

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 November 2014

BALCA Case No.: 2014-PWD-00016
ETA Case No.: P-100-14001-693907

In the Matter of:

ABP CORPORATION
d/b/a
AU BON PAIN,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

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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
REVERSING 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 Multi-Location Unit Manager in Boston, Massachusetts.

BACKGROUND

On January 1, 2014, ABP Corporation (d/b/a Au Bon Pain) (the “Employer”), filed an Application for Prevailing Wage Determination, ETA Form 9141, with the Office of Foreign Labor Certification (“OFLC”), National Prevailing Wage Center (“NPWC”). The application is in support of an application for permanent alien labor certification for the position of Multi-Location Unit Manager (the “Position”). The Position does not require any training, experience, or other special requirements. The minimum requirement for the Position is a bachelor’s degree in hospitality or business management. Job duties of the Position include supervision of twenty-two other employees at a bakery café and satellite café location.

The NPWC issued a prevailing wage determination (“PWD”) on March 4, 2014, of \$68,557.00 annually. The PWD was based upon the standard occupational classification (“SOC”) (O*NET-OES)¹ code 11-9051, occupational title Food Service Manager. The NPWC also assigned a wage level IV for the Position.

On March 14, 2014, the Employer requested a re-determination of the prevailing wage. The Employer argued that following the step-by-step approach in the *Prevailing Wage Determination Policy Guidance Revised November 2009* (the “2009 PWD Policy Guidance”)² for this application yields a wage level II, not IV, for O*NET-SOC code 11-9051. The Employer first disagreed with the NPWC’s determination to add two points to the wage level for the Position’s education requirement, arguing that the *2009 PWD Policy Guidance* instructs adding only one point when the position’s education requirement is more than what “most occupations require.” *2009 PWD Policy Guidance* at 11; *ONET Printout*. The Employer further argued that no point should be added to the wage level for supervisory duties because the *2009 PWD Policy Guidance* contains an exception to adding a point “[i]f supervision is a customary duty for the O*NET occupation.” *2009 PWD Policy Guidance* at 13. The Employer asserted that supervisory duties are inherent in the job of a Food Service Manager and fall within the exception.

The NPWC re-considered its determination, but, on May 6, 2014, affirmed the PWD made on March 4, 2014. The NPWC, while noting that no Education and Training Category Code (“E & TC”)³ is provided for the Food Service Manager occupation, stated the normal level

¹ The SOC system organizes workers into occupational categories. Classifications are based on work performed and, in some cases, on the skills, education, and/or training needed to perform the work at a competent level. U.S. Bureau of Labor Statistics, *2010 SOC User Guide, Classification Principles* (2010), http://www.bls.gov/soc/soc_2010_class_prin_cod_guide.pdf. O*NET Online is an application for researching occupational data from the O*NET database. The O*NET database contains information on skills, abilities, knowledge, tasks, work activities, and specific vocational preparation levels associated with occupations. *2009 PWD Policy Guidance* at 3.

² The *2009 PWD Policy Guidance* was issued by the Employment and Training Administration and is used by the NPWC in issuing wage determinations for the Nonagricultural Immigration Programs.

³ There are five E & TC (one through five) which correspond to different education degree levels. *See Appendix D* of the *2009 PWD Policy Guidance*. Professional occupations are assigned an E & TC based upon the usual

of education for the occupation is a high school diploma. The NPWC reasoned that because Employer's requirement of a bachelor's degree is two degree levels higher than the norm, two wage level points should be added for education. Furthermore, the NPWC stated the Position requires supervision of twenty-two other employees, some being other managers, and as supervision is not a normal duty for this occupation, one point was added to the wage level for supervisory duties. Thus, the NPWC concluded wage level IV is appropriate for the Employer's Position.

