

U. S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 September 2018

BALCA Case No.: 2018-JSW-00001

In the Matter of:

PROS, INC.,
Appellant/Employer

v.

EMPLOYMENT AND TRAINING ADMINISTRATION,
Appellee

Appearances: Wei Zhao, Attorney at Law
For Appellant/Employer

Matthew Bernt, Acting Associate Solicitor
For Appellee

Before: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER

This matter arises from a request for review filed by Appellant/Employer PROS, Inc. (hereinafter Employer) appealing a prevailing wage determination made during the course of a compliance investigation by the Employment Standards Administration's Wage and Hour Division, Clear Lake District Office, under the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* (the Act), and the H-1B regulations at 20 C.F.R. Part 655, Subpart H.

I. BACKGROUND

On May 11, 2016, Employer submitted a labor condition application (LCA) on behalf of its employee, Zhichao Sun (Employee), whom Employer hired as Implementation Consultant II. In connection therewith, Employer obtained a prevailing wage determination (PWD) of \$68,432 from the Office of Foreign Labor Certification National Processing Center's Occupational Employment Statistics based upon Standard Occupational Classification (SOC) code 15-1199.08 (Business Intelligence Analysts). One year later, Employee filed a complaint with the Wage and Hour Division (WHD) alleging that Employer failed to meet the prevailing wage condition because it applied the improper SOC code to the position. In response thereto, on September 18, 2017, the WHD submitted an inquiry to the National Prevailing Wage Center (NPWC) requesting a PWD based upon the information contained in the LCA and Employee's

interview statement and letter. AF 32-49.¹ On October 23, 2017, the Center Director (CD) of the NPWC determined that, upon review of the documents provided by WHD, the proper SOC code is 15-1121 (Computer Systems Analysts) with a wage level range of II through IV. The CD also based his decision on four prior PWDs issued for Employer, two of which had similar job descriptions to that provided by Employee and two of which had different job descriptions.² The CD noted that the position required three to seven years of experience. AF 28-31. On March 12, 2018, the WHD sent the NPWC's determination to Employer. AF 23.

On April 10, 2018, Employer requested review of the PWD, arguing that the NPWC assigned an improper SOC code, failed to provide factual support for its determination, and incorrectly determined a wage level range of II through IV. AF 1-27. The Board of Alien Labor Certification Appeals (the Board) received Employer's request for review on June 7, 2018. This matter was assigned to the undersigned on July 12, 2018. In accordance with the Notice of Docketing and Briefing Schedule, the parties filed briefs on August 23, 2018.

II. APPLICABLE LAW

The Act's H-1B visa program permits domestic employers to employ non-immigrant aliens temporarily to perform specialized jobs in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). Under that program, an employer must file a labor condition application in which it attests that it is offering the prevailing wage level for the occupation. 8 U.S.C. § 1182(n)(1). When preparing the application, the employer must identify the occupational classification for which the LCA is sought and the actual job title. 20 C.F.R. § 655.730(c).

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 domestic workers. 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. The prevailing wage is the average rate of wages paid to workers similarly employed in the area of intended employment for the occupational classification and must be determined as of the time of the filing of the LCA. The prevailing wage must be based on the best information available, and the NPWC must choose the job classification that is most similar to the position's job duties. 20 C.F.R. § 655.731(a); *Quest Diagnostics, Inc.*, 2015-PWD-00002 (Feb. 12, 2015).

In the event of an investigation concerning a failure to meet the prevailing wage requirement, the WHD may contact the NPWC to provide a PWD. 20 C.F.R. § 655.731(d)(1). Reviews of PWDs are made in accordance with Section 656.41, which directs the procedure. *See* 20 C.F.R. §§ 655.731(d), 656.26-.27, 656.41. On appeal, the Board must review a prevailing wage determination on the basis of the administrative file, the request for review, and any legal briefs. While not specified in the statute or implementing regulations, the Board's standard of

¹ AF refers to the Administrative File compiled by the NPWC.

² These four job descriptions are not contained in the Administrative File.

review of the PWD is for abuse of discretion. *See Janrain, Inc.*, 2016-PWD-00003 (Nov. 16, 2016); *Gopher State Expositions, Inc.*, 2014-PWD-00010 (Aug. 1, 2014).

III. DISCUSSION

In reaching its PWD in this case, the NPWC reviewed the LCA, Employee's interview statement and letter, and job descriptions in connection with four previous PWDs issued for Employer, two of which had similar job descriptions to that provided by Employee and two of which had different job descriptions. However, the Administrative File does not contain the four previous job descriptions cited by the NPWC. As my review of the PWD is limited to the Administrative File, I do not give any credit to the NPWC's reliance on the previous job descriptions. Further, in his brief, the CD rested its arguments only on Employer's job description, contending that it is more similar to SOC code 15-1121 than to Employer's provided SOC code 15-1199.08. Thus, my review here is based upon the actual job description and Employee's interview statement and letter.

