

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 30 August 2013**

**BALCA Case No.: 2013-PWD-00006**  
ETA Case No.: P-100-12307-762501

*In the Matter of:*

**THE LOUIS BERGER GROUP, INC.,**  
*Employer*

Center Director: William K. Rabung  
National Prevailing Wage Center

Appearances: Kendra S. Elliott, Esq.  
Law Offices of Kendra S. Elliott  
Enola, PA  
*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: **Geraghty, Calianos, McGrath**  
Administrative Law Judges

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING PREVAILING WAGE DETERMINATION**

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 for the position of Senior Engineer.

## **BACKGROUND**

On November 2, 2012, the Employer filed an ETA Form 9141 Application for Prevailing Wage Determination (“PWD”). (AF 300-03).<sup>1</sup> The application is in support of an application for permanent alien labor certification for the position of “Senior Engineer [Design Engineer III].” (AF 300). The Employer requested in the ETA Form 9141 that the prevailing wage determination be based on the 2012 Engineering and Construction Compensation Forum Survey, which found an average salary for the position Design Engineer III in the Greater New York City area to be \$80,200. (AF 64-67, 301).

The NPWC issued a PWD on December 12, 2012, providing a prevailing wage of \$103,834.00 annually for the position. (AF 303). The prevailing wage was based on the SOC (O\*NET/OES) occupational title of Civil Engineers, an occupational code of 17-2051, and a Wage Level IV. (AF 303). The NPWC rejected the survey provided by the Employer because it limited the labor segment to a sample of Engineering and Construction Firms and “did not provide a representation of wages for substantially comparable jobs in the occupational category as the data was not collected across the various industries in the area of intended employment,” contravening the requirements of 20 C.F.R. § 656.40. (AF 303). The NPWC instead relied on the Occupational Employment Statistics (“OES”) wage data.

On January 11, 2013, the Employer requested that the PWD be reconsidered. (AF 299). The Employer argued that engineering jobs do not exist outside the engineering “industry” and therefore data cannot be collected “across industries.” (AF 30). The Employer asserted that the survey did collect data from many different sectors of the engineering industry, including transportation, architecture, environmental, construction services, mining, government, infrastructure, water, energy, private land development, education, aviation, health and science, and military. (AF 30, 33-49). The Employer further argued that the regulations at 20 C.F.R. § 656.40(g) do not require employer-provided surveys to be “across industry.” (AF 30). It stated that the Department of Labor (“DOL”) cannot add new substantive requirements to the employer-provided survey process by issuing “guidance” without engaging in the comment and rule making procedures. (AF 30). The Employer maintained that engineering jobs in various “industries” of the engineering field have very different required skill sets, and thus the wages are not comparable. (AF 31). Lastly, the Employer argued that the NPWC’s reason for rejecting the survey was “vague” as it did not explain what industries were left out of the data. (AF 31).

On February 15, 2013, the NPWC upheld its PWD. (AF 298). The NPWC stated that pursuant to the DOL’s National Prevailing Wage Policy Guidance, an employer-provided survey must “have been collected across industries that employ workers in the occupation.” (AF 298). The survey provided by the employer focused on industry-specific wage data from “member companies that specifically relate to the consulting, engineering and construction management service industry.” NPWC referred to OES data showing that 32% of civil engineers are employed in other industries, including federal, state and local governments. NPWC concluded

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

that limiting the sample to a particular segment of the labor market impacts the accuracy of the wage generated and therefore reliance on the OES wage was appropriate.

On March 15, 2013, the Employer appealed to the NPWC Center Director. (AF 292-97). The Employer reiterated its arguments made in its initial request for redetermination. The Employer additionally argued that public sector civil engineers are almost always covered by collective bargaining agreements (“CBA”) and thus wages for public sector civil engineers are not comparable because CBA wages are negotiated while wages in an employer-provided survey are based on the free market. (AF 294, 296). To illustrate its point, the Employer submitted evidence of New Jersey’s current “Salary Compendium” which provides negotiated salaries for all covered state employees, including civil engineers. (AF 101-67, 296). The Employer concluded that including public sector civil engineers whose wages are artificially set through a CBA and not by the free market would adversely impact the survey sample and the accuracy of the wages generated. (AF 296).

The Center Director (“CD”) issued his decision on May 14, 2013. (AF 174-77). The CD stated that the DOL’s policy that employer-provided surveys utilize a cross-industry sample is consistent with 20 C.F.R. § 656.40 and that BALCA in *Hathaway Children’s Services*, 1991-INA-00388 (Feb. 4, 1994) interpreted the regulation at 20 C.F.R. § 656.40(b)(3) defining “similarly employed” as requiring cross-industry surveys. (AF 175). The CD stated that the website printouts provided with the Employer’s redetermination request do not show that participants of the survey were involved in different sectors of the engineering industry, but instead merely illustrate the participants’ engineering projects. (AF 176). The CD also asserted that despite the Employer’s contention, skills required for a civil engineer would be similar across industries, and a civil engineer working in the government would have the same skills as a civil engineer working for an engineering firm. (AF 177). Lastly, the CD rejected the Employer’s evidence of the New Jersey “Salary Compendium” pursuant to 20 C.F.R. § 656.41(c) because it was not part of the record at the time the PWD was made and the CD cannot consider new evidence.