On June 4, 2014, the Employer appealed to the Center Director ("CD") of the NPWC. The Employer restated its arguments made in its initial request for redetermination. The Employer also cited the alternative title of Food Service Supervisor for O*NET-SOC code 11-9051 and quoted from the O*NET job summary and occupational outlook handbook to demonstrate that supervision is customary for the occupation.

The CD affirmed the NPWC's determination of wage level IV in his decision issued on August 5, 2014. The CD stated the Position's job duties require supervision of peer level managers, which is not a normal requirement for the Food Service Manager occupation. This level of supervision, he argued, warranted the increase in wage level. The CD also restated the NPWC's rationale for increasing the wage level by two points for the Position's education requirement.

On September 3, 2014, the Employer requested BALCA review, arguing that the CD and NPWC "did not comply with applicable law, regulations, and OFLC policy guidelines and thereby acted arbitrarily and capriciously." The Employer stated that a strict application of the *2009 PWD Policy Guidance* instructs adding only one point for the Position's education requirement. The Employer also disagreed with the CD's determination that the Position requires supervision of peer level management and argued the Position only requires supervision of subordinate level managers (i.e., junior managers). The Employer concluded that no point should be added based upon the supervision requirement because supervision is a customary duty for the Food Service Manager occupation.

On September 23, 2014, the CD forwarded the case to BALCA pursuant to 20 C.F.R. § 656.41. In the transmittal letter, the CD reiterated the reasoning developed in his decision dated August 5, 2014, for adding two points based upon the Position's education requirement. The CD agreed with the Employer that supervision of subordinate level staff is customary for the Food Service Manager occupation; however, the CD did not consider it customary for an entry level manager to supervise peers (i.e., other managers). The CD argued the Position's job duties include supervision of not only subordinate level staff, but peer level staff, and the skill level required to supervise other managers is above an entry level worker. Accordingly, the CD concluded the wage level was appropriately increased by one point to reflect the Position's requirement for supervision of peer level management.

education and training required when considering the education level for a PWD. *2009 PWD Policy Guidance* at 10.

On October 6, 2014, this BALCA panel issued a Notice of Docketing and Order Setting Briefing Schedule. The notice provided the parties thirty days from the date of the notice to submit a position statement or legal brief.

The Employer filed its brief on November 4, 2014. The Employer reiterated its argument that it was arbitrary and capricious to add a wage level based upon the Position's supervision of junior managers. The Employer argued the *2009 PWD Policy Guidance* contains a "clear and unambiguous" exception if supervisory duties are customary for the occupation, and the Position is "clearly and unambiguously" a manager occupation where supervision is customary. The Employer refuted the CD's rationale that "peer level supervision is not a normal requirement for this occupation." To the contrary, the Employer argues because food service establishments operate over forty hours a week, it is customary to employ assistant managers to carry out the unit manager's mandates when absent as it is not possible for the unit manager to be on premises at all times. The Employer noted the *2009 PWD Policy Guidance* makes no distinction between managing staff and managing other managers, and claimed the CD's rationale that "the skill level required to manage other managers is above an entry level worker" has no basis.⁴

The CD filed a motion for an extension of time to file its brief, which was granted, and the CD filed a brief on November 17, 2014. In his brief, the CD indicated that he relies on his rationale in his decision for increasing the wage level by two points based on the bachelor's degree requirement. As for the wage level increase for supervisory duties, the CD argued that he used his discretion under the *2009 PWD Policy Guidance* to determine the appropriate wage level, considering "the complexity of tasks, independent judgment requirement, and amount of close supervision received as described in the employer's job opportunity." Considering the Position requirements as a whole, he deemed that the Position's supervisory responsibilities are not normal for a Food Service Manager and are far more complex than entry level supervisory responsibilities, as it requires substantial independent judgment and the overseeing of staff at two locations, including junior managers. The CD argued he did not abuse his discretion in increasing the wage level for supervisory duties.

DISCUSSION

Standard of Review

The Board applies an abuse of discretion standard to the CD'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 CD'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.

