



Issue Date: 27 January 2017

**BALCA Case No.:** 2017-PWD-00002  
**ETA Case No.:** P-400-16183-211542

*In the Matter of:*

**ABOUT WOMEN OB/GYN, PC**  
*Employer*

Appearances:

Micole Allekotte  
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 H-2B labor certification provisions in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A. On December 21, 2016, the Board of Alien Labor Certification Appeals (“BALCA”) docketed the above-captioned prevailing wage determination appeal after receiving the appeal file, including a request from About Women OB/GYN, PC (“Employer”) for administrative review of a National Prevailing Wage Center (“NPWC”) Final Prevailing Wage Determination (“PWD”) issued on September 20, 2016.

**Background**

***Initial Prevailing Wage Determination***

On July 1, 2016, the Employer submitted a PWD request to the NPWC. (AF 26-31.)<sup>1</sup> The request supported the Employer’s request for H-2B certification for the position of Marketing Transition Specialist/Social Media Developer (the “Position”). (AF 26, 27.) In its PWD request, the Employer suggested the Standard Occupational Classification (“SOC”) code

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

for the Position should be 13-1161, “Market Research Analysts and Marketing Specialists.” (AF 27.)

The NPWC issued a PWD on July 26, 2016, assigning SOC 11-2021, “Marketing Managers.” (AF 29.)

### ***Request for Center Director’s Review***

On August 4, 2016, the Employer submitted a request for review of the PWD by the Center Director (“CD”). (AF 19-25.) The Employer explained its objections to the assigned prevailing hourly wage of \$75.26:

That [rate] is substantially high for a marketing representative and more than any current employed position within our OB/GYN practice; up to and including physicians. The position has no supervising/managerial responsibilities, no budgetary responsibilities, and no market projection responsibilities. The position is with a small business with less than 50 employees and temporary assistance in educating our community of our office move and assisting in minimal data entry for building of our new social media sites.

(AF 19.)

On September 20, 2016, the CD concluded that SOC 13-1161 is not consistent with the employer’s job duties. The CD stated:

The employer’s job duties are not consistent with the SOC definition and O\*NET defined tasks for the suggested SOC 13-1161 – Market Research Analysts and Marketing Specialists as the duties are not focused on performing market research to market products or services. Rather, the duties focus on developing social media strategies and educating the healthcare community about the employer’s new location and services.

(AF 9.) The CD found that the proper code is SOC 27-3031, “Public Relations Specialist.” (AF 10.) The CD assigned that code at a wage of \$46.20 per hour. (AF 11.)

### ***BALCA Review***

By letter dated September 28, 2016, the Employer requested review by BALCA. (AF 1-8.) The Employer contests the following from the CD’s determination: (i) “the determined wage and skill level”; and (ii) the use of the Washington, D.C. metropolitan area as the locality, when it is located in Woodbridge, Virginia and Stafford, Virginia. The Employer reiterates its position that:

[t]his wage is substantially high for a marketing representative and more than any current employed position with our OB/GYN practice; up to and including our physicians. The position . . . has no supervising/managerial responsibilities, no

budgetary responsibility, and no market projection responsibilities. In fact, the position is an entry level position . . . .

(AF 1.) On December 30, 2016, the CD submitted its brief to BALCA (“CD Brief”). On January 3, 2017, I issued a *Notice of Docketing and Order Setting Briefing Schedule*. To date, the Employer has not filed a brief with BALCA.<sup>2</sup>

## Discussion

### *Regulations and Guidelines*

BALCA applies an abuse of discretion standard to the CD’s decision on an employer’s appeal of a PWD.<sup>3</sup> 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.<sup>4</sup>

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).

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.<sup>5</sup>

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

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<sup>2</sup> On January 10, 2017, it came to my attention that the Employer was inadvertently omitted from the service sheet for the *Notice of Docketing and Order Setting Briefing Schedule*. A member of my staff left a voicemail for the Employer and faxed a copy of the order that same day. On January 12, 2017, the Employer contacted my law clerk and indicated that it had withdrawn its request for hearing in early December after filling the intended position. The Employer stated that it would submit to BALCA a copy of the letter withdrawing its request for hearing. On January 18, 2017, having not received the withdrawal letter, a member of my staff again contacted the Employer and left a voicemail message requesting it. To date, BALCA has not received this document.

<sup>3</sup> *See, e.g., Emory University*, 2011-PWD-00001, -00002, slip op. at 6-7 (Feb. 27, 2012).

<sup>4</sup> *See RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-00001, slip op. at 10 (June 30, 2010).

<sup>5</sup> [www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf)

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.

