.

On May 10, 2013, Employer filed a statement in support of its position requesting review of DOL's ETA decision. DOL provided no Statement of Position or Legal Brief.

On July 10, 2013, Employer moved for Summary Decision because of DOL's failure to comply with the Judge's Order Setting Briefing Schedule and timely submit or decline to submit any Statement of Position or legal brief.

On August 7, 2013, DOL-SOL filed a response to the Employer's Motion for Summary Decision stating that their staff is limited and given the volume of cases that are filed, DOL-SOL is often unable to submit briefs in support of the client agency decision. DOL-SOL stated they offer no response concerning the merit of the appeal and rely on the CO's decision.

Contentions of the Parties

1. Employer/Appellant

This case involves two appeals from PWDs in the middle of H-1B Wage and Hour investigations. Employer's first appeal regarding Mr. Cruz-Ospina is related to the PWD ETA determined the Employer was required to pay Mr. Cruz-Ospina during the time of his H-1B extension visa from 2000-2004. The Employer argues that it should only be required to pay Mr. Cruz-Ospina \$36,200.00, the PWD issued by the Texas SWA in 1997, while the CD determined that the Employer had not submitted evidence to support the PWD between 2000-2004.

The second appeal is related to the occupational classification of Mr. Kiran Mukun Mehendale. Mr. Mehendale was employed as a “Night Tour Mudlogger” beginning May 1, 2004 to April 30, 2007. The Employer argues that ETA improperly classified this occupation as a “Geophysicist,” and that the occupation should instead have been classified as “Service Unit Operator of Oil, Gas and Mining,”

2. Appellee

Appellee contends the \$36,200.00 PWD for the Petroleum Engineer was only valid for three years and expired on July 29, 2000. Appellee found that when the Employer filed for its H-1B extension visa in 2000 with a new LCA, it certified that it would pay \$58,739.00 for the Petroleum Engineer position from July 29, 2000 to July 29, 2003. Appellee also found that in 2003, Employer sought an extension of Mr. Cruz-Ospina’s H-1B visa with the INS and submitted a new LCA to DOL for the period of July 29, 2003 to July 2004 which it certified that it would pay \$42,349.00 for the Petroleum Engineer position.

Appellee also contends that the classification of the “Night Tour Logger” position was more properly classified as a “Geophysicist/Geoscientist” position because Employer described the “Night Tour Logger” as “performing geochemical and geophysical analysis” and indicated that the job required knowledge of geology, petroleum engineering and geophysical skills. Employer also stated that a major function of a mudlogger is the analysis of drill cuttings, and this duty is more aligned with “Geophysicist/Geoscientist,” but not the “Service Unit Operator” classification.

Issues

The issues presented in this case for resolution are:

1. Whether Appellee submitted a timely Statement of Position;
2. Whether the July 22, 2005 prevailing wage determination for Mr. Cruz-Ospina is valid;
3. Whether the July 22, 2005 prevailing wage determination, affirmed on December 2, 2005, utilized the correct job description and skill level for the offered position.

Legal Analysis

1. Timely Statement of Position

Employer moved for Summary Decision on July 10, 2013, because Appellee did not submit a timely Statement of Position or legal brief in compliance with the Judge’s Order Setting Briefing Schedule issued on April 12, 2013.

Appellee filed a response to the Employer’s Motion for Summary Decision stating that their staff is limited and given the volume of cases that are filed, DOL-SOL is

often unable to submit briefs in support of the client agency decision. Appellee stated they offer no response concerning the merit of the appeal and rely on the CO's decision.

Based on the foregoing, I find no support for the Motion to Dismiss. Here, Appellee has stated that based on their limited staff and the large number of filed cases, Appellee was not able to submit a brief in support of DOL. Moreover, Appellee stated that they rely on the CO's decision. Therefore, I rely on the CO's decision as Appellee's statement of support of its position. Accordingly, I find that and conclude that Employer's Motion to Dismiss is not granted.

