



Issue Date: 16 November 2016

BALCA Case No.: 2016-PWD-00003

ETA Case No.: P-100-15257-340513

In the Matter of:

JANRAIN, INC.,
Employer

Appearances: Jimmy W. Go, Esq.
Portland, Oregon 97204
For the Employer

Leticia Sierra
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING THE 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’s (“OFLC”) prevailing wage determination for the position of Director – Software Engineering (Customer Engagement Unit).

Background

Initial Prevailing Wage Determination

On September 14, 2015, Janrain, Inc. (the “Employer”) submitted a prevailing wage determination (“PWD”) request to the OFLC’s National Prevailing Wage Center (“NPWC”). (AF 14-19.)¹ The request was made in connection with the Employer’s application for permanent alien labor (“PERM”) certification for the position of Director – Software Engineering (Customer Engagement Unit) (the “Position”). (AF 63.) In its PWD request, the

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

Employer suggested the Standard Occupational Classification (“SOC”) code for the Position should be 15-1111, “Computer and Information Research Scientists.” (AF 64.)

The OFLC issued a PWD on November 19, 2015, assigning SOC 15-1133, “Software Developer, Systems Software.” The OFLC further determined that the Occupational Employment Statistics (“OES”) wage level for the position was level IV. Based on these determinations, the prevailing wage was determined to be \$138,445 per year. (AF 66.)

Redetermination of Prevailing Wage

On December 1, 2015, the Employer submitted a request for redetermination of the PWD. (AF 53-62.) The Employer explained that it does not disagree with the prevailing wage rate, and only disputes the SOC code assigned in the PWD. (AF 54-55.) The Employer further explained that:

The actual core job responsibilities . . . are primarily research and development . . . which have more in common with ONET 15-1111. The person filling this position will be primarily responsible for contributing to the employer’s complex data mining technology and algorithm platforms. These algorithm platforms are then used to power the software applications and tools that software developers create for users to interface with the employer’s various customer engagement products.

(AF 55.)

On September 13, 2016, the OFLC affirmed the PWD, concluding that SOC 15-1111 is not consistent with the employer’s job duties. The OFLC stated:

The employer’s job duties focus on the design for a data mining technology platform, to include the design and maintenance of high-availability systems and Javascript UI framework with embedded modules. The employer’s job duties do not, as written, indicate a focus on the performance of research in computer and information science as a theorist, designer, or inventor or the development of new technologies. Rather, the worker is using current technologies in the design and maintenance for a technology platform and frameworks.

(AF 52.)

Request for Center Director’s Review

On April 28, 2016, the Employer requested that the Center Director (“CD”) review the PWD. (AF 20-51.) The Employer argued that its “job opportunity—as written—clearly indicates a focus on research and development of new technologies.” The Employer pointed out that the job description on its Form 9141 stated: “[w]ill work independently in researching, innovating, and designing new approaches for solving complex algorithm problems for our proprietary data mining technology platform.” (AF 23.)

On July 19, 2016, the CD affirmed the redetermination PWD, again finding that “the employer’s job duties are not consistent with the SOC definition and O*NET tasks” for SOC 15-1111. The CD also modified the PWD to \$147,846 with an updated validity period. (AF 12-13.)

BALCA Review

On August 17, 2016, the Employer requested review by the Board of Alien Labor Certification Appeals (“BALCA”). (AF 1-11.) On October 6, 2016, I issued a *Notice of Docketing and Order Setting Briefing Schedule*. On October 18, 2016, the Employer submitted its brief to BALCA (“Employer Brief”). On October 31, 2016, the CD submitted its brief (“CD Brief”). On November 8, 2016, the Employer filed a *Reply to Brief in Support of CD’s Determination* (“Employer Reply Brief”).

Discussion

Regulations and Guidelines

BALCA applies an abuse of discretion standard to the CD’s decision on an employer’s appeal of a PWD.² 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.³

Upon review of the CD’s determination, BALCA may only consider the Appeal File prepared by the NPWC, the legal briefs submitted by the parties, and the Employer’s request for administrative review. 20 C.F.R. §§ 655.13(c)(3), 655.61(e). Additionally, “[t]he request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD was based.” 20 C.F.R. § 655.13(c)(2). After considering the evidence of record, BALCA must: (1) affirm the CD’s determination; (2) reverse or modify the CD’s determination; or (3) remand the case to the CD for further action. 20 C.F.R. § 655.61(e).

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 O*NET description that corresponds to the employer’s job offer shall be used to identify the appropriate occupational classification. *See* Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009) (“PWD Guidance”) at 4.⁴

² *See, e.g., Emory University*, 2011-PWD-00001, -00002, slip op. at 6-7 (Feb. 27, 2012).