The regulations require the PWD to be “the arithmetic mean of the wages of workers similarly employed in the area of intended employment using the wage component of the BLS Occupational Employment Statistics Survey (OES),” unless the position is covered by a collective bargaining agreement or the Employer provides a survey as outlined in the regulations. 20 C.F.R. § 655.10(b)(2).

### ***Analysis of the Facts***

I will address the following issues: (i) whether the CD abused her discretion in determining that one SOC code was more appropriate than another; (ii) whether use of an average wage was proper for the wage determination; and (iii) whether the CD abused her discretion in determining that the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division was the proper locality to determine the prevailing wage.

#### **(i) SOC Code**

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 Market Research Analysts and Marketing Specialists SOC code, and the tasks identified under the Public Relations Specialists SOC code.

#### ***Employer’s Job Description***

On the PWD request, the Employer provided the following job description<sup>6</sup> for the position of Marketing Transition Specialist/Social Media Developer:

##### **(1) Marketing/Publishing:**

Reaching out to the local physicians, healthcare providers and community to educate on office relocation/opening to raise awareness of presence in the local area.

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<sup>6</sup> I have inserted numbers corresponding to the Employer’s job duties for ease of reference. The numbers are identical to those assigned in the CD’s brief, with the addition of (a) and (b) to task three.

- (2) Candidate will be responsible for developing and performing the strategy for the transition to the new (added) location by gathering information on the consumers demographics and preferences to include patient's, insurance companies and referring physician's preferences.
- (3) (a) Develop marketing reports and (b) organize local events which will assist in the transitioning process and promotional processes.
- (4) With approved marketing plan, candidate will meet with each office and educate on new, added and relocated, locations and services, provide each office with all referrals pads and education material needed by the customer.
- (5) Collect contact information for referring providers and add to the current database.
- (6) Candidate will also create and train current staff on the contact database for future reference.  
  
Travel will be incurred to each of the referring physician's offices (all within a 30 mile radius), no overnight travel needed.
- (7) Social Media Strategy Development and Set-up: Develop a Social Media Strategy for new location and implement with the new location and for the practice (no social media strategy currently in place) as a whole.
- (8) Strategy should assist current market in identification of current and new locations.
- (9) In addition, the strategy should include the development of a continued plan for the practice as a whole.
- (10) Once created, set-up and train current staff on the Social Media Strategy and how to maintain the social media means developed.

(AF 30.)

*Market Research Analysts and Marketing Specialists, SOC 13-1161*

According to O\*NET, the primary role of Market Research Analysts and Marketing Specialists is to “[r]esearch market conditions in local, regional, or national areas, or gather information to determine potential sales of a product or service, or create a marketing campaign. May gather information on competitors, prices, sales, and methods of marketing and distribution.” The O\*NET lists the following tasks for the Employer's suggested SOC 13-1161:

1. Prepare reports of findings, illustrating data graphically and translating complex findings into written text.

2. Seek and provide information to help companies determine their position in the marketplace.
3. Gather data on competitors and analyze their prices, sales, and method of marketing and distribution.
4. Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.
5. Devise and evaluate methods and procedures for collecting data, such as surveys, opinion polls, or questionnaires, or arrange to obtain existing data.
6. Monitor industry statistics and follow trends in trade literature.
7. Measure and assess customer and employee satisfaction.
8. Measure the effectiveness of marketing, advertising, and communications programs and strategies.
9. Forecast and track marketing and sales trends, analyzing collected data.
10. Attend staff conferences to provide management with information and proposals concerning the promotion, distribution, design, and pricing of company products or services.
11. Conduct research on consumer opinions and marketing strategies, collaborating with marketing professionals, statisticians, pollsters, and other professionals.
12. Develop and implement procedures for identifying advertising needs.
13. Direct trained survey interviewers.

*Public Relations Specialists, SOC 27-3031.00*

According to the O\*NET, the primary role of Public Relations Specialists is to “[e]ngage in promoting or creating an intended public image for individuals, groups, or organizations. May write or select material for release to various communications media.”

The O\*NET lists the following tasks for SOC 27-3031.00:

Core tasks

1. Respond to requests for information from the media or designate an appropriate spokesperson or information source.
2. Write press releases or other media communications to promote clients.
3. Establish or maintain cooperative relationships with representatives of community, consumer, employee, or public interest groups.
4. Plan or direct development or communication of programs to maintain favorable public or stockholder perceptions of an organization’s accomplishments, agenda, or environmental responsibility
5. Study the objectives, promotional policies, or needs of organizations to develop public relations strategies that will influence public opinion or promote ideas, products, or services.
6. Coach client representatives in effective communication with the public or with employees.
7. Update and maintain content posted on the Web.
8. Confer with other managers to identify trends or key group interests or concerns to provide advice on business decisions.