2. Whether the Administrator properly determined the prevailing wage for Mr. Cruz-Ospina

The prevailing wage is determined for the occupational classification in the area of intended employment and must be determined as of the time of the filing of the LCA. 20 C.F.R. § 655.731(a)(2). The regulations require that the prevailing wage be based on the best information available. *Id.* The Department considers a determination from the relevant State Workforce Agency (SWA) to be the most accurate and reliable source for determining the prevailing wage. *Id.* The regulations require the Administrator to determine whether an employer has the proper documentation to support its wage attestation. 20 C.F.R. § 655.731(d)(1). Where the documentation is nonexistent or insufficient to determine the prevailing wage, or where the employer has been unable to demonstrate that the prevailing wage determined by an alternate source is in accordance with the regulatory criteria, the Administrator may contact the ETA which shall provide the Administrator with a prevailing wage determination.³ *Id.*

As stated above, the Employer filed an H-1B visa application accompanied by an LCA on July 17, 1997 for Mr. Cruz-Ospina for the position of Petroleum Engineer, which included the SESA TWC's prevailing wage determination of \$36,200.00 on the LCA that Employer would pay. However, Employer submitted a new H-1B application to DOL for the Petroleum Engineer position for the period of July 29, 2000 to July 29, 2003, with a prevailing wage of \$58,739.20. For this PWD, Employer did not provide evidence that it had obtained a prevailing wage from TWC for the LCA from 2000 to 2003. However, Employer noted on the LCA that its source of the wage determination came from SESA. Employer did not provide any documentation of a prevailing wage from the TWC when Employer sought an extension of the H-1B visa with the INS and submitted a new LCA for the period of July 29, 2003 to July 24, 2004 identifying a prevailing rate to be paid as \$42,349.00. Based on the evidence provided, ETA determined that the PWD for the H-1B visa and LCA for 2000 to 2004 as well as the extension from July 2003 to July 2004 was \$63,793.60.

³ According to the Administrator, the Department of Labor, Bureau of Labor Statistics collects wage data for its OES program, which it compiles in the Occupational Information Network (ONET) database and makes available to the public at <http://online.onetcenter.org>. State Workforce Agencies also have access to the data, which they can use to determine prevailing wage rates for each state. See also http://www.bls.gov/oes/oes_ques.htm.

Here, Employer argues that the safe harbor provision at 20 C.F.R. § 655.731(a)(2)(ii)(A) applies to the prevailing wage determination for the extension of the visa from July 2003 to July 2004:

“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, but shall do so in accordance with these regulatory provisions and Department guidance.”⁴

Employer’s argument does not have merit. When Employer applied for a new H-1B visa in 2000, it failed to provide evidence that the TWC-SWA had provided the wage determination, even though Employer noted on the LCA the prevailing wage’s source was SESA. The prevailing wage the TWC provided in its documentation 1997 applied to Employer’s H-1B visa for a period of two years. However, that prevailing wage determination provided by TWC expired in 2000 when Employer applied for a new H-1B visa for Mr. Cruz-Ospina for the Petroleum Engineer position. Moreover, Employer certified in 2000 and in 2003 that the \$36,200.00 prevailing wage had expired by evidence of their applications requesting a prevailing wage of \$58,739.20 and \$42,349.00, respectively.

Based on the foregoing, I find no support for the contention that the Appellee erred in denying Employer the use of the safe harbor provision at 20 C.F.R. § 655.731(a)(2)(ii)(A) and determining that the prevailing wage rate from 2000 to 2004 for Mr. Cruz-Ospina was not \$36,200.00. Accordingly, I find that and conclude that Employer has not established the invalidity of the June 22, 2005 prevailing wage determination in the present case.

3. Whether the July 22, 2005 prevailing wage determination, affirmed on December 2, 2005, utilized the correct job description for the offered position.

Appellee identified the job classification within the OES-SOC code that was similar to the job description provided in Employer’s petition. The classification identified was “Geophysicist/Geoscientist,” OES Code 19-2042. The OES job description for “Geophysicist/Geoscientist” identifies that the job includes:

“Analyze and interpret geological, geochemical, or geophysical information from sources such as survey data, well logs, bore holes, or aerial photos; Plan or conduct geological, geochemical, or geophysical field studies or surveys, sample collection, or drilling and testing programs used to collect data for research or application; Prepare geological maps, cross-sectional diagrams, charts, or reports concerning mineral extraction, land use, or resource management, using results of fieldwork or laboratory research; Analyze and interpret geological data, using computer software; Investigate the composition, structure, or history of the Earth’s

⁴ This regulation has been updated since the Employer’s arguments in 2005.

crust through the collection, examination, measurement, or classification of soils, minerals, rocks, or fossil remains.”

The job described by Employer as stated above requires:

“Performing Geochemical and Geophysical analysis and evaluation onsite for oil and gas wells while the wells are being drilled. Requires practical Geology, Petroleum Engineering and Geophysical skills as well as operation of specialized Data Acquisition Computer Systems, knowledge of specific programs and ability to operate Analytical Laboratory Instrumentation. Requirements also include the ability to interpret and evaluate analysis in the field, as well as troubleshooter and repair equipment.” It further states “collecting cuttings and fluids samples at return line of well, processing and analyzing with microscope, geoscope and specific chemical tests.”

