



Issue Date: 25 February 2015

BALCA Case No.: 2015-PWD-00003
ETA Case No.: P-20014072-582153

In the Matter of:

ITA USA Enterprise, LLC d/b/a Club Med Academies,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

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

Jeffrey S. Nesvet, 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 AFFIRMING 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 March 14, 2014, the Office of Foreign Labor Certification's National Wage center ("NPWC") received an H-1B prevailing wage request from ITA USA Enterprise, LLC ("Employer"), for the position of "Strategic Relationships/Development Planner." (AF 21-24).¹

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

According to the job description in the ETA Form 9141 application, the successful candidate will:

Conduct market research and analysis. Engage in outreach development. Use metric systems; create commision [sic] structures; strategize and introduce internet based [sic] social media marketing; administer quality control procedures. Improve internal management systems and processes. negotiate [sic] venture projects, initiate and maintain strategic relationships; prepare training materials and workshops.

(AF 22).

Successful applications must also have a Master's Degree in Business Administration (MBA). No training or other experience was required. (AF 23). Employer suggested the Standard Occupational Code ("SOC") 13-1111 for "Management Analysts." (AF 24).

On May 1, 2014, the NPWC issued a prevailing wage determination ("PWD") of \$79,394, at Wage Level III, with the combined classifications of "Management Analysts," code number 13-1111, and "Market Research Analysts and Marketing Specialists," code number 13-1161. (AF 24).

On May 30, 2014, Employer submitted a request for redetermination. Employer argued that the proposed duties for the "Strategic Relationships/Development Planner" position "fit squarely into the suggested SOC, 13-1111 (Management Analysts)." (AF 17-20). Following the Employer's request for redetermination, the NPWC affirmed the PWD on July 15, 2014, and modified the wage to \$94,016.00 to reflect current OES wage data. Specifically, it stated, "[t]he employer's job duties include[d] both conducting market research and analysis; and improving internal management systems and processes." The NPWC further explained that the O*NET defined tasks for the SOC 13-1111, Management Analyst, "does not include researching market conditions in local, regional, or national areas or gather information to determine potential sales of a product or service, or creating a marketing campaign[.]" and the O*NET defined tasks for the SOC 13-1161, Market Research Analysts and Marketing Specialists, "does not include designing systems and procedures, conducting work simplification and measurement studies, and preparing operations and procedures manuals to assist management in operating more efficiently and effectively." (AF 11-12).

As to the wage level, the NPWC stated the occupation with the highest wage, based on the requirements of the employer, is used to assign the wage and SOC for a combination of duties. In addition, because it is reasonable for a U.S. worker to expect additional compensation for obtaining the distinct skills and being required to perform them in more than one occupation, the wage level is increased one level when the position entails a combination of duties. O*NET Job Zone 4 ("JZ4") and Education and Training Category Code 4 ("E&TC 4") were assigned to the occupation. The normal education level for the occupation is a Bachelor's degree; thus, Employer's requirement of a Master's degree is one degree level above the norm. As such, a wage level of III was deemed appropriate. (AF 11).

On August 12, 2014, Employer requested Center Director (“CD”) review of the PWD, first asserting that the listed job duties are “encompassed” by the O*NET defined tasks for the preferred SOC 13-1111, Management Analyst, designation, while the tasks defined for SOC 13-1161, Market Research Analyst, are “outside the scope of the offered position.” Employer also argued that the occupation should be assigned Wage Level I. It reasoned that the MBA requirement with no prior experience (equivalent to four years’ Specific Vocational Preparation (“SVP”)) was within the suggested SOC’s SVP range of 7.0 to 8.0 (between two and four years). (AF 7-10).

On October 10, 2014, the CD affirmed the PWD, concluding that Employer’s job duties included both marketing and management analysis. (AF 2). The CD again stated that the O*NET defined tasks for SOC 13-111, Management Analysts, did not include marketing, and the O*NET defined tasks for SOC 13-1161, Market Research Analysts, did not include management analysis. Employer argued that the marketing designation included job duties not within its description, and the CD stated that while some responsibilities do fall outside of the job description, “that does not exclude the use of the occupation when the [e]mployer’s job duties are overall consistent with the SOC.” (AF 3).

The CD also stated that he did not raise the wage level because the Employer did not require experience. However, as it is reasonable for a U.S. worker to expect additional compensation when the position entails a combination of duties, the wage level would be increased. The CD relied on the *PWD Guidance* for professional occupations, and he asserts that the correct wage level is Wage Level III. (AF 3-4).

On November 7, 2014, Employer requested review by the Board of Alien Labor Certification Appeals (“Board”). (AF 1). On January 14, 2015, both the Associate Solicitor and Employer submitted briefs to BALCA. The Associate Solicitor supported the CD’s determination offering the same reasons for it to be upheld, while Employer argued that the decision was made in an “automated fashion” against Department of Labor policies. The Employer argues the CD overlooked the actual requirements of the position.

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.

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.