³ *See RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-00001, slip op. at 10 (June 30, 2010).

⁴ www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf

The OES Survey provides four levels of wages for each O*NET-SOC occupation, commensurate with the experience, education, and level of supervision required. PWD Guidance at 6. When determining a prevailing wage, the NPWC selects one of the wage levels based on a comparison of the employer's job 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: (i) experience; (ii) education; (iii) special skills and other requirements; and (iv) supervisory duties. *Id.* at 9-13. The PWD 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.

PWD Guidance at 8.

Even though the PWD Guidance uses a standardized approach for determining the wage level, the guidance notes that 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.*

The PWD Guidance explains that a job's O*NET/SOC code is identified by selecting the O*NET job description that best corresponds to the employer's job offer. *Id.* at 4.; *Gen. Anesthesia Specialists Partnership Med. Group (GASP)*, 2013-PWD-5 at 6. The PWD Guidance further provides: "[i]f the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the NPWHC [National Prevailing Wage and Helpdesk Center] should default directly to the relevant O*NET/SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer/pilot, the NPWHC shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination." PWD Guidance at 4.

In cases involving disputes over which O*NET/SOC applies, the Board has considered the job duties O*NET lists for each code and compared them to the job duties the Employer listed on its prevailing wage form. *See, e.g., Gen. Anesthesia Specialists*, 2013-PWD-5.

Analysis of the Facts

Pursuant to *Quest Diagnostics, Inc.*, 2015-PWD-00002 (Feb. 12, 2015), the CD must choose the job classification that is most similar to the employer's duties. In this case, the main issue is whether the CD abused his discretion in determining that one SOC code was more appropriate than another. In evaluating that issue, I will consider the duties described by the

Employer, the tasks identified under the Software Developer – Systems Software SOC code, and the tasks identified under the Computer and Information Research Scientist SOC code.

Employer's Job Description

On the PWD request, the Employer provided the following job description for the position of Director – Software Engineering (Customer Engagement Unit):

Work independently in researching, innovating and designing new approaches for solving complex algorithm problems for employer's proprietary data mining technology platform. This technology platform provides the real-time user interface (UI) framework as well as the mining and curation of social networking information and user-generated content in real time that software developers need to create software applications for online customer brand engagement.

The key duties and responsibilities will include the following:

1. Study, define, create, and improve complex algorithms problems and techniques to mine and curate social networking information from real-time data streams.
2. Perform language, sentiment, and trend analytics on huge volumes of real-time user generated content.
3. Design and maintain high-availability systems that can scale to millions of concurrent users engaging on a website or a mobile application.
4. Contribute to the technology roadmap for exploring, identifying, and creating new and improved forms of user interactivity to increase engagement and time spent by users on mobile and web properties.
5. Work on robust and redundant distributed computing architectures for enterprise SAAS software and systems.
6. Develop innovative visualizations to represent curated and user-generated real-time content.
7. Maintain and enhance a Javascript UI framework with modules that can be embedded on web and mobile applications.
8. Design, develop and maintain a self-serve dashboard for customers to create user-generated content streams.

(AF 67.)

Computer and Information Research Scientists, SOC 15-1111

According to O*NET, the primary role of Computer and Information Research Scientists is to “conduct research into fundamental computer and information science as theorists, designers, or inventors. Develop solutions to problems in the field of computer hardware and software.” The O*NET lists the following tasks for the Employer's suggested SOC 15-1111:

Core tasks:

1. Analyze problems to develop solutions involving computer hardware and software.
2. Assign or schedule tasks to meet work priorities and goals.
3. Evaluate project plans and proposals to assess feasibility issues.
4. Apply theoretical expertise and innovation to create or apply new technology, such as adapting principles for applying computers to new uses.
5. Consult with users, management, vendors, and technicians to determine computing needs and system requirements.
6. Meet with managers, vendors, and others to solicit cooperation and resolve problems.
7. Conduct logical analyses of business, scientific, engineering, and other technical problems, formulating mathematical models of problems for solution by computers.
8. Develop and interpret organizational goals, policies, and procedures.
9. Participate in staffing decisions and direct training of subordinates.
10. Develop performance standards, and evaluate work in light of established standards.

Supplemental tasks:

11. Design computers and the software that runs them.
12. Maintain network hardware and software, direct network security measures, and monitor networks to ensure availability to system users.
13. Participate in multidisciplinary projects in areas such as virtual reality, human-computer interaction, or robotics.
14. Approve, prepare, monitor, and adjust operational budgets.
15. Direct daily operations of departments, coordinating project activities with other departments.