Both parties compared Employer's job description to the two SOC codes in chart format. Rather than integrating those charts here, I instead look to the core duties of Employer's job description, those contained in Employee's written statement, and those of the two SOC codes.

Employer's Job Description, Implementation Consultant II: Analyze customer needs and design solutions, i.e., recommend products that meet customer needs. Configure or guide clients in configuring those solutions. Participate in product launches. Act as an application, training, and support resource during software implementation. AF 36-37.

Employee's Interview Statement: Implement software for each client. Convert software to make it usable for the customer. Meet with customers to determine their needs and implement software to meet those needs. AF 46-49.

Employer's Suggested SOC Code 15-1199.08, Business Intelligence Analysts: Produce financial and market intelligence by querying data repositories and generating periodic reports. Devise methods for identifying data patterns and trends in available information sources. Collect data about customer needs. Analyze information and evaluate results to choose the best solution and solve problems. Provide technical support for software maintenance or use.³

The NPWC's Suggested SOC Code 15-1121, Computer Systems Analyst: Analyze science, engineering, business, and other data processing problems to implement and improve computer systems. Analyze user requirements, procedures, and problems to automate or improve existing systems, and review

³ See O*NET Online Summary Report for 15-1199.08, Business Intelligence Analysts, available at <https://www.onetonline.org/link/summary/15-1199.08> (last visited Aug. 28, 2018).

computer system capabilities, workflow, and scheduling limitations. May analyze or recommend commercially available software.⁴

Employee also stated that, of the six other Implementation Consultants, only one is classified under SOC code 15-1199.08. That consultant is paid at level IV, whereas Employee is paid at level II. Employee contended that he should be paid between level II and level III if SOC code 15-1199.08 is correct. AF 46-49.

In reviewing the above, I find that the NPWC did not abuse its discretion in assigning SOC code 15-1121. The job duties fit both SOC codes reasonably well, but the one chosen by Employer, SOC code 15-1199.08, appears to apply generally to analyzing industry and business trends whereas SOC code 15-1121 relates specifically to analyzing a particular customer's needs. I find that the NPWC appropriately chose SOC code 15-1121 as the one most similar to the position's job duties. Accordingly, the NPWC's application of SOC code 15-1121 is affirmed.

Employer also disputed the wage level assigned by the NPWC. The NPWC determined that wage levels II through IV are appropriate. Employer argued that the appropriate wage level is level II. The CD did not address this argument.

I find the NPWC's determination applying PWD wage levels III and IV to the instant position constitutes an abuse of discretion. The job description requires at least three years and accepts at most seven years of experience. AF 34. The NPWC considered the entire range of experience (three to seven years) in determining the wage level range and effectively applied a seven-year experience requirement to the job, although Employer clearly stated the minimum experience requirement for the job is three years and only looked upon additional experience favorably. The applicable Specific Vocational Preparation (SVP) level for a job requiring at least three years of experience is SVP 7 ("Over 2 years up to and including 4 years").⁵ According to the Employment and Training Administration's Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs, wage levels III and IV encompass experience and education requirements at the higher ranges and generally apply to lead, management, and supervisory positions.⁶ These levels are clearly outside the instant position as it is described both by Employer's description and Employee's explanation of his job duties. Rather than analyzing the wage levels against the job description and requirements as a whole, the NPWC based its wage level determination solely on the maximum years of experience Employer considers applicable to its position. As such, the NPWC should have applied wage level II, which is commensurate with the minimum experience requirement of three years and the overall job duties. Accordingly, the NPWC's wage level determination is reversed.

⁴ See O*NET Online Summary Report for 15-1121, Computer Systems Analyst, *available at* <https://www.onetonline.org/link/summary/15-1121.00> (last visited Aug. 28, 2018).

⁵ See An Explanation of SVP, *available at* <http://www.flcdcenter.com/svp.aspx> (last visited Aug. 28, 2018). SVP levels are "mutually exclusive and do not overlap."

⁶ See Prevailing Wage Determination Policy Guidance, rev. Nov. 2009, *available at* https://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited Aug. 28, 2018).

IV. ORDER

For the reasons stated above, Employer's appeal of the prevailing wage determination is **DENIED in part** and **GRANTED in part**. The Center Director's determination of the appropriate SOC code is hereby **AFFIRMED**, and the Center Director's determination of the appropriate wage level range is hereby **REVERSED**. The Employment and Training Administration is directed to assign a prevailing wage in accordance with SOC code 15-1121 at wage level II for the Implementation Consultant II position.

For the Board:

LARRY W. PRICE
Administrative Law Judge

Covington, Louisiana

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.