9. Prepare or edit organizational publications, such as employee newsletters or stockholders' reports, for internal or external audiences.
10. Coordinate public responses to environmental management incidents or conflicts.
11. Arrange public appearances, lectures, contests, or exhibits for clients to increase product or service awareness or to promote goodwill.
12. Develop plans or materials to communicate activities undertaken by organizations that are beneficial to the environment, public safety, or other important social issues.
13. Prepare or deliver speeches to further public relations objectives.
14. Confer with production or support personnel to produce or coordinate production of advertisements or promotions.
15. Consult with advertising agencies or staff to arrange promotional campaigns in all types of media for products, organizations, or individuals.

Supplemental tasks:

16. Plan or conduct market or public opinion research to test products or determine potential for product success, communicating results to client or management.
17. Develop marketing campaigns for environmental technologies or services.
18. Purchase advertising space or time as required to promote client's product or agenda.

As stated above, the Employer contends that the rate assigned by the CD "is substantially high for a marketing representative and more than any current employed position" within the practice, including physicians. The Employer emphasizes the following:

The position has no supervising/managerial responsibilities, no budgetary responsibilities, and no market projection responsibilities. The position is with a small business with less than 50 employees and temporary assistance in educating our community of our office move and assisting in minimal data entry for building of our new social media sites.

(AF 19.)

The CD contends that SOC 27-3031.00 is the appropriate occupation code for the Employer's job. The CD acknowledges that there is some degree of overlap between its selected job code (SOC 27-3031.00) and the Employer's suggested job code (SOC 13-1161), and that four of the Employer's duties could be performed by either code. The CD submits that six of the duties in the Employer's job description "could typically be performed only by a Public Relations Specialist because they are not core tasks for Market Research Analysts." The CD explains that some of the Employer's job duties involve "engaging with the public, and SOC 13-1161 does not." (CD Brief at 6.) Those job duties include (i) "[r]eaching out to the local physicians, healthcare providers and community to educate on office relocation/opening to raise awareness of presence"; (ii) "organiz[ing] local events which will assist in the transitioning process and promotional processes"; and (iii) "meet[ing] with each office and educat[ing] on new, added and relocated, locations and services, provide each office with all referrals pads and education material needed by the customer." (CD Brief at 7.) The CD contends that "[t]he core tasks of SOC 27-3031.00 encompass all of the employer's listed job duties." (CD Brief at 11.)

After a thorough review of the job description and duties as described in the Form 9141, I find that the Employer's job description, in general, more closely fits with the Public Relations Specialists duties, SOC 27-3031.00, which focuses on engaging with the public, developing social media strategies, and training staff to maintain social media strategies. In contrast, the Marketing Research Analysts duties at SOC 13-1161 do not cover these duties. I agree that there is overlap in job duties between the two SOC codes at issue. However, SOC 27-3031.00 encompasses the job description and each of the tasks provided on the Form 9141. As explained below, I find that job duties one, part (b) of three, four, six, and ten are covered under SOC 27-3031.00, but are not covered under SOC 13-1161, and that job duties two, part (a) of three, five, eight, and nine could appropriately fit under either SOC code.

SOC 27-3031.00 encompasses all of the duties in numbers one, part (b) of three, four, six, and ten, and SOC 13-1161 does not. Those duties are:

(1) Marketing/Publishing:

Reaching out to the local physicians, healthcare providers and community to educate on office relocation/opening to raise awareness of presence in the local area.

(3)(b) organize local events which will assist in the transitioning process and promotional processes.

(4) With approved marketing plan, candidate will meet with each office and educate on new, added and relocated, locations and services, provide each office with all referrals pads and education material needed by the customer.

(6) Candidate will also create and train current staff on the contact database for future reference.

(10) Once created, set-up and train current staff on the Social Media Strategy and how to maintain the social media means developed.

(AF 30.) I agree with the CD that those tasks involve "engaging with the public" and "training staff to maintain a marketing database and a social media strategy," which are not covered by SOC 13-1161. *See* CD Brief at 6, 7.

Job duties two, part (a) of three, five, eight, and nine, could appropriately fit under either SOC code. I agree with the CD that: (i) the Employer's job duty two corresponds with SOC 13-1161 job duty four; (ii) the Employer's job duty three part (a) corresponds with SOC 13-1161 job duty one; (iii) the Employer's job duty five corresponds with SOC 13-1161 job duty five; (iv) the Employer's job duty eight corresponds with SOC 13-1161 job duty twelve; and (v) the Employer's job duty nine corresponds with SOC 13-1161 job duty ten. However, I also agree with the CD that those duties all also correspond with job duties for SOC 27-3031.00. The chart below summarizes these findings.