⁴ The Employer did not address in its brief the NPWC's increase in wage level based on the Position's education requirement.

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 regulations provide several methods by which the prevailing wage is determined. 20 C.F.R. § 656.40(b)(1)-(4). The applicable regulation in this matter is section 656.40(b)(2), which provides:

If the job opportunity is not covered by a [collective bargaining agreement] CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics [“OES”] Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

20 C.F.R. § 656.40(b)(2).

The OES Survey provides four levels of wages for each O*NET-SOC occupation, commensurate with the experience, education, and level of supervision required. *2009 PWD Policy Guidance* at 6. When determining a prevailing wage, the NPWC selects one of the four wage levels based on a comparison of the employer’s job requirements to the general occupational requirements contained in O*NET. *Id.*

The *2009 PWD Policy Guidance* outlines a five-step, standardized approach for determining the OES wage level. All prevailing wage determinations start with a Level I wage. *Id.* at 8. Points are then awarded after a comparison of the employer’s job offer requirements to the general requirements for similar occupations. *Id.* The points are then totaled on a worksheet to arrive at the appropriate wage level. *Id.* When determining the wage level, points may be added based on the job offer’s requirements for: 1) experience, 2) education, 3) special skills and other requirements, and 4) supervisory duties. *Id.* at 9-13. The *2009 PWD Policy Guidance* summarizes the process for determining the appropriate wage level as follows:

All employer applications for a prevailing wage determination shall initially be considered an entry level or Level I wage. The employer’s requirements for experience, education, training, and special skills shall be compared to those generally required for an occupation as described in the O*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker and warrants a prevailing wage determination at a higher wage level.

2009 PWD Policy Guidance at 8.

Even though the *2009 PWD Policy Guidance* uses a standardized approach for determining the wage level, the process should not be implemented in an automated fashion. *Id.* at 13. The NPWC may exercise judgment when making prevailing wage determinations to reach

a wage level commensurate with the complexity of tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity. *Id.*

Whether the CD Abused His Discretion in Affirming the NPWC's Determination Regarding the Wage Level

The Employer does not contest the classification of its position under the O*NET-SOC code 11-9051, Food Service Manager. However, the Employer argues the CD and NPWC acted arbitrarily and capriciously when making their wage level IV determination by not following the *2009 PWD Policy Guidance* instructions. Contrary to the CD's and NPWC's wage level determination, the Employer argues that strict application of the five step approach in the *2009 PWD Policy Guidance* results in a wage level of II. Specifically, the Employer contests the NPWC and CD's increase in the wage level by two points for education and one point for supervisory duties.

Education⁵

Step three of the *2009 PWD Policy Guidance* instructs adding one point for non-professional occupations if the education or training required for the job opportunity is more than what "most occupations require" or "usually" require, and two points if more than what "some may require" as described in the O*NET Job Zone for that occupation. *Id.* at 11. Food Service Manager is categorized in Job Zone three, which states most occupations require training in vocational schools, related on-the-job experience, or an associate's degree.

The NPWC added two points to the wage level for education because a bachelor's degree is two degree levels above a high school diploma, which the "Education" section in the O*NET summary report indicates is the normal level for this occupation.⁶ In determining the appropriate wage level, it appears the CD and NPWC have conflated the instructions for determining the education wage level for non-professional occupations with professional occupations.⁷ The *2009 PWD Policy Guidance* has different requirements for determining the education wage level for professional versus "all other occupations" (i.e., non-professional). *Id.* at 10-11. Professional occupations are listed by their O*NET-SOC code and associated E & TC in *Appendix D* of the

⁵ The Employer did not address the education aspect of the wage level in its brief before BALCA. However, the issue was raised in Employer's request for BALCA review, and we read both the request for review and the brief together.

