

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 July 2013

BALCA Case No.: 2013-PWD-00004
ETA Case No.: P-100-12313-259879

In the Matter of:

PAYLESS SHOESOURCE, INC.,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearances: Judy Bordeau, Esquire
Bordeau Immigration Law, LLC
Overland Park, Kansas
For the Employer

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

Before: **Avery, Romero and Price**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises from the Employer's appeal pursuant to 20 C.F.R. § 656.41 of the Employment and Training Administration, Office of Foreign Labor Certification, National Prevailing Wage Center's ("NPWC") prevailing wage determination relating to the position of Construction Manager.

BACKGROUND

On November 8, 2012, Payless Shoesource, Inc. (“Employer”) filed an ETA Form 9141 Application for Prevailing Wage Determination (“PWD”). (AF 178-184).¹ The application is in support of an application for permanent alien labor certification for the position of Manager of Store Planning in Topeka, Kansas. According to Employer, the position involves working with “the Real Estate Representative and Construction Project Managers to plan, organize, coordinate, and budget activities concerned with the construction and maintenance of new Payless stores.” (AF 182). The minimum requirements for the position are as follows (AF 180; AF 183):

- a Bachelor’s degree in Architecture, Construction Management, or related field
- 60 months of employment experience
- Demonstrated ability with Excel, Word, Lotus Notes, and AutoCAD
- Bilingual in English and Spanish, both written and oral communications
- Ability to travel internationally for “a minimum of 25% of the time.”

The NPWC issued a PWD on December 18, 2012 of \$94,037.00 annually. (AF 181). The PWD was based on the SOC (ONET/OES) occupational title of Construction Manager, an occupational code of 11-9021, and Level IV wage. (AF 181).

On December 26, 2012, the Employer filed a request that the PWD be reconsidered because the Employer believed “the formula used to determine the level is arbitrary.” (AF 177). The NPWC reconsidered but decided to affirm the initial wage determination on January 28, 2013. (AF 176). It was indicated that the Employer requires fluency in Spanish and international travel, neither of which are normal to the occupation generally. Additionally, the 60 month experience requirement is above the normal experience range for the position. For these reasons, additional wage levels were added by the Center Director to the starting Level I wage, resulting in a Level IV wage determination. (AF 176).

The Employer appealed to the NPWC Center Director on February 26, 2013, arguing that a Level IV wage determination for a Construction Manager is arbitrary and capricious.

In summary, the Department of Labor complied with the Consolidated Appropriations Act of 2005 by creating 4 wage levels, but then created an arbitrary and capricious methodology for determining prevailing wages. The methodology is based on assumptions with no correlation to the data it collects from the OES. The OES survey does not collect data for experience levels, foreign language skills, or differentials for travel. Nor does it appear that the Department of labor has researched whether or to what extent these factors would increase wages. The Manager of Store Planning should be assigned a Level 2 wage Construction Manager prevailing wage as that is more appropriately in line with actual researched data contained in the *Occupational Outlook*

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

Handbook, where 5 years is required before entry into the occupation.

(AF 127-128).

The Center Director issued his decision on April 26, 2013. (AF 110-113). The Center Director noted the Employer's argument but found that the Employer was requiring fluency in Spanish and English, the ability to travel internationally, and 60 months of experience, and consequently the NPWC's determination was consistent with the Employment and Training Administration's *Prevailing Wage Determination Policy Guidance – Nonagricultural Immigration Programs* (2009).² (AF 110-113). The Employer then requested Board of Alien Labor Certification Appeals ("the Board" or "BALCA") review. (AF 1-109).

DISCUSSION

Standard of Review

BALCA applies an abuse of discretion standard to the Center Director's decision on an employer's appeal of a prevailing wage determination. *See Emory University*, 2011-PWD-1 and 2, slip op. at 6-7 (Feb. 27, 2012); *RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-1 (June 30, 2010). Accordingly, we will review the Center Director's decision in this case to determine whether it was consistent with the applicable regulations and was a reasonable exercise of that discretion. *See RP Consultants*, slip op. at 10.

