



Issue Date: 31 July 2014

BALCA Case No.: 2014-PWD-00006

ETA Case No.: P-100-13212-774215

In the Matter of:

HM SHAKIL CORP.,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearances: Mindy S. Rodney, Esquire
Rodney & Bernstein, P.A.
Miami, Florida
For the Employer

Jonathan H. Waxman, Acting Associate Solicitor
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Office of the Solicitor
Washington, D.C.
For the Center Director

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

**DECISION AND ORDER REMANDING FOR FURTHER PROCEEDING
ON PREVAILING WAGE DETERMINATION**

This matter arises from a request for review of a prevailing wage determination pursuant to 20 C.F.R. § 656.41(d).

BACKGROUND

On July 31, 2013, Employer HM Shakil Corp. (Employer) submitted a prevailing wage request for the position of “Assistant” to the National Prevailing Wage Center (NPWC). (AF 22-26).¹ Employer suggested an Occupational Informational Network (O*NET) Standard

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

Occupational Classification (SOC) Code 13-1161, Market Research Analyst and Marketing Specialist and provided the following job description for the Assistant position:

Assist stores with market promotions, market research and analysis; expansion feasibility; increasing sales of food and merchandise; bulk purchasing; price negotiations, training and hiring of staff; budget preparation and implementation.

Assist with improvement of record keeping and evaluation systems.

(AF 18, 23).

On September 13, 2013, the NPWC issued a prevailing wage determination of \$88,171 with the classification of Marketing Manager, SOC Code 11-2021, wage level II. (AF 25). Employer requested redetermination on September 19, 2013, noting that the position is not of a manager but an assistant. The NPWC affirmed the PWD on January 13, 2014, specifically finding that the listed duties exceed the scope of the O*NET defined tasks for the suggested classification code. The NPWC concluded that the job duties included managerial duties consistent with SOC Code 11-2021, Marketing Manager. (AF 20-21).

On February 10, 2014, Employer requested redetermination by the Center Director (CD), noting that the NPWC's classification added duties and categories of responsibility not contained in the job description. (AF 9-17). On April 10, 2014, the CD modified the PWD to \$144,040, classified the position as General Operations Manager, SOC Code 11-1021, and assigned wage level IV. The CD found that the job duties, as written, require performance "in a managerial or assistant managerial capacity." The CD found these duties beyond the scope of the suggested classification and most consistent with the O*NET defined tasks for the SOC Code 11-1021, General and Operations Manager. (AF 2-4).

On May 6, 2014, the Employer requested review by the Board of Alien Labor Certification Appeals (BALCA) under 20 C.F.R. § 656.41(d). (AF 1). The appeal file was received and docketed on May 28, 2014. Both parties filed briefs on July 7, 2014. In its brief, Employer emphasizes that the job duties are those of an assistant with no managerial or supervisory power. The CD argues that he acted within his discretion by finding that the listed job duties exceeded the scope of Employer's suggested classification code.

DISCUSSION

A. Regulations and Guidelines

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 CD's decision in this case to determine whether it was consistent with the applicable regulations and is a reasonable exercise of that discretion. *See RP Consultants*, slip op. at 10.

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 outlines a step-by-step, standardized approach for determining the appropriate occupational classification under the SOC/O*NET. In discussing how the occupational code is assigned, the *2009 PWD Guidance* provides that the O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification. *2009 PWD Guidance*, at 4.

B. Occupational Classification under O*NET

Employer provided the following job description for the Assistant position:

Assist stores with market promotions, market research and analysis; expansion feasibility; increasing sales of food and merchandise; bulk purchasing; price negotiations, training and hiring of staff; budget preparation and implementation. Assist with improvement of record keeping and evaluation systems.

(AF 18, 23).

The O*NET lists the following tasks for Employer's suggested SOC Code 13-1161, Market Research Analyst and Marketing Specialist:

- Prepare reports of findings, illustrating data graphically and translating complex findings into written text.
- Seek and provide information to help companies determine their position in the marketplace.
- Gather data on competitors and analyze their prices, sales, and method of marketing and distribution.
- Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.
- Devise and evaluate methods and procedures for collecting data, such as surveys, opinion polls, or questionnaires, or arrange to obtain existing data.
- Monitor industry statistics and follow trends in trade literature.
- Measure and assess customer and employee satisfaction.
- Measure the effectiveness of marketing, advertising, and communications programs and strategies.
- Forecast and track marketing and sales trends, analyzing collected data.
- Attend staff conferences to provide management with information and proposals concerning the promotion, distribution, design, and pricing of company products or services.

See <http://www.onetonline.org/link/summary/13-1161.00> (last visited Jul. 14, 2014).

A review of the foregoing reveals that Employer's Assistant position includes several tasks beyond those of a Market Research Analyst and Marketing Specialist. The Market Research Analyst and Marketing Specialist occupational title does not encompass any tasks relating to bulk purchasing, price negotiations, the training and hiring of staff, budget preparation and implementation, or record keeping and evaluation systems. Accordingly, the CD acted within his discretion in affirming the NPWC's rejection of Employer's suggested SOC Code.

On appeal from the NPWC by Employer, the CD also rejected the NPWC's classification, SOC Code 11-2021, Marketing Manager. (AF 20-21). Instead, the CD assigned SOC Code 11-1021, General Operations Manager. (AF 2-4).