On June 13, 2013, the Employer requested BALCA review. (AF 1-173). In the request, the Employer first argued that the New Jersey data for state employees was not “new evidence.” (AF 9). The Employer explained that it did not have a prior opportunity to submit the information because NPWC’s reasons for denial of the survey in its PWD were not specific enough to formulate an effective argument. (AF 9). The Employer additionally argued the CD’s reliance on *Hathaway Children’s Services* is misplaced as the case stands for the proposition that only wages for jobs requiring the same skill set need to be considered in determining the prevailing wage. (AF 13). The Employer asserted that public sector civil engineers do not have the same skill set as private sector civil engineers, citing to the Bureau of Labor Statistics’ explanation of the difference between government and private sector civil engineers. (AF 14). The Employer relied on *Golabek v. Regional Manpower Administration*, 329 F. Supp. 892, 895-96 (E.D. Pa. 1971), which stated that wages for private sector teachers are distinct from those for public sector teachers. The Employer reasoned that since “the DOL has deemed that jobs covered by a CBA do not need to consider private sector wages in the prevailing wage . . . the converse should be true as well, i.e. that private sector wages do not need to factor in CBA

negotiated wages.” (AF 15). The Employer also suggested that the Bureau of Labor Statistics does not “guarantee government wages are included” as part of its OES wage data. (AF 15-16).

On June 27, 2012, the CD forwarded the case to BALCA pursuant to 20 C.F.R. § 656.41. In the transmittal letter, the CD stated that civil engineers work in a variety of industries, including private sector companies that have internal engineering departments, and local, state and federal governments. Thus, the Employer’s survey, which was limited to the architecture, engineering and construction industry, was not a cross-industry survey and the rejection of the survey was valid.

On July 19, 2013, this BALCA panel issued a Notice of Docketing and Order Setting Briefing Schedule. On August 16, 2013, the Employer filed a Statement of Intent to Proceed and noted that it had previously filed its legal brief with its Request for BALCA Review. The CD did not file an appellate brief in this matter.

## **DISCUSSION**

### *Standard of Review*

The Board 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-00001/2, slip op. at 6-7 (Feb. 27, 2012); *RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-00001 (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.<sup>2</sup>

### *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 National Prevailing Wage Center. 20 C.F.R. § 656.40(a). The regulations provide several methods by which the prevailing wage is determined. Section 656.40(b)(1) states that if the job opportunity is covered by a collective bargaining agreement, the wage rate set forth in the CBA is considered the “prevailing wage” for labor certification purposes. Section 656.40(b)(2) states that if there is no CBA for the job opportunity, the prevailing wage shall be the mean of the wages of workers similarly employed<sup>3</sup> in the area of intended employment, as determined by the OES Survey unless the employer provides an acceptable survey under Section 656.40(g).

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<sup>2</sup> The Employer argues that *de novo* review should apply in this matter because it was denied due process. (AF 12). The Employer claims that it was not provided a sufficient explanation of the reasons for the rejection of the survey in the initial denial and therefore it could not adequately present arguments or evidence to overcome the denial. (AF 12). We do not find this argument persuasive. First, we do not find any violation of due process here. The NPWC specifically identified the reason for its denial in the PWD—the survey did not represent wages for substantially comparable jobs in the occupational category as the data was not collected across the various industries and instead limited the labor segment to a sample of Engineering and Construction Firms. (AF 303); *See* 20 C.F.R. § 656.40(g)(4). The fact that the NPWC did not lay out the specific industries missing from the sample does not result in a violation of due process. We further note that the Employer cited to no legal authority to support its assertion that in certain cases *de novo* may be the appropriate standard of review.

<sup>3</sup> The regulations define “similarly employed” as “having substantially comparable jobs in the occupational category in the area of intended employment.” 20 C.F.R. § 656.40(d).

According to Section 656.40(g)(2), when an employer submits its own survey:

[T]he employer must provide the NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office.