B. Occupational Classification under O*NET

Employer provided the following job description for the position of "Strategic Relationships/Development Planner":

Conduct market research and analysis. Engage in outreach development. Use metric systems; create commision [sic] structures; strategize and introduce internet based [sic] social media marketing; administer quality control procedures. Improve internal management systems and processes. negotiate [sic] venture projects, initiate and maintain strategic relationships; prepare training materials and workshops

(AF 22).

The O*NET lists the following tasks for Employer's suggested SOC 13-1111, "Management Analysts":

- Gather and organize information on problems or procedures.
- Analyze data gathered and develop solutions or alternative methods of proceeding.

- Confer with personnel concerned to ensure successful functioning of newly implemented systems or procedures.
- Develop and implement records management program for filing, protection, and retrieval of records, and assure compliance with program.
- Review forms and reports and confer with management and users about format, distribution, and purpose, and to identify problems and improvements.
- Interview personnel and conduct on-site observation to ascertain unit functions, work performed, and methods, equipment, and personnel used.
- Document findings of study and prepare recommendations for implementation of new systems, procedures, or organizational changes.
- Prepare manuals and train workers in use of new forms, reports, procedures or equipment, according to organizational policy.
- Design, evaluate, recommend, and approve changes of forms and reports.
- Plan study of work problems and procedures, such as organizational change, communications, information flow, integrated production methods, inventory control, or cost analysis.

See <http://www.onetonline.org/link/summary/13-1111.00> (last visited Feb. 4, 2015).

The CD found the Employer's advertised position to represent a combination of the SOC 13-1111 (Management Analysts) and SOC 13-1161 (Market Research Analyst). The O*NET lists the following tasks for SOC 13-1161:

- 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 Feb. 4, 2015).

We review the typical duties of the occupation titles as compared to the job duties that are required for the advertised position to determine if the CD abused his discretion in assigning a combined SOC to the advertised position. 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.

A review of the foregoing O*NET job descriptions reveals that Employer’s advertised position includes several tasks beyond those of a Management Analyst. The Management Analyst occupational title does not encompass any tasks relating to marketing, outreach, or commission structures. Thus, we find and conclude that the CD did not abuse his discretion in assigning a combined occupation to the Employer’s position. Based on the nature of the advertised job duties, the position clearly exceeds the scope of Marketing Analyst.

C. Determining Wage Levels

Having found the CD did not abuse his discretion in assigning a combination of O*NET occupations to the Employer’s advertised position, we now turn to the wage level.

Employer also takes issue with the wage level assigned by the CD. It reasoned that the MBA requirement with no prior experience (equivalent to four years’ Specific Vocational Preparation (“SVP”)) was within the suggested SOC’s SVP range of 7.0 to 8.0 (between two and four years), which correlates to Wage Level I.

The NPWC stated the occupation with the highest wage, based on the requirements of the employer, is used to assign the wage and SOC for a combination of duties. In addition, because it is reasonable for a U.S. worker to expect additional compensation for obtaining the distinct skills and being required to perform them in more than one occupation, the wage level is increased one level when the position entails a combination of duties. O*NET Job Zone 4 (“JZ4”) and Education and Training Category Code 4 (“E&TC 4”) were assigned to the occupation. The normal education level for the occupation is a Bachelor’s degree; thus, Employer’s requirement of a requirement of a Master’s degree is one degree level above the norm. As such, a wage level of III was deemed appropriate. The CD did not raise the wage level because the Employer did not require experience. However, as it is reasonable for a U.S. worker to expect additional compensation when the position entails a combination of duties, the wage level would be increased. The CD relied on the *PWD Guidance* for professional occupations, and he asserts that the correct wage level is Wage Level III.

The *PWD Guidance* instructs the CD to begin at Wage Level I for each PWD request. Points are then added based on the required experience, education, special skills, and supervisory duties of the position. *PWD Guidance* at 7-13; *see also*, Appendices A-C. The CD added two wage levels because the advertised position encompassed two occupational skill sets and required a master’s degree. We find this decision was not an abuse of discretion.

For both SOCs, the O*NET indicates that “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” The *PWD Guidance* instructs the NPWC to add a wage level “[i]f the education or training is more than what ‘most occupations require...’” *PWD Guidance* at 11. As such, this wage level increase was reasonable and not an abuse of discretion.

The second wage level increase related to special skills of the job. Where an advertised position encompasses two SOCs, the CD is given discretion to add a point to the wage level. The marketing skills required by the Employer exceed the Management Analyst O*NET description. The *PWD Guidance* allows the CD to “consider whether a point should be entered...” where the advertised requirements (here, marketing skills) are beyond those of an entry level worker. Here, the required marketing skills are not included in the Management Analyst occupation. Thus, the CD was well within his discretion when he added a wage level for those special skills. *See Univ. of Wisconsin-Oshkosh*, 2011-PWD-00003 at 8 (Mar. 27, 2012).

ORDER

Based on the foregoing, the prevailing wage determination is **AFFIRMED**.

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.