We review the typical duties of the occupation titles as compared to the job duties that are required for the Assistant position to determine if the CD abused his discretion in rejecting the NPWC's occupational title and assigning the General Operations Manager occupational title.

The following chart compares each job duty of the position of Assistant to the duties that are normal for the occupations of Marketing Manager and General Operations Manager.²

Job duties for the position of Assistant	Is this similar to a normal job duty for Marketing Manager, SOC Code 11-2021?	Is this similar to a normal job duty for General Operations Manager, SOC Code 11-1021?
Assist stores with market promotions, market research, and analysis	Yes. (1) "Initiate market research studies or analyze their findings." (2) "Identify, develop, or evaluate marketing strategy, based on knowledge of establishment objectives, market characteristics, and cost and markup factors." (3) "Formulate, direct and coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers." (4) "Coordinate or participate in promotional activities or trade shows, working with developers, advertisers, or production managers, to market products or services." (5) "Consult with buying personnel to gain advice regarding the types of products or services expected to be in demand."	Yes. "Plan and direct activities such as sales promotions, coordinating with other department heads as required."
Assist stores with expansion feasibility	No.	No.

² See <http://www.onetonline.org/link/summary/11-1021.00> (last visited Jul. 14, 2014) and <http://www.onetonline.org/link/summary/11-2021.00> (last visited Jul. 14, 2014).

Job duties for the position of Assistant	Is this similar to a normal job duty for Marketing Manager, SOC Code 11-2021?	Is this similar to a normal job duty for General Operations Manager, SOC Code 11-1021?
Assist stores with increasing sales of food and merchandise	Yes. (1) "Compile lists describing product or service offerings." (2) "Use sales forecasting or strategic planning to ensure the sale and profitability of products, lines, or services, analyzing business developments and monitoring market trends."	Yes. "Oversee activities directly related to making products or providing services."
Assist stores with bulk purchasing	No.	Yes. "Locate, select, and procure merchandise for resale, representing management in purchase negotiations."
Assist stores with price negotiations	Yes. "Develop pricing strategies, balancing firm objectives and customer satisfaction."	Yes. (1) "Direct and coordinate activities of businesses or departments concerned with the production, pricing, sales, or distribution of products." (2) "Determine goods and services to be sold, and set prices and credit terms, based on forecasts of customer demand."
Assist stores with training and hiring of staff	Yes. "Direct the hiring, training, or performance evaluations of marketing or sales staff and oversee their daily activities."	Yes. "Determine staffing requirements, and interview, hire and train new employees, or oversee those personnel processes."
Assist stores with budget preparation and implementation	Yes. "Evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, or return-on-investment and profit-loss projections."	No.

Job duties for the position of Assistant	Is this similar to a normal job duty for Marketing Manager, SOC Code 11-2021?	Is this similar to a normal job duty for General Operations Manager, SOC Code 11-1021?
Assist with improvement of record keeping and evaluation systems	Yes. “Evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, or return-on-investment and profit-loss projections.”	No.

All job duties described for a Marketing Manager are subsumed within Employer’s Assistant position. However, while there are certain tasks in common between the Assistant position and the General Operations Manager occupation, the overall coordinating and management responsibilities of the General Operations Manager occupation are not contained in the Assistant position job description. The O*NET defines the following additional job tasks for SOC Code 11-1021, General Operations Manager:

- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement.
- Manage staff, preparing work schedules and assigning specific duties.
- Direct and coordinate organization’s financial and budget activities to fund operations, maximize investments, and increase efficiency.
- Establish and implement departmental policies, goals, objectives, and procedures, conferring with board members, organization officials, and staff members as necessary.

See <http://www.onetonline.org/link/summary/11-1021.00> (last visited Jul. 14, 2014).

In discussing how the occupational code is assigned, the *2009 PWD Guidance* provides that the O*Net description that corresponds to the employer’s job offer shall be used to identify the appropriate occupational classification. The ETA emphasized that the PWD process “should not be implemented in an automated fashion. The NPWC must exercise judgment when making prevailing wage determinations.” *2009 PWD Guidance*, at 13.

As indicated in the table above, the General Operations Manager far exceeds the scope of Employer’s Assistant position. Thus, we find and conclude that the CD abused his discretion in assigning the General Operations Manager occupation, particularly where Employer’s position is for an assistant and is clearly more similar to the NPWC’s O*NET occupational choice (SOC Code 11-2021, Marketing Manager) based on the nature of the job duties.

While the Board must use deference when reviewing the determinations of the CD, the CD’s decision in this case resulted in a significantly increased wage level, from \$88,171 to \$144,040. (AF 2, 25). In so doing, the CD did not exercise due judgment as prescribed in the *2009 PWD Guidance* and failed to adhere to the warning contained in the *Guidance* to avoid

implementing the process in an automated fashion and to exercise judgment when making prevailing wage determinations.

Taken as a whole, the Board finds that, while the Employer's suggested occupational title was improper, rejecting the NPWC's assigned occupational title in favor of the General Operations Manager occupation was an abuse of discretion by the CD.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that the matter is **REMANDED** to the Center Director for processing consistent with the conclusions stated in this order.

For the Panel:

LARRY W. PRICE
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.