The DOL's 2009 Prevailing Wage Determination Policy Guidance ("2009 PWD Guidance") lists certain criteria for employer-provided surveys.<sup>4</sup> (AF 326-27). For example, the job description applicable to the wage data "must be adequate to determine that the data represents workers who are similar employed," meaning "jobs requiring substantially similar levels of skills." (AF 327). Furthermore, "[t]he wage data must have been collected across industries that employ workers in the occupation." (AF 327, 347).<sup>5</sup> The DOL's Prevailing Wage Frequently Asked Questions also reiterates that an employer must provide a "list of employer participants or explanation of how the cross industry nature of the survey was maintained."<sup>6</sup>

#### *Whether the Center Director Should Have Considered Evidence Submitted by the Employer*

If the NPWC rejects an employer's survey, the employer has an opportunity to submit supplemental information to the NPWC pursuant to Section 656.40(h). Under the regulations, the NPWC will consider one supplemental submission about the employer survey. 20 C.F.R. § 656.40(h)(2). If the NPWC does not accept the survey after considering the employer's supplemental information, the employer may appeal the PWD to the CD. *Id.*

Section 656.41(c) requires the CD to "review the PWD *solely* on the basis upon which the PWD was made." (emphasis added). Furthermore, upon BALCA review, an employer must provide "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). BALCA must review the affirmation of the prevailing wage determination "on the basis of the record upon which the

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<sup>4</sup> *Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009 ("2009 PWD Guidance"),* [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited August 20, 2013).

<sup>5</sup> Although the Employer argues that the 2009 PWD Guidance is "ultra vires" and therefore should be disregarded, we find that the NPWC and CD properly relied on such guidance as 20 C.F.R. § 656.40(a) specifically states that the NPWC shall determine the prevailing wage in accordance with the regulations "and with Department guidance." Furthermore, we find that DOL's guidance stating that wage data must be taken "across industries" is a reasonable interpretation of Section 656.40, which requires consideration of wages of workers "similarly employed." It is also consistent with BALCA's holding that the nature of the employer is not taken into consideration in determining the prevailing wage under Section 656.40. See *Hathaway Children's Services*, 1991-INA-00388 (Feb. 4, 1994).

<sup>6</sup> National Prevailing Wage and Helpdesk Center, Prevailing Wage Frequently Asked Questions, March 2010, PDF at 4, [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_03\\_2010.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_03_2010.pdf) (last visited August 20, 2013).

decision was made, the request for review, and any Statements of Position or legal briefs submitted.” 20 C.F.R. § 656.27(c).

After receiving the PWD, the Employer exercised its opportunity to submit supplemental information, providing printouts showing participating firms’ work in various areas of engineering. (AF 30, 33-49). After considering this additional information, the NPWC affirmed its decision to reject the Employer’s survey. As the regulations only allow one supplemental submission of evidence, and the CD may only review the PWD on the basis upon which the PWD was made, anything submitted subsequently shall not be considered under the regulations. *See* 20 C.F.R. §§ 656.27(c), 656.40(h)(2), 656.41(c), (d)(1). The DOL in the preamble to the regulations emphasizes this point, stating:

[T]he appeal stage of the process is not intended to serve as an avenue for the employer to submit new materials relating to a prevailing wage determination. The employer’s submittal of an employer provided alternative survey . . . and the single opportunity to submit supplemental information to the SWA, represent the employer’s only opportunities beyond the initial filing to include materials in the record that will be before the CO in the event of an employer request for review under § 656.41.

ETA Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77373 (December 27, 2004).

The CD properly refused to consider the New Jersey Salary Compendium submitted with the Employer’s appeal to the CD under these regulations.<sup>7</sup>

*Whether the Center Director Abused His Discretion in Affirming the NPWC’s Rejection of the Employer-Provided Survey*

The NPWC rejected the Employer’s wage survey because it did not contain data “across industries” and instead was limited to the consulting, engineering and construction management service industry.<sup>8</sup> According to the Bureau of Labor Statistics (“BLS”), industries employing the largest number of civil engineers are as follows: (1) Architectural, engineering, and related services, 48%; (2) state government, 13%; (3) local government, 11%; (4) nonresidential building construction, 5%; and (5) federal government, 5%. Bureau of Labor Statistics, U.S.

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<sup>7</sup> The Employer argued that the New Jersey Salary Compendium should not be considered new evidence under 20 C.F.R. § 656.24(g). This regulation applies to the Labor Certification Process under Subpart C of the regulations, and not to the Determination of Prevailing Wage under Subpart D. There is nothing in Subpart D that suggests Section 656.24(g) applies to the review process for prevailing wage determinations. The only regulations in Subpart C incorporated into the provisions regarding prevailing wage determinations are Sections 656.26 and 656.27. Accordingly, Section 656.24(g), and case law interpreting this provision, is inapplicable to the appeal before us.

<sup>8</sup> The Employer argued that the survey collected data from numerous sectors of the engineering industry, providing printouts of the participating companies’ websites. We agree with the CD that the printouts provided by the Employer simply show the various projects or services provided by the participating companies, and do not represent independent industries.

Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Civil Engineers, <http://www.bls.gov/ooh/architecture-and-engineering/civil-engineers.htm> (last visited August 20, 2013) [hereinafter *BLS Occupational Outlook Handbook*].

The Employer contends that the public sector civil engineer jobs do not need to be considered in the survey because most public sector wages are determined under a negotiated CBA and are not based on the free market, thereby skewing survey results. The Employer has provided no support for its assertion that “most” public sector civil engineer positions are governed by a CBA. Furthermore, DOL and BALCA have explicitly stated that the nature of employer, including whether it is public or private, is irrelevant in determining the prevailing wage. (AF 328); *Hathaway Children’s Services*, 1991-INA-00388, PDF at 6 (Feb. 4, 1994). As explained in the 2009 PWD Guidance:

Factors relating to the nature of the employer, *such as whether the employer is public or private*, for profit or nonprofit, large or small, charitable, a religious institutions, a job contractor, or a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 655.10 and 20 CFR 656.40. As noted above, the relevant factors are the job, the geographic locality of the job, and the level of skills required to perform independently on the job.

(AF 328) (emphasis added); *see also Hathaway Children’s Services*, 1991-INA-00388 at 6 (“It follows that the term ‘similarly employed’ does not refer to the nature of the Employer’s business as such; on the contrary, it must be determined on the basis of similarity of the skills and knowledge required for performance of the job offered.”).

Employer relies on *Golabek v. Regional Manpower Administration*, 329 F. Supp. 892 (E.D. Pa. 1971) for its assertion that wages for public sector positions should be separate from those for the private realm. However, BALCA in *Hathaway* found that *Golabek* did not support a holding that the nature of an employer’s business should be taken into consideration in determining prevailing wage and the federal court in *Golabek* simply applied the accepted principal that a prevailing wage may be established by a CBA. *Hathaway Children’s Services*, 1991-INA-00388 at 5; *Golabek*, 329 F. Supp. at 895.

The Employer next argues that even if the nature of the employer is not taken into consideration, the survey was not required to include data from the public sector because the required skills for civil engineers in the public sector are not the same as those in the private sector, and thus government civil engineers do not represent “similarly employed” workers whose wages need to be considered under Sections 656.40(b)(3) and (d). We agree that under the regulations, 2009 PWD Guidance and case law, only wages from “similarly employed” workers need to be considered in determining the prevailing wage, and in order to be “similarly employed,” the jobs must involve a substantially similar level of skills. *See* 20 C.F.R. §§ 656.40(b)(3) & (d); *Hathaway Children’s Services*, 1991-INA-00388 at 6; (AF 327). However, we find that the skills for public sector and private sector civil engineers are substantially the

same, and thus the governmental industries should have been considered in the Employer's survey.

The BLS states on its website: "The federal government employs about 12,100 civil engineers *to do many of the same things done in private industry*, except that the federally employed civil engineers may also inspect projects to be sure that they comply with regulations." *BLS Occupational Outlook Handbook*. Contrary to the Employer's contention, this statement by the BLS supports a finding that the public sector and private sector do require substantially similar skill sets.<sup>9</sup> Furthermore, the O\*Net and BLS descriptions for civil engineers note that civil engineers must be able to comply with governmental laws, regulations and standards. (AF 306, 309); *BLS Occupational Outlook Handbook*. Thus, all civil engineers must have knowledge of governmental regulations and ensure projects comply with such regulations, and this is not a skill uniquely limited to government civil engineers.

Lastly, the Employer's contention that the BLS's own OES data does not rely on government wages lacks merit, as BLS specifically lays out in its handbook its methodology for obtaining censuses of all levels of government for its OES wages. [BLS Handbook of Methods, Occupational Employment Statistics, http://www.bls.gov/opub/hom/homch3.htm#sampling\\_procedures](http://www.bls.gov/opub/hom/homch3.htm#sampling_procedures) (last visited August 20, 2013). Employer argues: (1) only the executive branch and postal service employment within the federal government are considered in the OES survey; (2) there is no guarantee that state governments will respond to the BLS census; and (3) because BLS only uses a probability sample for local government wages, there is no guarantee that the wages selected from the local government will be for civil engineer positions. These assertions go the methodology of BLS' collection of data, which is not at issue here, and do not support the Employer's blanket statement that BLS "does not include government wage data." (AF 17).

Based on the foregoing, we hold that the CD did not abuse his discretion in affirming the NPWC's rejection of the Employer's provided survey because the survey did not contain wages "across industries"; specifically it did not include wages from federal, state and local government industries.

### **ORDER**

**IT IS ORDERED** that the prevailing wage determination made by the National Prevailing Wage Center is hereby **AFFIRMED**.

For the Panel:

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

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<sup>9</sup> We note that the regulatory definition of "similar employed" does not require comparable jobs to have the same exact skills, but rather "substantially similar" skill levels.

**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.