Regulations and Guidelines

The PERM regulations require an employer filing an application for permanent labor certification after January 1, 2010, to request a prevailing wage determination from the NPWC. 20 C.F.R. § 656.40(a). The Employment and Training Administration's *2009 PWD Guidance* memorandum outlines a step-by-step, standardized approach for determining the appropriate occupational classification under the SOC/ONET and appropriate wage level for the job opportunity.

Under the *2009 PWD Guidance*, every occupation begins at Wage Level 1, which is considered an entry-level wage. *See PWD Guidance* at 8. The *2009 PWD Guidance* explains that the employer's requirements for experience, education, training, and special skills are compared to those generally required for the occupation as described by ONET, and will be used as indicators that the job opportunity is for an experienced (Level 2), qualified (Level 3) or fully competent (Level 4) worker, thereby warranting a PWD at a higher wage level. *Id.* Accordingly, when determining the wage level, a point (or level) is added based on: 1) experience, 2) education, 3) special skills and other requirements, and 4) supervisory duties. *2009 PWD Guidance* at 9-13.

² See AF 25-41; www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited July 22, 2013).

Whether the Center Director Abused His Discretion in Affirming the NPWC's Assignment of a Level IV Wage

In the instant case, the Employer argues that the Construction Manager position qualifies for only a Level II wage. The Employer urges that the Center Director failed to provide any evidence or argument to demonstrate the “baseline formula” used by the Department of labor in making a prevailing wage determination is not arbitrary and capricious. The Employer also argues that there is no evidence to support paying a premium for an employee’s foreign language skills or for a job requiring travel. According to the Employer, the *2009 PWD Guidance* report provides no research or studies to support the formulas it uses to determine a prevailing wage.

The Center Director indicates that the procedures provided in the *2009 PWD Guidance* were used in determining the prevailing wage for the occupation of Construction Manager in this case. The Center Director outlined the reasons for each of the points added to the initial Level I wage in using the standard worksheet for calculating the applicable OES wage level.

Employer’s arguments on appeal in this case largely focus on challenging the established formulas and data used in determining a prevailing wage and how the OES wage levels are set. BALCA has held that an ALJ lacks inherent or express authority to rule on the validity of a regulation or to invalidate a regulation as written. *Bolton Spring Farm*, 2008-TLC-00028 (May 16, 2008). Therefore, our discussion here is focused on whether the Center Director abused discretion in making the determination of the prevailing wage according to the policies and guidance presently in place. The issue of whether such policies are potentially flawed is not properly before the OALJ.

We find that the Center Director did not abuse discretion in affirming the NPWC’s assignment of a Level IV wage level for the PWD. The Employer does not contest the classification of its position under the SOC (ONET/OES) occupational title of Construction Manager, Occupational Code 11-9021. That occupation has an ONET Job Zone of 4. Job Zone 4 has an Specific Vocational Preparation (“SVP”) range of SVP 7.0, up to but not including SVP 8.0. An SVP of 7.0 equates to over two years up to and including four years. The *2009 PWD Guidance* for Job Zone 4 occupations provides for the assignment of three additional wage levels when the Employer’s experience and SVP range exceeds 49 months. Here, the Employer’s requirement was for 60 months of experience. Thus, the NPWC clearly applied the *2009 PWD Guidance* correctly to find that the Employer’s position required a PWD based on a Level IV wage level based on what is considered normal for the occupation.³ Therefore, the Center Director did not abuse discretion in affirming the PWD in this case considering the Employer’s five year requirement exceeded normal requirements for the Construction Manager position.

³ Starting with a Level I wage and then adding three wage levels for experience requirements results in a position requiring OES Wage Level IV. Applying a Level IV wage in this case is appropriate even without considering whether the Center Director abused discretion in adding a wage level for the travel and language requirements; therefore, it is unnecessary to discuss the effect of these requirements on the wage level and whether the Center Director abused discretion in applying them.

ORDER

Accordingly, **IT IS ORDERED** that the prevailing wage determination made by the National Prevailing Wage Center in this matter is hereby **AFFIRMED**.

For the panel:

C. Richard Avery
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.