<b>The Employer's Listed Duties, (AF 30)</b>	<b>Job Duties for SOC 13-1161</b>	<b>Job Duties for SOC 27-3031.00</b>
(2) Candidate will be responsible for developing and performing the strategy for the transition to the new (added) location by gathering information on the consumers demographics and preferences to include patient's, insurance companies and referring physician's preferences.	(4) Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.	(5) Study the objectives, promotional policies, or needs of organizations to develop public relations strategies that will influence public opinion or promote ideas, products, or services.
(3)(a) Develop marketing reports	(1) Prepare reports of findings, illustrating data graphically and translating complex findings into written text.	(9) Prepare or edit organizational publications, such as employee newsletters or stockholders' reports, for internal or external audiences.
(5) Collect contact information for referring providers and add to the current database.	(5) Devise and evaluate methods and procedures for collecting data, such as surveys, opinion polls, or questionnaires, or arrange to obtain existing data.	(3) Establish or maintain cooperative relationships with representatives of community, consumer, employee, or public interest groups.
(8) Strategy should assist current market in identification of current and new locations.	(12) Develop and implement procedures for identifying advertising needs.	(4) Plan or direct development or communication of programs to maintain favorable public or stockholder perceptions of an organization's accomplishments, agenda, or environmental responsibility.
(9) In addition, the strategy should include the development of a continued plan for the practice as a whole.	(10) Attend staff conferences to provide management with information and proposals concerning the promotion, distribution, design, and pricing of company products or services.	(4) Plan or direct development or communication of programs to maintain favorable public or stockholder perceptions of an organization's accomplishments, agenda, or environmental responsibility.

It is not surprising that there is overlap between these SOC codes because the O\*NET classifies them as related occupations. Although some of the duties fit under the Employer's suggested code, the overall job description is a closer fit with SOC 27-3031 than SOC 13-1161.

In conclusion, the core duties of SOC 27-3031.00 encompass all of the Employer's listed job duties; three of the Employer's listed job duties are not covered by SOC 13-1161; and all duties covered by SOC 13-1161 are also covered by SOC 27-3031. Accordingly, the assignment of SOC code 27-3031, Public Relations Specialists, was appropriate. The CD did not abuse her discretion in assigning SOC 27-3031 because her determination was consistent with the applicable regulations and was a reasonable exercise of discretion.

(ii) Use of an Average Wage

The CD properly used an average wage rather than a wage associated with a skill level. Although the Employer suggests that a skill level of one should be applied, (AF 1), the CD correctly asserts that "the arithmetic mean of the wages of workers similarly employed in the area of intended employment" was properly utilized as instructed by the regulations at 20 C.F.R. § 655.10(b)(2). (CD Brief at 11.) The regulations require the PWD to be the arithmetic mean, as described above, unless the position is covered by a collective bargaining agreement or the Employer provides a survey as outlined in the regulations.<sup>7</sup> 20 C.F.R. § 655.10(b)(2). It is undisputed that (i) the position is not covered by a collective bargaining agreement; and (ii) the Employer has not provided a survey pursuant to the regulations. Accordingly, the CD's use of the arithmetic mean rather than skill level was proper.

(iii) Use of the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

The Employer lists the place of employment as Woodbridge, Virginia, in Prince William County and indicates that work will not be performed in multiple worksites within an area of intended employment. (AF 28.) The Employer objects to the statistical area used in calculating the prevailing wage, stating that its "main location in Woodbridge, Virginia along with the new practice in Stafford, Virginia is considered as non-metropolitan areas," and that the CD made "a mistake in comparing [its] location with Washington D.C. metropolitan area. After comparing the above SOC codes with non-metropolitan areas in our zone; the average wage is from \$11.40-\$17.69 per hour which is realistic." (AF 1.)

The CD explains that it "used the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division, which includes Prince William County, VA, to determine the applicable wage." (CD Brief at 12.) The CD cites the following definition of *area of intended employment*:

the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including

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<sup>7</sup> The 2013 Interim Final Rule, 78 Fed. Reg. 24047 (Apr. 24, 2013), amended the procedures set forth in § 655.10 by discontinuing the use of skill levels to set wages. The 2015 Final Wage Rule did not modify the use of the arithmetic mean. 80 Fed. Reg. 24184 (Apr. 29, 2015).

a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

20 C.F.R. § 655.5. The CD asserts that Woodbridge, Virginia is located within the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Statistical Division. (CD Brief at 11-12.) The CD cites the delineations of statistical areas under OMB Bulletin No. 15-01 (July 15, 2015), which places Prince William County, Virginia in the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Statistical Division.

I find that the CD correctly used the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division and AFFIRM it.

#### Conclusion

As explained above, the CD did not abuse her discretion in assigning SOC 27-3031; the CD properly used an average wage rather than a wage associated with a skill level; and the CD correctly used the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division.

#### **ORDER**

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

**STEPHEN R. HENLEY**  
Chief 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 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.