Employer argues that Appellee erred in classifying the job as “Petroleum Engineer” and “Geophysicist/Geoscientist.” Employer argues the job is more similarly classified as OES Code 47-5013, “Service Unit Operator of Oil, Gas, and Mining.” This job description includes:

“Maintain and perform safety inspections on equipment and tools; Operate controls that raise derricks or level rigs; Listen to engines, rotary chains, or other equipment to detect faulty operations or unusual well conditions; Prepare reports of services rendered, tools used, or time required, for billing purposes; Install pressure-control devices onto wellheads.”

First, I find that the job requirements as described by Employer require Employee to “perform Geochemical and Geophysical analysis and evaluation onsite for oil and gas wells while the wells are being drilled.” I find such a task to be similar to the task of “analyze and interpret geological, geochemical, or geophysical information from sources such as survey data, well logs, bore holes, or aerial photos” as set forth in the provided description of OES-SOC code 19-2042. Additionally, Employer’s job description also requires “practical Geology, Petroleum Engineering and Geophysical skills as well as operation of specialized Data Acquisition Computer Systems, knowledge of specific programs and ability to operate Analytical Laboratory Instrumentation.” I find such a task to be similar to the task of “analyze and interpret geological data, using computer software,” as set forth in the provided description of OES-SOC code 19-2042. Furthermore, Employer’s job description also requires “collecting cuttings and fluids samples at return line of well, processing and analyzing with microscope, geoscope and specific chemical tests.” I find such a task to be similar to the task of “investigate the composition, structure, or history of the Earth’s crust through the collection, examination, measurement, or classification of soils, minerals, rocks, or fossil remains,” as set forth in the provided description of OES-SOC code 19-2042.

Employer merely alleges the prevailing wage determination for “Geophysicist/Geoscientist” was the incorrect job classification for the offered position. Employer provides no factual support for its allegation the position is properly classified as OES Code 47-5013, “Service Unit Operator of Oil, Gas, and Mining.” Employer does not address the differences between the positions other than providing their job description and the affidavits of Mr. Ellington and Mr. Hamrick. Without more, I find Employer provided no basis for consideration of whether the prevailing wage determination was based on the wrong job description. Consequently, I find and conclude employer’s allegation that the Appellee used an incorrect job description is without merit.

Second, I find that Appellee did not classify the position as “Petroleum Engineer.” The June 1, 2005 correspondence from Appellee classified the position as “Geophysicist” with a prevailing wage of \$43,035.00, using data from the Occupational Employment Statistics (OES) database. Furthermore, the July 22, 2005, correspondence from Appellee affirmed its classification of the “Geophysicist” position, rejecting the Employer’s argument that the job opportunity should be classified as “Service Unit Operator of Oil, Gas and Mining.” (AF 64). Lastly, the December 2, 2005, correspondence from Appellee affirmed the classification of the “Night Tour Logger” position as “Geophysicist/Geoscientist.” (AF 6-7). Therefore, Appellee did not classify in any of its correspondence with Employer that the Night Tour Logger position is aligned with the position of a “Petroleum Engineer.” Consequently, I find Employer’s allegation that the Appellee’s job classification for the Night Tour Logger as a “Petroleum Engineer” for the offered position is without merit.

I have reviewed the job descriptions set forth in the parties’ arguments. I have also reviewed the information provided at <http://online.onetcenter.org>, the website cited by Appellee from which it derived the job description provided for the OES Code. I find the job description “Geophysicist/Geoscientist” includes duties and responsibilities primarily centered around analyzing and interpreting geological information, which is similar to Employer’s job description of analyzing geochemical and physical information on site for oil and gas wells. Based on the foregoing, I find and conclude OES-SOC code 19-2042 “Geophysicist/Geoscientist,” is the appropriate job classification for the offered position.

CONCLUSION

Based on the foregoing, I find and conclude that (1) Employer’s Motion to Dismiss should be denied; (2) Appellee properly determined the prevailing wage determination for Mr. Cruz-Ospina; (3) Appellee properly determined the correct job description classification for the offered position to Mr. Mehendale.

ORDER

Accordingly, the Employer's appeal is of the prevailing wage determination is **DENIED**.

Therefore, the Response from ETA Dallas CD John Bartlett dated July 22, 2005 and the Response from R.L. Souder Dallas Backlog Elimination Center dated December 2, 2005 are hereby **AFFIRMED**.

SO ORDERED.

For the panel:

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 (20) days from the date of service, a party petitions for en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 at the following address:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400N
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties and be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting en banc 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.