⁶ The CD and NPWC have repeatedly alleged that the "O*NET data" shows approximately 79.82% of individuals filling the Food Service Manager occupation hold a high school diploma or equivalent, but only 11.34% hold a bachelor's degree. We cannot locate such information on O*NET Online. Nonetheless, the only relevant section under the *2009 PWD Policy Guidance* for determining points assigned for education is the Job Zone section describing what "most occupations require."

⁷ Alternately, the CD and NPWC might have considered the occupation "Food Services Manager" a professional occupation.

2009 PWD Policy Guidance.⁸ For professional occupations, the policy guidance instructs increasing the wage level incrementally for each category (i.e., degree level) more than the usual education requirement contained in *Appendix D*.⁹ *Id.* For non-professional occupations, however, the education required on the employer's PWD application is compared to the education level described in the O*NET Job Zone for that occupation. *Id.* at 11. The wage level is increased by one point if the education required by the employer is more than what "most occupations require" or "usually" require within the relevant Job Zone, and by two points if more than what "some may require" within the Job Zone.¹⁰

The Food Service Manager (O*NET-SOC code 11-9051) occupation is not listed as a professional occupation in *Appendix D*. To classify Food Service Manager as a professional occupation, the CD and NPWC would need to rely upon the definition for professional occupation in the PERM regulations. Section 656.3 defines professional occupation as:

[A]n occupation for which the attainment of a bachelor's or higher degree is a usual education requirement. A beneficiary of an application for permanent alien employment certification involving a professional occupation need not have a bachelor's or higher degree to qualify for the professional occupation. However, if the employer is willing to accept work experience in lieu of a baccalaureate or higher degree, such work experience must be attainable in the U.S. labor market and must be stated on the application form.

20 C.F.R. § 656.3.

There is no dispute that a Bachelor's degree is not an usual education requirement for the occupation of Food Service Manager. Thus, because Food Service Manager is not listed in *Appendix D*, and the occupation does meet the requirements of professional occupation as defined above, it should not be classified as a professional occupation. Consequently, I find it was arbitrary and capricious for the CD and NPWC to increase the wage level by two points

⁸ The list of professional occupations found in *Appendix D* of the 2009 PWD Policy Guidance is the same as the list found in Appendix A of the preamble to the PERM regulations. See 69 Fed. Reg. 247 at 77377-77384 (Dec. 27, 2004).

⁹ For example, if the occupation generally requires a bachelor's degree and the employer's job offer requires a master's degree, one wage level is added; if the job offer requires a Ph.D., two wage levels are added. 2009 PWD Policy Guidance at 11.

¹⁰ Depending on the applicable Job Zone, the phrases "most occupations require," occupations "usually" require, or "some may require" may be used in describing the education level for the occupation. See O*NET OnLine Help, Job Zones, <http://www.onetonline.org/help/online/zones>; 2009 PWD Policy Guidance at 11. If the Job Zone describes the education level for the occupation with the phrase "most occupations require" or "usually" require, and the employer's opportunity requires more than what is described in the O*NET Job Zone, one point is added. 2009 PWD Policy Guidance at 11. If the Job Zone describes the education level for the occupation with the phrase "some may require," and the employer's opportunity requires more than what is described in the O*NET Job Zone, two points are added. *Id.*

because this contradicts the instructions under the *2009 PWD Policy Guidance* for non-professional occupations.¹¹

To determine the appropriate education level for non-professional occupations, we will follow the instructions in step three of the *2009 PWD Policy Guidance*. The Food Service Manager occupation falls within O*NET Job Zone three. The phrase “most occupations require” is used to describe the education level for this Job Zone. The education level for this zone provides “most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate’s degree.” *ONET Printout*. The Employer’s Position requires a bachelor’s degree in either hospitality or business management. This education requirement is more than what “most occupations require” in Job Zone three. Accordingly, the *2009 PWD Policy Guidance* instructs adding one point to the wage level. *2009 PWD Policy Guidance* at 11. Therefore, the wage level for the Position in this matter should be increased by one point, not two points as decided by the CD, under the *2009 PWD Policy Guidance* based on the Position’s education requirement.