Software Developer, Systems Software, SOC 15-1133

According to O*NET, the primary role of Software Developer, Systems Software is to

research, design, develop, and test operating systems-level software, compilers, and network distribution software for medical, industrial, military, communications, aerospace, business, scientific, and general computing applications. Set operational specifications and formulate and analyze software requirements. May design embedded systems software. Apply principles and techniques of computer science, engineering, and mathematical analysis.

The O*NET lists the following tasks for SOC 15-1133:

Core tasks

1. Modify existing software to correct errors, to adapt it to new hardware, or to upgrade interfaces and improve performance.
2. Develop or direct software system testing or validation procedures.
3. Direct software programming and development of documentation.
4. Consult with customers or other departments on project status, proposals, or technical issues, such as software system design or maintenance.

5. Analyze information to determine, recommend, and plan installation of a new system or modification of an existing system.
6. Consult with engineering staff to evaluate interface between hardware and software, develop specifications and performance requirements, or resolve customer problems.
7. Design or develop software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.
8. Prepare reports or correspondence concerning project specifications.
9. Confer with data processing or project managers to obtain information on limitations or capabilities for data processing projects.
10. Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
11. Coordinate installation of software system.

Supplemental tasks:

12. Monitor functioning of equipment to ensure system operates in conformance with specifications.
13. Supervise and assign work to programmers, designers, technologists, technicians, or other engineering or scientific personnel.
14. Advise customer about or perform maintenance of software system.
15. Train users to use new or modified equipment.
16. Specify power supply requirements and configuration.
17. Evaluate factors such as reporting formats required, cost constraints, or need for security restrictions to determine hardware configuration.
18. Use microcontrollers to develop control signals, implement control algorithms, or measure process variables, such as temperatures, pressures, or positions.
19. Recommend purchase of equipment to control dust, temperature, or humidity in area of system installation.

The Employer provided charts comparing the job duties of its position with the two O*NET codes at issue, and asserts that its job duties are best described by O*NET code 15-1111, Computer and Information Research Scientists. (Employer Brief at 2; AF 6-10; Employer Reply Brief at 7-8.) The Employer contends that its job duties match six out of the ten core tasks under O*NET code 15-1111. Specifically, the Employer asserts that its listed duties correspond with O*NET code 15-1111's core tasks one, three, four, seven, eight, and nine. (Employer Reply Brief at 7-8.) The Employer clarifies that it "is not making a combination of occupation claim," and that its position is that "O*NET 15-1111 is the appropriate and closest match to the job opportunity." (Employer Reply Brief at 10.) The Employer also compares its job duties to those provided by the Occupational Outlook Handbook (OOH) and concludes that the duties more closely "match to the OOH occupation for Computer and Information Research Scientists and [are] clearly different from the OOH for Software Developer." (Employer Brief at 2; AF 10-11.) The Employer argues that "[t]he use of OOH by BALCA for the purposes of helping make a case easier to understand is well established," and cites *Albert Einstein Medical Center, 2009-PER-379* (Nov. 21, 2011). (Employer Reply Brief at 10.) The Employer alleges that its job position duties numbered two, four, and six "do not fit any of the core duties" for O*NET 15-1133. (AF 10; Employer Reply Brief at 8-9.) The Employer characterizes the job duties it listed on its Form 9141 the following way:

the proffered position is not for research, design, development and testing of operational-level software. Rather, the person filling the Employer's job opportunity must build, solve, improve, and simplify very difficult and complex algorithms and to generate technological advancements and efficiencies in computing functionality.

(AF 5.) Finally, the Employer points out that it "used the same suggested O*NET 15-1111 for its certified LCA . . . and approved H-1b petition," and that "[t]he H-1b position—valid December 20, 2014 to December 7, 2017—is the same as the PERM position and for the same PERM foreign worker." (AF 34.)

The CD contends that SOC 15-1133 is the appropriate occupation code for the Employer's job as described on it Form 9141. The CD states:

[o]verall, [the Employer's] job description suggested that the Director-Software Engineering would not be undertaking activities typically associated with computer scientists; the incumbent would not be tackling problems as a scientific theorist, conducting or seeking to publish "fundamental" computer research, or serving primarily as an "inventor."

(CD Brief at 4.) While acknowledging that there is overlap between the two job codes, the CD explains that four of the Employer's job duties, numbers 3, 5, 7, and 8, "could typically be performed only by a software developer; they are not core tasks for SOC 15-1111." (CD Brief at 5.) The CD contends that "all of [the Employer's] job duties were covered by core tasks for the assigned code, software developer."⁵ (CD Brief at 9.) The CD explains that the CO considered the job title, along with the duties, when assigning an SOC code. (CD Brief at 8-9.) Finally, the CD states that "[c]ontrary to [the Employer's] assertion that the position focuses on research and development . . . the incumbent [as defined] in its job description would not be acting primarily as an inventor, conducting fundamental research, or serving primarily as a scientific theorist." (CD Brief at 15.) The CD argues that BALCA "has found that OOH information is not suitable for the purpose of determining whether an employer's job opportunity in a given case fits what is in the OOH, or for classifying occupations in the labor certification context." The CD explains that "[t]he OOH offers general, career-oriented information, often too broad to align fully or consistently with the job code information on O*Net." (CD Brief at 16.) Finally, the CD clarifies that it "has not issued an SOC code previously to this employer for Computer and Information Research Scientist, for the same set of duties" because the Employer "did not submit a PWD request in association with [its] LCA." (CD Brief at 17-18.)

After a thorough review of the job description and duties as described in the Form 9141, I find that the Employer's written job description, in general, more closely fits with the Software Systems Developer duties, SOC 15-1133, which focuses more on the operating systems level than SOC 15-1111. I agree that there is overlap in job duties between the two SOC codes at

⁵ The Employer urges the Board not to consider the CD's argument that all the Employer tasks are covered by tasks within SOC 15-1133, arguing that the "CD Brief is presenting evidence for the first time that all 8 of the Employer's tasks are covered." (Employer Reply Brief at 6.) After a thorough review of the entire record, I find that the CD's brief does not raise new arguments. Rather, it elaborates on the arguments that it had raised previously. See AF 11-12.

issue. However, SOC 15-1133 encompasses the job description and each of the eight tasks provided on the Form 9141. As explained below, I find that job duties three, five, seven, and eight are covered under SOC 15-1133, but are not covered under SOC 15-1111, and that job duties two, four, and, and six could appropriately fit under either SOC code.

SOC 15-1133 encompasses job duties three, five, seven, and eight, and SOC 15-1111 does not. Those duties are:

- 3. Design and maintain high-availability systems that can scale to millions of concurrent users engaging on a website or a mobile application.
- 5. Work on robust and redundant distributed computing architectures for enterprise SAAS software and systems.
- 7. Maintain and enhance a Javascript UI framework with modules that can be embedded on web and mobile applications.
- 8. Design, develop and maintain a self-serve dashboard for customers to create user-generated content streams.

(AF 67.) I agree with the CD that the essence of these tasks is the “design and maintenance of computer software or hardware, [and these are] core software development activities that are simply not covered by the core functions of SOC 15-1111.” (CD Brief at 5.)

Job duties two, four, and six, as described on the Form 9141, could appropriately fit under either SOC code. I agree with the CD that: (i) the Employer’s job duty two corresponds with SOC 15-1133 job duties five and ten; (ii) the Employer’s job duty four corresponds with SOC 15-1133 job duty seven; and (iii) the Employer’s job duty six corresponds with SOC 15-1133 job duty seven. The chart below summarizes these findings.

The Employer’s Listed Duties, (AF 67)	Job Duties for SOC 15-1133
(2) Perform language, sentiment, and trend analytics on huge volumes of real-time user generated content.	(5) Analyze information to determine, recommend, and plan installation of a new system or modification of an existing system. (10) Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
(4) Contribute to the technology roadmap for exploring, identifying, and creating new and improved forms of user interactivity to increase engagement and time spent by users on mobile and web properties.	(7) Design or develop software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.

(6) Develop innovative visualizations to represent curated and user-generated real-time content.	
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It is not surprising that these duties also correspond with some of the core duties in SOC 15-1111, because, as the Employer points out, SOC 15-1133 and SOC 15-1111 are related occupations. *See* AF 4-5. Although the Employer argues that its job duties more closely align with SOC 15-111 and that the “actual core job responsibilities . . . are primarily research and development (R&D) duties,” (AF 55), the job description in the Form 9141 does not reflect that.

In conclusion, the core duties of SOC 15-1133 encompass all of the Employer’s listed job duties; a number of the Employer’s listed job duties are not covered by SOC 15-1111; and all duties covered by SOC 15-1111 are also covered by SOC 15-1133.⁶ Accordingly, the assignment of SOC code 15-1133, Software Developer, Systems Software, was appropriate. The CD did not abuse her discretion in affirming the NPWC’s PWD because her determination was consistent with the applicable regulations and was a reasonable exercise of discretion.

ORDER

In light of the above, the Center Director’s prevailing wage determination is hereby **AFFIRMED**.

For the Board:

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁶ Although it would be acceptable to use the descriptions provided in the OOH for purposes of general reference, it is unnecessary in this case. *See Thomas Jefferson University*, 2010-PER-014 (Aug. 7, 2012).

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 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 400N
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.