Supervisory Duties

Step five of the *2009 PWD Policy Guidance* instructs adding one point to the wage level if the number or range of people to be supervised is greater than zero, excepting occupations where supervision is a customary duty for the O*NET occupation (e.g., First-line Supervisors/Managers occupations). *Id.* at 13. The O*NET summary report for the Food Service Manager occupation reveals that managing and supervising subordinates is customary. The O*NET summary report for Food Service Manager lists “providing guidance and direction to subordinates, including setting performance standards and monitoring performance” as a work activity. *See ONET Printout*.

The CD and NPWC assert, however, that the Employer’s position requires supervision of peer level management, which is not a customary duty for an entry level manager. This peer level supervision requirement, they argue, warrants increasing the wage level by one point because the skill level required to supervise other managers is above that of an entry level worker. In support of their position, the CD and NPWC rely upon the job duties listed in the Employer’s application. Supervisory duties from the Employer’s application include:

Forecast weekly staffing, inventory and food production levels and ensure that managers have set staffing, inventory and food production levels in accordance with forecasted need; discipline and warn junior managers and hourly staff; meet with junior managers on a weekly basis to discuss and improve their performance, prepare and preside at quarterly crew meetings, and direct junior managers on what needs to be covered in pre-shift meetings held twice a day.

Application for PWD at 5-6.

¹¹ We note the CD and NPWC also departed from the instructions under step three by not using the education level described in the O*NET Job Zone.

The Employer's application also indicates the Position's job duties entail supervising twenty-two employees at two locations, a bakery café and satellite café. *See Application for PWD.*

The Employer argues the CD and NPWC incorrectly understood the Position's job duties as requiring supervision of peer level managers, rather than subordinate level managers. Further, the Employer argues it is customary in the industry to employ assistant managers to carry out the unit manager's mandates in her absence because food service establishments operate over forty hours a week, which prevents the unit manager from being on the premises at all times. Lastly, the Employer claims the *2009 PWD Policy Guidance* does not distinguish between managing staff and managing other managers.

We find the CD did not abuse his discretion in affirming the NPWC's determination to add one point based upon the Position's supervisory duties. The CD and NPWC do not dispute that supervision is customary for the Food Service Manager occupation. The CD and NPWC argue, however, that the level of supervision involved in the Position is not normal for an entry level manager, and therefore the supervisory duties exception is not applicable. We agree that the Position's requirements, including managing staff at two locations, and supervising both employees and other managers, exceeds the amount of supervision typically required for the Food Service Manager occupation. By adding a point for supervisory duties, the CD and NPWC have exercised their discretion in determining the level of supervision and the amount of independent judgment required for this Position is above that of an entry level manager. Because the supervisory duties required by the Employer's Position exceed those normally required for a Food Service Manager, the NPWC added one point to the wage level. Accordingly, we find the CD did not abuse his discretion in affirming the NPWC's determination to exercise judgment in adding one point for supervisory duties based upon the employer's application. *See 2009 PWD Policy Guidance* at 13.

Based on the foregoing, we hold that the CD did abuse his discretion in affirming the NPWC's rejection of the Employer's redetermination request because the NPWC did not correctly follow step three of the *2009 PWD Policy Guidance*, resulting in a wage level determination that was arbitrary and capricious. The appropriate wage level classification for this position is wage level III, based on a one-point increase for the Position's education requirement and a one-point increase based on the Position's required supervisory duties.

ORDER

IT IS ORDERED that the prevailing wage determination made by the National Prevailing Wage Center is hereby **REVERSED** and the CD is directed to overrule the affirmation of the PWD consistent with this Decision and Order.

For the Panel:

COLLEEN A. GERAGHTY
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR EN BANC 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 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 the Board's 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.